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DEVELOPMENT RISKS

Our Code of Obligations was the first regulation in Europe to name and establish producers' strict liability for defective products as a separate institution. The solution endorsed in this Code consistently implements the theoretical concept of strict liability – a producer cannot be privileged from liability for damage caused by defective product by proving that the defect was undiscoverable while under producer's control.

On the other hand, the Directive on liability for defective products recommends to the EU member states to discharge from liability producers who prove that the defect was impossible to discover at the time when a product was placed into circulation, even with the implementation of the highest levels of scientific and technical knowledge.

Does the nature of a producer's liability change by assuming the question about what the producer could have known as legally relevant? What is the rationale of the rule suggested by the European legislator, which transfers the unforeseeable risk of damage from the producer to the damaged party? Are there convincing reasons for incorporating this rule in our law? Finally, which are the possible consequences of our adherence to the solution that differs from the one endorsed by the majority of European countries, in regard to liability for damage from undiscoverable defects?

Key words: *Strict liability – Liability for damage from defective products – Development risks – Undiscoverable defects.*

I
INTRODUCTION

A producer is strictly liable for damage deriving from defective product. This liability does not presuppose contractual relationship be-

tween the producer and the damaged party – it is, by its nature, an extra-contractual liability.[1]

A producer places a product in circulation and thus increases the risk of damage for others, while he obtains profit. In addition, it is far easier for a producer than for a consumer, to protect himself against the ultimate financial consequences of a prejudicial event (*l'événement dommageable*) – he may insure himself against liability or transfer the risk inherent in his activity to consumers by increasing the price of his product. Furthermore, a producer has at his disposal far more information about a product than its end user and it is therefore easier for him to forestall possible damage. For the said reasons, modern laws do not base a producer's liability on his fault, but on the fact that the producer creates or sustains increased risk of damage and profits from this fact.[2]

According to the Code of Obligations, a producer is liable for damage from defective products regardless of whether he was aware of the existence of the defect. The producer cannot be privileged from liability by proving that he is not at fault. In other words, the fact that a producer knew or could have known that a product was defective bears no legal significance.

On the other hand, the institution of development risks defense enables the producer to excuse himself from liability for damage from a defective product by proving that the defect was undetectable even by applying the highest level of scientific and technical knowledge at the time when the product was put into circulation. Although it cannot be disputed that the product had a certain defect at the time when it was placed in circulation, the producer is not liable for the damage that arises from it because it was objectively impossible to know about the defect.

Exoneration from liability by quoting development risks is often illustrated in literature by a case from Dutch court practice.[3] A patient received a blood transfusion during heart surgery, and the blood he

1 *Cf.* Marija Karanikić, *Odgovornost za štetu od proizvoda – u pravu Evropske unije i Sjedinjenih Američkih Država* (*Liability for Defective Products in the Laws of European Union and the United States of America*), Law Review *Pravni život*, vol. II, 2003, pp. 711–737.

2 Prior to enacting the Code of Obligations, our legal system had no specific regulations about extra-contractual liability for damage from defective products. What existed was the institution of contractual liability for the physical flaws in soled goods. *Cf.* §§459–493 of the Serbian Civil Code; §§922–933 of the Austrian Civil Code; usances 135–159 of the General Usances for Trade in Goods.

3 Hartman v. Stichting Sanquin Bloedvoorziening, Feb. 3, 1999, NJ 1994/621, according to Christopher Hodges, *Product Liability in Europe: Politics, Reform and Reality,* 27 *Willian Mitchell Law Review* 121, 2000, pp. 124–125.

received was contaminated with the HIV. The Dutch court considered the blood contaminated with a virus as a defective product. Still, the supplier of the blood succeeded in exempting himself from liability by proving that the presence of the virus in the blood could not have been discovered according to the state of scientific and technical knowledge at the time when the blood was delivered.

At the time of the ruling, in 1999, the Dutch court believed that *sound reasons had already existed for some time* for the Dutch public to expect that HIV was not present in blood used for transfusion. However, there were no grounds for such expectations in 1996, when the surgery took place. In the particular case, the blood was tested according to two methods (*HIV–1–2* and *HIV p24 antigen*) and both tests yielded negative results. The third method (*HIV–1 RNA)*, the one by which the presence of the virus in the blood was subsequently discovered, was still in the experimental phase and was not officially approved for use at the time of the testing. The court ruled that, although the supplier of the blood had behaved in accordance with the highest level of scientific and technical knowledge, it was practically impossible to discover the presence of the virus in the blood, and that the supplier was therefore not liable.

The Government's Draft Law on Product Liability entered summary proceeding in the Serbian Legislature in February 2005,[4] and the new Product Liability Act was enacted in November 2005.[5] The contents and numeration of the new Act fully correspond with the Serbian Government's Draft Law – that is to say, the Act was passed without any disputations or controversies among the members of the legislative body. By means of this Act, the institution of development risks is introduced into Serbian law.

II
LIABILITY FOR UNDISCOVERABLE DEFECTS UNDER THE SERBIAN CODE OF OBLIGATIONS

The strict liability for defective products was introduced in our law with the Code of Obligations. The existence of a contractual relationship between the producer and the damaged party is unimportant for the establishment of this kind of liability.[6] The Code attributes the producer's

4 Source: web-page of the Serbian Legislature – www.parlament.sr.gov.yu

5 Zakon o odgovornosti proizvođača stvari sa nedostatkom, Official Gazette of the Republic of Serbia, No. 101/05 of November 14, 2005.

6 Besides the extra-contractual liability of a producer for damage from defective products, the Code of Obligations also regulates the contractual liability of the retailer for

obligation to compensate for damage to the existence of a causal relationship between the defectiveness of the product, on the one hand, and the inflicted damage, on the other. In addition, the right to compensation of damage is held not only by the buyer of a defective product, but also by any third party who suffers damage as a result of a physical flaw in a certain product.

According to the Code of Obligations, the producer *can* be liable for damage caused by a physical flaw in a product if, at the time the product was placed in circulation, he *did not know* that the product was physically flawed:[7]

"Whoever shall place an item he has produced in circulation, which presents a risk to persons or property because it contains a defect that it was impossible for the producer to know about, shall be liable for the damage caused by that defect."

In this regard, the Code of Obligations does not differ from solutions proposed in the *Framework of the Code of Obligations and Contracts*.[8] However, Article 179 of the Code of Obligations contains another paragraph, covering cases in which a product has dangerous properties, which the producer knows about and which do not make this product defective. For example, petrol has certain inherent qualities that inevitably make it a dangerous product. These include inflammability and the fact that it poses a health hazard when swallowed or when its vapours are inhaled. Still, the mentioned properties do not make petrol a defective product, in spite of the fact that they increase the risk of damage. A producer who fails to do everything necessary to prevent damage from a known dangerous feature, by a warning, safe packaging or some other appropriate way, can only be liable for the damage he could have foreseen.[9]

Although it is not expressly mentioned in Article 179 of the Code of Obligations, the producer is also liable for damage caused by a

material flaws in sold goods (Articles 478–500 of the Code of Obligations), and the contractual liability of the retailer and producer based on the warranty for the correct functioning of the sold item (Articles 500–507 of the Code of Obligations).

7 Article 179, para. 1 of the Code of Obligations.

8 Article 179, para. 1 of the Code of Obligations is identical to Article 141 of the Framework of the Code of Obligations and Contracts (Skica za zakonik o obligacijama i ugovorima). *Cf.* Mihailo Konstantinović, *Obligacije i ugovori. Skica za zakonik o obligacijama i ugovorima*, Belgrade, Službeni list SRJ, 1996.

9 "A producer is also liable for the dangerous properties of a product if he fails to do everything necessary to prevent damage, which he could foresee, by a warning, safe packaging or some other appropriate measure." Article 179, para. 2 of the Code of Obligations.

physical defect he *did know* about at the time when he placed the product in circulation. The producer's *knowledge* of the dangerous flaw in product would mean that – by putting the product on the market – the producer acted with the intention to cause damage or with the gross negligence at least. However, the intention and the gross negligence are the degrees of fault that cannot be legally presumed in Serbian law.

Namely, in our law, the defendant's fault is arguably presumed as the condition and grounds for liability, if the damaged party (as the plaintiff) proves that damage which has been inflicted on him was caused by the defendant's behaviour, i.e. that he has suffered damage as a consequence of the defendants act or omission. However, this arguable legal presumption is in effect only for plain negligence – *culpa levis*. Unless presumption of a higher degree of fault is not explicitly envisaged by the law, the plaintiff who claims that damage was inflicted on him intentionally or through gross negligence, he must prove this claim.[10]

Therefore, our law does not presume that the producer knew about the existence of a defect. However, if the damaged party proves the existence of this knowledge, the producer's liability can be founded on fault. In other words, the fact that our law recognises the institution of the *strict liability* of the producer of a defective product does not exclude the possibility for grounding the producer's liability on fault. The Supreme Court of Serbia has ruled on this issue in the following fashion:[11]

"The Supreme Court finds premature the conclusion of the second-instance court, that the defendant is not liable in any aspect. This is because the producer who is not liable according to Article 179 of the Code of Obligations (regulating strict liability) may be liable according to Article 154 of the Code of Obligations, if the damage ensued as a result of his omissions. The liability of a producer who produces goods for the market is increased liability. According to Article 18 of the Code of Obligations, he must proceed with increased attention, i.e. with the attention of a reasonable man of business. Considering that his liability is

10 "According to the rule of presumed fault (Article 154, para. 1 of the Code of Obligations), only the lowest degree of fault of the perpetrator of damage (plain negligence – *culpa levis*) is presumed. A more serious degree of fault (gross negligence or intent to cause damage – *culpa lata* or *dolus*) is presumed only if such a presumption is explicitly prescribed by a legal regulation, or if it proceeds unequivocally from the meaning of the said legal rule. Barring such cases, the degree of fault is proved according to the general rules of procedure for the presentation of evidence." Conclusion of the XIV Joint Session of the Federal Court, the Republican and Provincial Supreme Courts and the Supreme Military Court, March 25 and 26, 1980.

11 Ruling of the Supreme Court of Serbia, Rev.368/96 of October 29, 1997, *Zbirka sudskih odluka* (A Collection of Court Decisions), Book 23, vol. I, Decision No. 102, 1999.

increased because he raises chickens for sale on the market, and he previously knew that his flock was suffering from Marek's disease, it was necessary to establish whether the defendant was liable based on fault."

Therefore, what is the meaning of the term *defect that the producer did not know about* in Article 179 of the Code of Obligations? In its nature, the producer's liability under Article 179 of the Code of Obligations is strict liability, i.e. liability regardless of fault. The interpretation according to which the legislator's words would actually mean that there is no liability in cases when a producer *knew* about a defect would have no grounds in logic. Namely, this would mean that exemption from strict liability exists in those very situations when the producer acts with the highest degree of fault. Besides, the rule that would exclude liability for intent or gross negligence would be against public policy (*ordre public*). Because of all the aforesaid reasons, the legislator's words cannot be taken as if the producer's unawareness of the defect represents the *conditio sine qua non* of the producer's liability for the damage arising from this defect.

It seems that the words the legislator used in Article 179 of the Code of Obligations – stating that a producer is liable for damage arising from *a defect he did not know about* – actually mean that the producer is liable for damage arising from the defect *regardless of whether he knew about the defect or not*. The law presumes that the producer did not know that he was putting a defective product into circulation. On the one hand, the producer has no interest in contesting this presumption, given that his knowledge of the defect would make him at fault and, on this basis, liable for the damage caused by the defect. On the other hand, for the damaged party, proving the producer's knowledge of the defect would mean a waste of resources, considering that the producer is liable for damage even if he did not know about the existence of the defect.

Furthermore, the provisions of the Code of Obligations do not attribute legal significance to the questions of whether or not a particular producer *could have known* about the defect that caused the damage, or whether the existence of the defect was at all accessible to human knowledge. The producer of the defective product cannot be absolved from liability by proving that, for some subjective reasons, he could not have known about the existence of the defect. Moreover, the producer cannot be freed of liability by proving that the existence of a certain defect was objectively undiscoverable. In other words, the producer is liable for damage caused by the defect, regardless of his knowledge of the product's defectiveness and regardless of whether it was possible, subjectively or objectively, to know of the existing flaws.[12]

12 No distinction is made in Article 179 of the Code of Obligations between discoverable or undiscoverable defects. *Cf.* Jakov Radišić, *Odgovornost proizvođača*

The conclusion of these previous considerations is the following: according to the Code of Obligations, the question of whether or not the producer *could have known* that the product was defective at the time when it was placed in circulation – can only be relevant regarding the establishment of the producer's fault, i.e. in the attempt to ascertain the producer's fault-based liability. Adversely, a producer is strictly liable for damage that arises from the undiscoverable defects in a product, i.e. from defects that could not have been discovered at the time of placing the product in circulation.

However, while assessing whether the damaged party has contributed by his own action to the aggravation of damage from the defective product,[13] the courts do take into consideration the knowledge the *damaged party* had or could have had about the existence of the defect. Thus, in a recent decision, the Supreme Court of Serbia reasoned as follows:[14]

"According to the findings and opinion of the expert witness, it is beyond doubt that the propane-butane gas leaked from the container and created an explosive mixture because the irreversible valve with the rubber seal was insufficiently screwed onto the outlet of the container, *which the user of the container could not have noticed* (underlined by M.K.). The explosive mixture of gas and air was most likely ignited by a spark or piece of char from the stove, which was located near the gas container onto which a gas burner, with the valve in good working order, was fitted in the proper fashion. Therefore, the gas explosion occurred because of a defect on the gas container, without any contribution by the plaintiff, as its user."

In this point, the question in principle arises on whether the producer's liability for damage from a defective product can remain *strict* in terms of its legal nature, if the dilemma about whether the producer could have known about the defect is sustained as legally relevant. In other words, does the question of what the producer could have known about the product bring the producer's liability closer to the institution of fault-based liability?

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stvari sa nedostatkom (Liability of the Producer of Defective Products), in: *Komentar Zakona o obligacionim odnosima* (Commentary on the Code of Obligations), Editor in Chief Slobodan Perović, Book I, Belgrade, Savremena administracija, 1995, p. 412.

13 "The damaged party, who contributed to causing the damage or causing it to be greater than it otherwise would have been, only has the right to proportionally reduced compensation." Article 192, para. 1 of the Code of Obligations.

14 Ruling of the Supreme Court of Serbia, Rev. 1660/00 of April 10, 2000, *Izbor sudske prakse* (Selection from Court Practice), No. 1/2002, Belgrade, Glosarijum, 2002.

III
THE INSTITUTION OF DEVELOPMENT RISKS

Modern law recognises solutions that envisage the possibility for considering, within the scope of establishing the *strict liability* of the producer, whether the producer of a defective product could have known about the flaws of the product and whether it was by any means possible to know of the existence of a defect.

The Directive on liability for defective products[15] introduced the institution of development risks in the EU law. Article 7(e) of the Directive provides that the producer shall not be liable as a result of the Directive if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

In other words, the Directive stipulates that a producer is freed from liability if he proves that the defect was undetectable at the time when the product was put into circulation even with the implementation of the highest scientific and technical knowledge (*development risk defense*). The Directive does not allow the producer to be released from liability by proving that the item was produced in accordance with the scientific and technical standards that are in effect (*state-of-the-art defense*).[16] In other words, a product can be defective even if the producer behaved as he should have – the fact that the producer respected the scientific and technical standards in effect does not rule out the possibility for the product to be defective. By proving that he respected the applicable scientific and technical standards in the production process, the producer actually proves that he behaved as he should have, i.e. that he is not at fault. This still does not mean that the produced item is free of defects that could cause damage, for which the producer may be strictly liable.

The question arises here as to which vital situation the aforesaid regulation of the Directive refers to, that is, which practical problem does the European legislator solve by allowing the producer to be exempted from liability for damage by proving that the defect that caused the damage was objectively undiscoverable at the time when the he placed it in circulation.

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15 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (hereinafter the Directive), source: www.europa.eu.int/eur-lex

16 Hans Claudius Taschner, *Harmonization of Product Liability Law in the European Community*, 34 *Texas International Law Journal* 21, 1999, p. 25 and further.

The development risks clause solves the following dilemma: who is liable for the damage inflicted in the period from the moment when a defective product was put into circulation till the moment when it is discovered that the product has a defect that creates a heightened risk of damage – and this in cases in which, bearing in mind the state of scientific and technical knowledge, the defect was impossible to discover at the time when the product was placed in circulation. In other words, who should bear the risk of the *subsequent* – and in terms of being able to prevent the damage, *belated* – knowledge about the existence of the defect in the product?

If a legal system allows the producer to be cleared of liability if he proves that the defect which caused the damage was impossible to know of, according to the state of scientific and technical knowledge at the time when the product was put into circulation, then the risk of changes in knowledge in the period from when the product was put into circulation till the manifestation of the damaging consequence, is born by the damaged party. If, however, the producer cannot be freed from liability in this way, then he alone is liable for unknown and unknowable risks – the risk of untimely knowledge of the possible cause of damage lies with him.[17]

Professional circles believe the development risks clause to be controversial, to say the least.[18] Some authors believe there is a contradiction between the possibility to clear the producer of liability by proving that he could not have known about the existence of the defect on the one hand, and grounding the producer's liability regardless of fault, on the other. In other words, these authors believe that discharge from liability by invoking development risks cannot survive in the system of strict liability.

Henderson and Twerski[19] also criticised the solution stipulated in the Directive as being obsolete because the Directive does not make a distinction between the three following types of defects in a product: 1. manufacturing defect – a defect caused in the manufacturing process, which means that the product is not what it should be according to the design; 2. design defect – a constructional defect or a flaw in the design,

17 The possible consequences of the adoption of either solution will be discussed later.

18 Simon Taylor, *L'harmonisation communautaire de la responsabilité du fait des produits défectueux. Etude comparative du droit anglais et du droit français*, Paris, Librairie Générale de Droit et de Jurisprudence, 1999, p. 67.

19 James A. Henderson, Aaron D. Twerski, *What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 *Texas International Law Journal* 1, 1999, pp. 13–14.

which occurs in the entire series of the product; 3. warning defect – the absence of adequate warning about the product's dangerous properties.[20]

The Directive leaves the possibility for the member states to deny the producer of the development risks defense through their national regulations. Luxembourg and Finland are the only countries to have fully used this possibility left open for the member states by Article 15 (1.b) of the Directive.[21] Therefore, according to the national regulations of Finland and Luxembourg, a producer cannot clear himself of liability by invoking development risks. In these states, a producer is liable for damage from an undiscoverable defect, regardless of the type of the product. In Spain, it is excluded that a producer can be cleared of liability by proving that it was impossible to know of a defect when damage originates from food or from pharmaceutical products. In other words, the producer is liable for the consequences of undiscoverable defects only when damage is caused by specific types of products. In France, producers are liable for damage from defects that they could not have known about only when damage is caused by products obtained from the human body – for instance, blood or blood plasma – and by those placed in circulation before May 1998, when France incorporated the provisions of the Directive into its national law. In German law a producer is liable for damage from undiscoverable defects only if damage is caused by pharmaceutical products and products obtained by genetic engineering.[22]

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20 According to the Restatements (Third) of Torts, a producer is strictly liable for damage caused by the first type of defect; in the other two cases, the producer can only be held accountable for negligence. *Ibidem,* pp 13–15. In Serbian law, the fault-based liability for damage caused by the warning defect is regulated separately in Article 179, para. 2 of the Code of Obligations.

21 "Each Member State may ... (1.b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered." Article 15 (1.b) of the Directive. *See also*: *Report on the Application of Directive 85/374 on Liability for Defective Products*, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, pp. 16–17; Christian von Bar, *The Common European Law of Torts*, Volume Two, New York, Oxford University Press, 2000, pp. 422–423; H.C. Taschner, *Harmonization of Product Liability Law in the European Community*, p. 32.

22 In the case when a recycled glass bottle exploded in the hands of a nine-year-old girl and injured her eye – the German Federal Supreme Court ruled that the explosion was the consequence of microscopic damage in the glass. The Court maintained that the producer could be privileged from liability by proving that the defect was objectively impossible to know only in the case of a design defect, not in the case of a defect that appeared in the production process. The Court found that the microscopic crack appeared during the production of the concrete bottle and not in the design of the entire series of the product, so it ruled that the producer in the said case was liable, regardless of the defect

To sum up, the producer's liability for defective products is defined more severely in Article 179 of our Code of Obligations than in the regulations of the majority of EU member states. According to the Code of Obligations, the producer is the bearer of liability for development risks, regardless of the type of product. Contrary to this, in the majority of western European legal systems, a producer can be freed of strict liability if he proves that, at the time when he placed the product in circulation, the state of scientific and technical knowledge was such that the existence of the defect could not have been discovered. Only in few EU state is the producer also liable for objectively undiscoverable defects. This goes for Finland and Luxembourg – regardless of the type of product, and for France, Germany and Spain – only when it comes to certain types of products.

IV
DEVELOPMENT RISKS DEFENSE UNDER NEW SERBIAN PRODUCT LIABILITY ACT

Our Code of Obligations was the first regulation in Europe that named and stipulated the strict liability of the producer as a separate institution.[23] It has been shown that, according to the Code of Obligations, a producer cannot be exempted from liability for defective product by proving that the defect was undiscoverable at the time when the product was put into circulation.

On February 16, 2005, the Draft Law on the Product Liability was submitted for procedure in the Legislature of the Republic of Serbia. The Government proposed the passage of this law in summary procedure, in order to fulfill the obligations stemming from the Action Plan for the harmonisation of regulations of the Republic of Serbia with those of the European Union. As the reason for this Draft, the government cited the need for bringing domestic legislation in line with the regulations of the

objectively being impossible to discover. BGH, 9 May 1995, VI ZR 158/94, quoted according to: Christian von Bar, *The Common European Law of Torts*, p. 424.

23 J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom* (Liability of the Producer of Defective Products), p. 410. Concerning the inter-relationship of the institutions of fault-based liability and strict liability in our law, and concerning created and controlled risks as the grounds for liability, *cf.* Mihailo Konstantinović, *Osnov odgovornosti za prouzrokovanu štetu* (Grounds of Liability for Damage), Law Review *Pravni život*, 9–10/1992, pp. 1153–1163, (article first published in Law Review *Arhiv za pravne i društvene nauke*, No. 3/1952); Slobodan Perović, *Predgovor za zakon o obligacionim odnosima* (Preface to the Code of Obligations), Belgrade, Official Gazette, 1995, p. 45 and on.

Directive. In November 2005, the Serbian legislative body passed the new Product Liability Act without any amendments to the text drafted by the Government.[24]

According to Article 7 of the new Product Liability Act, *a producer is liable for damage from a defective product regardless of whether he knew about the defect*. This regulation is similar to Article 179 of the Code of Obligations to the extent that it explicitly stipulates that the producer's knowledge about a defect is legally irrelevant for grounds of liability for damage from the defective product. One should note that the article of the Directive, to which the mentioned article of the Draft corresponds, does not mention the knowledge of the producer, but simply prescribes that the producer shall be liable for damage from a defective product.[25]

However, according to Article 8 of the new Act, *the producer shall not be liable if he proves that the level of scientific and technical knowledge at the time of putting the product into circulation did not enable the discovery of the defect.* In other words, in spite of the fact that Article 7 of the new Act apparently adheres to the solution envisaged in the Code of Obligations, it is the stand of the Government and of the Legislator of the Republic of Serbia that development risks defense should be provided for in our positive law, regardless of the type of product. Sure enough, producers of certain types of products can be denied this chance for exoneration from liability with a future law.

In the Explanation of the Draft Law, Serbian Government estimated that *the implementation of proposed solutions would not introduce additional costs either for citizens or companies, including small and medium enterprises.*[26] When considering the accuracy of this claim, one should take into consideration the fact that the interests of producers and consumers, regarding liability for development risks, are conflicting. The new Act on Product Liability changes the consumers' position which existed under the Code of Obligations in a way that it makes it more difficult. The new Act transfers the risk of undiscoverable defects from the producer to the consumer and, in this regard, it changes the existing state of affairs by worsening it for the consumer. In other words, the *status quo* cannot be changed without *additional expense* to the party it favoured.

Therefore, without going into an evaluation of the new Serbian regulations at this point, one should note that the Government, as well as

24 *Cf.* footnotes 3 and 4.

25 "The producer shall be liable for damage caused by a defect in his product." Article 1 of the Directive.

26 Source: web-page of the Serbian Legislature – www.parlament.sr.gov.yu

the Legislator, of the Republic of Serbia opted for the development risks defense, although it was not a mandatory requirement for the harmonisation with the EU Law. There are some more indicators of the intention to favour the interests of producers.

According to Article 7 of the Directive, a producer may be cleared of liability if he proves that a product was not defective when it was placed in circulation.[27] The meaning of this rule is as follows: if the plaintiff proves that the product has a defect and that this defect was the cause of the damage, then it is presumed that the product was defective at the time it was put into circulation, and the producer is cleared of liability if he proves this presumption wrong. In other words, the burden of proof that the defect came into being later than presumed – i.e. at the time when the product was already in circulation – lies with the producer. The Directive leaves it up to the member states to determine the degree in which the court must be convinced that the product was not defective at the relevant moment. According to Article 8 of the Serbian Product Liability Act, it is sufficient for the producer to prove that the defect *probably did not exist* at the time when he put the product into circulation.[28]

The new Act alleviates the position of the producer inasmuch as it is at all possible when the burden of proving a certain circumstance lies with the producer. In order to clear himself of liability, the producer has to prove that it is *more probable* that the defect did not exist than that it did exist at the relevant moment. The position of the producer would certainly be more difficult if he were requested to prove that it was *certain* that the product was not defective, or that it was *beyond reasonable doubt* that the product was defective at the time of it being placed in circulation. Therefore, it is sufficient for the producer to prove

27 Article 7 of the Directive prescribes that the producer is absolved of liability if he proves either of the following: that he did not put the product into circulation; that the defect came into being after he put the product into circulation; that the product was not manufactured by him for sale or *any form of distribution for commercial purposes*; that the defect is due to compliance with *a mandatory regulation* issued by the public authorities; that the state of scientific and technical knowledge at the time when he placed the product in circulation was not such as to enable the existence of the defect to be discovered. (Underlined by M.K.)

28 Article 8 of the Product Liability Act prescribes that the producer is absolved of liability if he proves either of the following: that he did not put the product into circulation; that the defect *probably did not exist* at the time when he put the product into circulation, or appeared at a later time; that he did not manufacture the product for the purpose of sale and that the product was not produced within his regular activity; that the defect is due to compliance with *the prescribed norms*; that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of the defect to be discovered. (Underlined by M.K.)

that there is *a higher probability* (51%) that the defect came into being *after* the product was put into circulation than that the defect already existed at that moment.

Furthermore, Article 8 of the new Serbian Product Liability Act stipulates that the producer is absolved of liability if he proves that the defect is due to compliance with the *prescribed norms* – regardless of whether these norms are mandatory or not. In contrast to that, Article 7 of the Directive explicitly envisages that the producer is freed of liability if he proves that the defect is due to producer's compliance with *mandatory* legal regulations.

When the national regulation was passed in Luxembourg to implement the provisions of the Directive, the Luxembourg legislator was in the situation similar to ours. Namely, according to the national regulations at that time, producers were also considered liable for damages from objectively undiscoverable defects. And so, the Luxembourg legislator opted for keeping the existing rule, that is, not to deny consumers the protection they already enjoyed.[29] In other words, Luxembourg made use of the possibility provided by Article 15 (1.b) of the Directive and retained the existing solution, formulated by its own court practice, according to which the producer's liability was defined more strictly than recommended by the Directive. A report by the European Commission from 2001 asserted that there had been no problems regarding the step that Luxembourg opted for.[30]

On the other hand, neither was it maintained by the French courts that the producer might exonerate himself from the strict liability by proving that the cause of the damage was objectively undiscoverable.[31] Still, regardless of the rules that were accepted in court practice until then, the development risks defense was introduced into French law in 1998,[32] with the sole exception for the defective parts of the human body and defective products obtained from the human body.[33]

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29 Report on the Application of Directive 85/374 on Liability for Defective Products, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, p. 17.

30 *Ibidem*, p. 17.

31 Yvan Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défféctueux*, Paris, Librairie Générale de Droit et de Jurisprudence, 1990, p. 225.

32 On May 19, 1998, France passed a law that integrated the provisions of the Directive into its national legal system (Loi No. 98–389). The regulations of this law have become a part of the French Civil Code. *Cf.* François Terré, Philippe Simler, Yves Lequette, *Droit civil – Les obligations*, 8e édition, Paris, Dalloz, 2002, p. 937 and on.

33 "Le producteur est responsable de plein droit à moins qu'il ne prouve: ... (4°) Que l'état des connaissances scientifiques et techniques, au moment où il a mis le produit

Next, the Republic of Slovenia did not amend the provision on producer's liability in its Code of Obligation – it preserved the wording of Article 179 verbatim, the sole change being in the numeration.[34] However, by passing the Consumer Protection Act (*Zakon o varstvu potrošnikov*), Slovenian legislator provided for the development risks defense on behalf of the producer of defective product.[35] Therefore, the new Slovenian regulation on consumer protection equated undiscoverable defects, according to their legal significance, with *chance* or *force majeure* and worsened the consumers' position – in comparison with the position of the damaged party assured by the Slovenian Code of Obligations.

V
DEVELOPMENT RISKS IN THE EU LAW

Here, it is necessary to present and explain in more detail the contents of the legal solution the European legislator suggested to the EU member states. From our perspective, therefore, it is necessary to examine the scope of the rule adopted in the majority of European Union countries, and then to consider the policy behind this rule and what the possible consequences would be of retaining a solution that differs in terms of development risks from the one accepted by the majority.

Commission vs. United Kingdom is the most significant case before the Court of Justice of the European Communities that interprets Article 7(e) of the Directive.[36] In 1995, the Commission of the European

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en circulation, n'a pas permis de déceler l'existence du défaut." Article 1386–11, Code Civil (Article 12, Texte issu de la loi n° 98–389 du 19 mai 1999.)

"Leproducteur ne peut invoquer la cause d'exonération prévue au 4° de l'article 1386–11 lorsque le dommage a été causé par un élément du corps humain ou par les produits issus de celui-ci." Article 1386–12/1, Code Civil. (Article 13, Texte issu de la loi n° 98–389 du 19 mai 1999.)

34 "Odgovornost proizvajalca stvari z napako: (1) Kdor da v promet kakšno stvar, ki jo je izdelal, ki pa pomeni zaradi kakšne napake, škodno nevarnost za osebe ali stvari, odgovarja za škodo, ki nastane zaradi take napake. (2) Proizvajalec odgovarja tudi za nevarne lastnosti stvari, če ni ukrenil vsega, kar je potrebno, da škodo, ki jo je mogel pričakovati, prepreči z opozorilom, varno embalažo ali kakšnim drugim ustreznim ukrepom." člen 155, Obligacijski zakonik, Uradni list Republike Slovenije 83/2001, 32/2004.

35 "Proizvajalec ni odgovoren za škodo, če dokaže, da: ... – svetovna raven znanosti in tehničnega napredka v času, ko je dal izdelek v promet, ni bila takšna, da bi bilo možno napako na izdelku odkriti (npr. z znanimi metodami in analizami)." člen 10, Zakon o varstvu potrošnikov (uradno prečiščeno besedilo), Uradni list Republike Slovenije 98/2004.

36 Commission of the European Communities vs United Kingdom of Great Britain and Northern Ireland, C–300/95, European Court Reports 1997 Page I–02649. Source:

Communities applied for a declaration that, by failing to take all the measures necessary to implement the Directive on liability for defective products, the United Kingdom failed to fulfill its obligations under that directive and under the EC Treaty.

The controversial provision of the Consumer Protection Act – by which the United Kingdom intended to implement the development risks clause – prescribed that "in respect of a defect in a product, it shall be a defense for a producer to show that the state of scientific and technical knowledge at the relevant time was not such that *a producer of products of the same description as the product in question* might be expected to have discovered the defect if it had existed in his products while they were under his control."[37]

In procedure, the Commission submitted that the test in Article 7(e) of the Directive is objective given that it refers to a state of knowledge, and not to the capacity of the particular producer, or to the capacity of another producer of a product of the same description as the product in question, to discover the defect. In contrast to that, the controversial Section 4(1)(1) of the UK Consumer Protection Act presupposes a subjective assessment based on the behaviour of a reasonable producer. The Commission stated that "it was easier for the producer of a defective product to demonstrate, under section 4(1)(e), that neither he nor a producer of similar products could have identified the defect at the material time, provided that the standard precautions in the particular industry were taken and there was no negligence, than to show, under Article 7(e), that the state of scientific and technical knowledge was such that no-one would have been able to discover the defect."[38]

The European Court of Justice dismissed the Commission's application with the following explanation: the estimate of the adequacy of the domestic provision, whereby a particular member state implements a provision of *droit communautaire*, takes into account the manner in which the national courts of the member state interpret that domestic provision. The Court considered that the controversial provision of the UK Consumer Protection Act itself did not offer grounds for the interpretation which the Commission attributed to it, and that the Commission "has not referred in support of its application to any national judicial

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www.europa.eu.int/eur-lex. *Cf.* S. Taylor, *L'harmonisation communautaire de la responsabilité du fait des produits défectueux. Etude comparative du droit anglais et du droit français*, pp. 69–72.

37 Section 4(1)(e), Consumer Protection Act of 1987, which came into effect on March 1, 1988.

38 Commission vs. United Kingdom, C–300/95.

decision which, in its view, interprets the domestic provision at issue inconsistently with the Directive."[39]

Furthermore, the Court held that Article 7(e) was not specifically directed at the practices and safety standards in use in the industrial sector in which the producer was operating, but at the general state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product was put into circulation. Also, according to the Court's interpretation, "in order for the relevant scientific and technical knowledge to be successfully pleaded as against the producer, that knowledge must have been *accessible* at the time when the product in question was put into circulation."[40]

The court did not define the notion of the *accessibility* of information but left this to the courts of the member states. Nevertheless, it should be noted that in this context one can judge whether information was accessible only if it was published – that is to say, if it was expressed or made accessible in some way.[41] For instance, it is pointless to evaluate the accessibility of information written down in some scientist's notebook or computer if it has never been publicised, that is to say – publicly communicated. Such information is *a priori* inaccessible.

The accessibility of information is a matter of the national courts' evaluation. This evaluation does not focus on whether the information objectively belongs to the universal scientific and technical legacy. Namely, the information *is* part of that legacy by its very existence – regardless of whether it is accessible. This means that in appraising the accessibility of specific knowledge, the national courts will also deal with the question of *adequacy* of the producer's behaviour. In other words, courts will inevitably raise the question of whether there were any grounds for expecting the producer to possess knowledge of a particular nature, i.e. whether a reasonable and careful producer could obtain that knowledge.

For instance, information that is of importance for the timely discovery of a defect in a product was published in a scientific magazine in a foreign language. The question of the accessibility of that information in the court basically amounts to the question of whether the producer could be expected to keep track of scientific magazines in a foreign language. In this way, elements are introduced into the reasoning

39 *Ibidem*.

40 *Ibidem*.

41 *Cf.* Geraint G. Howells, Mark Mildred, *Is European Products Liability more protective than the Restatement (Third) of Torts Products Liability*, 65 *Tennessee Law Review* 985, 1998, p. 998–1015.

of the court, which are specific for the institution of fault-based liability, that is, precisely those elements the absence of which is characteristic of the institution of strict liability.[42] They certainly include the standard of reasonable expectations and the standard of a reasonable and careful man.

In any case, if the ability to know about the defect were to be considered in terms of existing scientific and technical knowledge regardless of their accessibility, the European producer would also be liable for those defects that could have been discovered on the basis of some information in a local newspaper in China. The example Jane Stapleton mentions is well-known: had, at the time when *Thalidomide* was placed on the European market, a doctor in Manchuria or Siberia announced in the local dialect or in the circle of his friends the idea of testing dog food in a particular way which would enable the discovery of the harmful effects of this medicine, his idea would have been the part of scientific and technical knowledge.[43]

Some authors criticise the structure of the Directive pointing out that in it, the provisions regulating the *conditions* of liability are unjustifiably separated from the provisions regulating the *defenses* (or, what the producer should prove in order to exempt himself from liability).[44] Apart from that, there is also criticism of the fact that theoretical concept which underpins the regime of strict liability is not applied in the Directive in its pure form.[45]

The conditions of the producer's liability are stipulated in Article 4 of the Directive, under which the damaged party should prove that he has suffered damage, that the product was defective, and that the very defect in product was the cause of the damage suffered. The producer's fault does not figure as the condition of his liability. On the other hand, Article 7 of the Directive prescribes that the producer is absolved of liability if he proves either of the following: that he did not put the product into circulation; that the defect came into being after he put the product into circulation; that the product was not manufactured by him for sale or any form of distribution for commercial purposes; that the defect is due to compliance with a mandatory regulation issued by the public authorities; that the state of scientific and technical knowledge at the time when he

42 *Cf.* Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 *Texas International Law Journal* 45, 1999, pp. 58–59.

43 *Ibidem*, p. 59.

44 Jane Stapleton, *International Torts: A Comparative Study: Restatement (Third) of Torts: Product liability, An Anglo-Australian Perspective*, 39 *Washburn Law Journal* 363, 2000, p. 368.

45 Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits déféctueux*, p. 227.

placed the product in circulation was not such as to enable the existence of the defect to be discovered.

The Serbian Code of Obligations also regulates the conditions of strict liability separately from the conditions under which the producer may absolve himself of liability. Article 173 of the Code of Obligations stipulates the following conditions of strict liability: the existence of damage and that of a causal relationship between dangerous proprieties of the item and damage inflicted. The existence of this causal relationship is arguably presumed if the damaged party proves that the dangerous object had a material role in the infliction of damage. Article 177 allows the holder of a dangerous item or the perpetrator of a dangerous activity to be acquitted of liability if he disproves this presumption. In other words, Article 177 corresponds in everything with Article 173; it does not introduce any new circumstance that the holder of the dangerous item could prove in order to acquit himself of liability that does not disprove any of the conditions for liability formulated in Article 173. Discharge from liability, therefore, boils down to proving that the conditions for liability have not been fulfilled, i.e. to disproving what the damaged party has proved or what has arguably been presumed as the condition of liability.

Adversely, Article 7 of the Directive introduces a new circumstance – the circumstance which has not been considered a condition of liability and which is even logically opposed to the regime of strict liability. Article 4 of the Directive stipulates the producer's liability regardless of his fault. Article 7 of the Directive enables the producer to evade liability for damage that arises from flaws *he could not have known about*. In other words, the producer who does not dispute that the product was defective is released from liability for the damage inflicted by that defect if he proves that there is no fault on his part.[46]

In modern civil law, there is a tendency towards objectifying the notion of fault as grounds for liability. The notion of fault is identified with the notion of erroneous behaviour, regardless of what the perpetrator had in mind or intended.[47] Fault is viewed as error, i.e. as behaviour that

46 *Ibidem*.

47 "One can say that anyone is at fault who did not behave in the manner that could be reasonably expected of him. This expectation need not be based on law, it is enough that it is based on custom, general habits. When I walk on the right side, as is the custom, I expect that the other person will walk on the right side, and thus avoid colliding with me. The person who does not do so, but walks on the left side and collides with me who am walking straight ahead, is liable for the damage that is consequently caused regardless of everything else – because I legitimately, and with reason, believed that he would walk on the right side, according to the custom of the city, like me. Fault interpreted in this way considerably widens the domain of fault based liability and

digresses from what can reasonably be expected from a reasonable and careful man. In spite of the trend of objectifying fault itself as grounds for liability, the Directive offers the possibility for the person whose liability is not based on fault to be acquitted of liability by proving that something could not have been known, i.e. *by invoking the absence of fault on his part.*

Some authors consider that the very essence of the institution of strict (product) liability lies precisely in the producer's liability for a defect that objectively he could have had no knowledge of.[48] They recollect that the development of the institution of product liability in Europe was significantly quickened due to the mass damages caused by the use of the medication known as *Thalidomide* – on this occasion the attention of European lawyers focused on the question of liability for defects that were not known at the time when the medication appeared on the market. For what reason then does the Directive suggest, and the member states of the European Union largely accept, that the producer can be cleared from strict liability by proving that at the time when the defective article was placed in circulation it was not possible to discover its defectiveness?

VI
ON ARGUMENTS THAT CORROBORATE OR CONTEST THE INSTITUTION OF DEVELOPMENT RISKS

The institution of strict liability for damage from a defective product should lead to the realisation of two social aims. The first aim is indemnification – compensation for damage that was caused by the defective product, i.e. placing the damaged party in the financial position in which he would have been if he had not suffered the damage. The second aim is deterrence – deterring producers from placing defective articles in circulation. The civil law sanction, which the producer of a defective article is exposed to, consists of the obligation to compensate for the damage that is the consequence of this defect.[49]

The European legislator stresses in the Preamble of the Directive that strict liability for damage from a defective article should ensure *a*

removes the grounds for some of the criticism of that theory." Mihailo Konstantinović, *Diskusija* (Discussion), in the collection of papers and discussions *Građanska odgovornost* (Civil Liability), Belgrade, *Institut društvenih nauka*, 1966, p. 332.

48 J. Stapleton, *International Torts: A Comparative Study: Restatement (Third) of Torts: Product liability, An Anglo-Australian Perspective*, p. 368.

49 G. Howells, M. Mildred, *Is European Products Liability more protective than the Restatement (Third) of Torts Products Liability*, p. 1026.

fair apportionment of risk in a society whose technological development is constantly accelerating. The risk that should be distributed is the threat of damages caused by defective products. In other words, the Directive was passed with the intention of it playing a particular role in the attainment of distributive justice in society so that the risk of the said type of damage would be attributed to the party who created that risk.

Still, it appears that development risks clause of the Directive intervenes in the distribution of risk from an entirely different angle. Here, the focus of the legislator's attention is no longer the risk which the end user of the defective product is exposed to – the threat of causing damage to the consumer. On the contrary, at this point, the legislator's attention focuses on the indirect risk to which the *producer* is exposed – the risk of being sued for damages from a defect he was unable to know anything about.[50]

The development risks clause constitutes an exception to the general rule that the producer shall be liable for damage caused by a defect in his product. Namely, with regard to the damage arising from those defects that could not be discovered in a timely manner, the moment of placing an article in circulation designates the transfer of the risk from the producer to the consumer. The circumstance that the defect was discovered *after* the article was placed in circulation does not alter the fact that a defective article *was* placed in circulation.[51] In other words, the defect existed even though it was impossible to know about its existence. The question that arises is the following: does the fact that it was impossible to discover the defect in the moment when the article was placed in circulation justify the transfer of risk from the producer to the consumer?[52]

The institution of development risks represents an attempt to make a compromise between two conflicting interests. On the one hand, there is the need to establish a system that encourages not only manufacturing but also scientific research and innovation in the function of improving production. On the other hand, there are the consumer's legitimate expec-

50 *Cf.* Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défectueux*, p. 221.

51 According to Markovits, development risk itself represents a kind of flaw – development risk is a subsequent shortcoming in the safety of the product (*un manque a posteriori de sécurité*). Liability for a subsequent lack of safety should be borne by the producer because the lack of safety existed even in the time of placing the product in circulation, albeit it could not be discovered at that moment. *Cf.* Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défectueux*, pp. 218–234.

52 *Ibidem*, p. 221.

tations concerning the safety of products that have been placed on the market.

The problem of development risks appear most often in the pharmaceutical, the chemical and the bio-chemical industries, in the production of food and genetically modified organisms – in other words, in those domains of production in which sensitive ethical questions, the application of high technology and the danger of mass damages are typical.[53]

There are numerous reasons that justify the institution of development risks, that is, arguments *substantiating* the claim that it is very important to acquit the producer of liability for damage from undiscoverable defects.

Usually, it is stressed that scientific and technical progress is advantageous to everyone, i.e. society as a whole profits from it. Therefore, the risk that inevitably accompanies scientific and technical progress should be distributed to all who enjoy the fruits of this progress.

It appears that the participants in the debate on development risks sometimes quote the arguments which otherwise they do not favour. For instance, the producers are unquestionably the stronger side in this relationship than the consumers. They are stronger in terms of economics and available information – the producers are the side whose interest, as a rule, is in minimising the legislator's intervention. Nevertheless, the producers are here seeking additional norms and quoting the general interest. In other words, in the debate on who should shoulder the development risk, one comes to an interesting turnabout: those interest groups which as a rule are not inclined to the idea of the state playing a role in the fair distribution of wealth in society, quote the need for a fair apportionment of risk or the need for an elaborate scheme of social insurance.

Next, it is claimed that the institution of development risks encourages innovation by way of reducing innovation-related risks. The repeal of this institution would impede scientific research by increasing the costs of each innovation in proportion to the price of insurance against liability for unknown risks. Apart from that, the abandonment of

53 On some of the cited arguments for and against the institution of development risks, *cf. Green Paper on liability for defective products*, Commission of the European Communities, Brussels, 1999, COM(1999) 396 final; *Report on the Application of Directive 85/374 on Liability for Defective Products*, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, p. 16–17; *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, Fondazione Rosselli, Contract No. ETD/2002/B5, p. 34; Y. Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défectueux*, pp. 229–230.

the institution of development risks would lead to producers hesitating to place articles produced according to the latest technology in circulation.

Likewise, one should note that producers are often in the role of patrons of scientific research and that, as a rule, the latest scientific and technical knowledge is under their control. It is not in the interest of the producer to make the results of his research accessible if he can release himself from liability by proving that the defect could not be discovered, given the level of *accessible* scientific and technical knowledge.

Furthermore, it is claimed that it would be difficult for producers to obtain insurance in case of liability for damage from an undiscoverable defect and that the institution of development risks represents the key to stability on the *insurance-against-liability* market in European industry. In other words, the question arises as to whether, and at what price, insurers would be willing to provide insurance against *unknown* risks.

It is also indicated that the producer's liability for undiscoverable defects would lead to lowering standards in the production process, seeing that the producer could not privilege himself from liability by proving the implementation of the highest levels of scientific and technical knowledge. Bearing in mind that even so much as compliance with the highest scientific and technical knowledge *could not* protect him from liability, it would profit the producer to moderately lower the standards according to which he manufactures, i.e. to optimalise his investment in the safety of a product.

Next, it is stressed that the institution of liability ought to encourage producers to place products that are as safe as possible on the market, and not to place producers in the position of an insurer. The greatest encouragement that could be given to the producer to manufacture safe products is to discharge him from liability for damages that occurred in spite of the fact that he applied the highest level of scientific and technical knowledge.

Furthermore, the position of the producer in the proceedings is already made difficult enough by the requirement that the producer must prove a negative fact (that the defect *could not be discovered*) in order to be absolved of liability.[54]

54 The judge, who assesses whether a particular product has a defect, takes the consumer's justified expectations as his point of reference. This rule implies that there are certain risks which the consumer simply has to anticipate, i.e. that the consumer can justifiably expect a certain degree of safety from the product but not its absolute safety. The expectations which the consumer in question had are not relevant – it is solely *the legitimate* expectations that are relevant. *Cf.* Article 6 Directive. As one of the guidelines in establishing which expectations were legitimate, the courts consider the expectations of the public (and not the expectations of the average customer nor the expectations of the

Finally, it is argued that the institution of strict liability is not the best way to cope with mass damages. Compensation within the system of social insurance is proposed as a more appropriate solution; or the founding of special – public or private – funds, from which indemnities would be paid out. In many EU states, producers of medicines, vaccines and food have already created funds together with insurance associations that are active in the relevant branches of industry, from which indemnities for damages caused by certain types of defective products are paid out.[55]

On the other hand, the arguments presented *against* the institution of development risks are also numerous. The institution of development risks destroys the coherence of the regime of strict liability. It allows the producer to be released from liability by proving the absence of his own fault – within the system whose basic characteristic is that the producer's liability is not stipulated by the existence of his fault.

Apart from that, it is considered *not fair* for consumers to bear the risk of those dangerous activities from which the producer primarily has the advantage. Also, it would be economically effective for the costs of product's defectiveness to be borne by the person who creates those costs – and that is the producer. Next, it is the producer who has most of the information about the possible risks – in any case he knows more about the product than the average consumer.

The producer can shift the costs of increasing the product safety to the consumer. In the same way, the producer can also build the costs of insurance against liability into the price of the product. As for major producers, the shifting of the costs of insurance against liability to the consumer does not lead to a significant increase in the price of the product.[56]

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consumer in question) with regard to the degree of safety of a particular product. *Cf*. H. C. Taschner, *Harmonization of Product Liability Law in the European Community*, p. 30–31. In present-day American law, Restatements (Third) of Torts applies the test that gauges the convenience of a product, according to the risk which that product carries (risk utility test).

55 *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, Fondazione Rosselli, Contract No. ETD/2002/B5, pp. 79–88.

56 In Finland, producers are liable for damage from objectively undiscoverable defects in a product. The Finnish government informed the European Commission that, in this connection, there was a negligible increase in liability insurance premiums. German and Dutch insurance companies stress that 90% of the cases dealing with liability for defective products are resolved in the out-of-court settlements. *Report on the Application of Directive 85/374 on Liability for Defective Products*, Commission of the European Communities, Brussels, 2001, COM(2000) 893 final, pp. 10–17.

Next, it is argued that no light has been shed on the link between the producer's liability for development risk and his readiness for innovation, that is, it has not been *proved* that the possibility of being liable for damages from undiscoverable defects would make producers reluctant to invest in scientific research. Yet, it appears that it is necessary to prove the claim which *prima facie* does not hold water, and in the concrete case it is the claim that producers would go in for innovations even when they were liable for all the unforeseeable consequences of those innovations.

Finally, the Directive permits member states to prescribe the financial cap on producer's liability. Namely, a member state may fix the highest amount of compensation for damages resulting from death or physical injury caused by a product with a particular defect, provided that this amount can be no less than 70 million euros.[57] So far, only three states – Germany, Portugal and Spain – have limited the amount of producer's total liability. In those three countries it has never happened that the amount of damage caused exceeds the prescribed limit of the producer's liability.[58]

In 2004, the European Commission engaged the *Fondazione Rosselli* to make a comprehensive analysis of the economic influence achieved by the institution of development risk.[59] This voluminous analysis considers that the participants in economic relations always adjust their conduct to the alterations in applicable rules and regulations. It points to the fact that the renouncement of the institutions of development risks would lead to the increase of partial and the decline of radical innovations. Namely, if they were to be deprived of the possibility of being privileged from liability for damage from defects that they could not discover even by applying the highest level of scientific and technical knowledge, the producers would direct their efforts to conventional and less risky research, investing in the safety and quality of that which

57 "Any Member State may provide that a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU." Article 16.1 of the Directive.

58 *Green Paper on liability for defective products*, European Commission, Brussels, 1999, COM(1999) 396 final. The new Serbian Product Liability Act does not prescribe the financial limit of the producer's liability.

59 *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, Fondazione Rosselli, Contract No. ETD/2002/B5. The Fondazione Rosselli is an independent, non-profit, research institution in the domain of economic, political and other social sciences, established in Turin, in 1988. Source: www.europa.eu.int .

already exists. Besides, there would be a reduction in the number of radical innovations and pioneer scientific research, as well as a decline in the assortment of products on offer.

The Analysis emphasises that it is certain that annulling institution of development risks would lead to an increase in the costs of insurance and that producers would not be able to obtain insurance for certain types of development risks. Further, it is asserted that the repeal of this institution would lead to changes in the structure of the European market and to the concentration of companies. The Analysis predicts the creation of public and private compensation funds at the level of the European Union, from which compensation will be paid out for damage caused by undiscoverable defects; while in some branches of industry, the producers' participation in compensation funds will be mandatory.[60]

VII
LIMITING THE SCOPE OF THE INSTITUTION OF DEVELOPMENT RISKS

Although nearly all the EU states – with the exception of Finland and Luxembourg – accepted the solution suggested in the Directive and introduced development risks defense, the fact is that some of the biggest national economies in Europe made an exception in that respect in the very sectors of industry in which development risks occur the most frequently and where the likelihood is greater of raising sensitive, ethical issues. In French, German and Spanish law, producers *are* liable for risks that were beyond the range of contemporary knowledge for those very products where such risks are the greatest – in food, pharmaceutical products and products obtained from the human organism.

There are some more indicators of the intention to limit the scope of development risks defense. For instance, in the restrictive interpretation given by the courts in Germany, development risks clause refers exclusively to *design defects* – defects that occur in the construction and

60 The Analysis underlines the need for approximation (in keeping with Article 153 of the EC Treaty) of the member states' laws concerning development risks; as well as the need for harmonisation of the system of compensation provided in the Directive on liability for defective products with the system of administrative control prescribed by the Directive on general product safety. (Council Directive 92/59/EEC of 29 June 1992 on general product safety; amended by Directive 2001/95/EC of the European Parliament and of the Council, of 3 December 2001 on general product safety). *Cf.* Fondazione Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report. Study for the European Commission*, pp. 137–138.

design processes and affect a whole line of products. The producer cannot be absolved of liability if the defect occurred in the production of the concrete unit of a product, that is, in the case of a *manufacturing defect*[61].

Furthermore, in French law, the producer has the obligation to monitor the product in the period of ten years after placing it in circulation (*obligation de suivi*).[62] In the event that the defect was discovered within the period of ten years after the item was placed in circulation, the producer who did not undertake the appropriate measures to prevent the occurrence of the harmful consequences of that defect cannot be acquitted of extra-contractual liability by invoking development risk or his own constraint by mandatory regulations.[63]

In other words, only the producer who complied with the obligation of monitoring a product can be absolved of liability for damage by proving that the subsequently discovered defect is the consequence of his adherence to mandatory regulations which were in effect at the time when the item was placed in circulation; or that the state of scientific and technical knowledge at the time when he placed the item in circulation was such that the existence of this defect could not be discovered. According to the aforesaid clause of the French Civil Code, disregarding the obligation of monitoring a product is *not* an offence, but it prevents the producer from being absolved of liability under civil law.[64] The

61 *Cf.* footnote 22. Nevertheless, the position of pharmaceutical producers in Germany is made easier by the existence of the private underwriters fund *Pharmapool*, formed by the national insurance companies. Given that they fall within one of three prescribed risk categories, the pharmaceutical producers pay a percentage of their annual turnover into this fund. Damaged parties can sue neither the insurance companies nor *Pharmapool*, directly. The German legislator is resisting the demands of consumer protection organisations, who seek the establishment of a general compensation fund out of which compensation would be paid for damages caused by defective pharmaceutical products. Fondazione Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products. Final Report*. *Study for the European Commission*, p. 111–112.

62 *L'obligation de suivi des produits* has already been sanctioned by the French courts as early as in 1979. Pascal Oudot, *Le risque de développement. Contribution au maintien du droit à réparation*, Dijon, Editions Universitaires de Dijon, 2005, p. 65. On *l'obligation de suivi*, see also: S. Taylor, *L'harmonisation communautaire de la responsabilité du fait des produits défectueux. Etude comparative du droit anglais et du droit français*, pp. 79–81.

63 "Le producteur ne peut invoquer les causes d'exonération prévues aux 4° et 5° de l'article 1386–11 si, en présence d'un défaut qui s'est révélé dans un délai de dix ans après la mise en circulation du produit, il n'a pas pris les dispositions propres à en prévenir les conséquences dommageables." Article 1386–12/2, Code Civil. (Article 13, Texte issu de la loi n° 98-389 du 19 mai 1999.)

64 The Directive on general product safety stipulates the obligation of the producer and the distributor to inform consumers adequately and effectively about a defect discovered after a product has already been placed in circulation, and to withdraw

producer will be considered *at fault* and therefore liable if, in the period of ten years after the product was placed in circulation, he does not undertake all the appropriate measures in order to prevent the consequences of that defect.

The idea that the producer should suffer the ultimate consequences of the defectiveness of his product is fairly old in French law – it originated as long ago as *Pothier*.[65] The rule that preceded the implementation of the provisions of the Directive was that, in order to absolve himself from liability, the producer of defective article had to prove that the cause of the damage was outside the article, i.e. that there was no causal relationship between the defectiveness of the article and the incurred damage.

The development risks defense was introduced in French law in 1998. It implicitly equates the undiscoverable defect in the product itself with those causes of damage that existed outside the product. In other words, according to this rule, the undiscoverable defect has the same legal significance as the causes of damage that exist outside the article.[66]

In summary, the great concession that France, Germany and Spain apparently made to their producers by introducing development risks defense is, in fact, quite limited. The right to quote development risks is denied to the producers of those very products where development risks are the greatest. Next, in German law, the said concession was additionally limited by the interpretation of the courts according to which the development risks defense was restricted to design defects. In addition, in French law, the seemingly extremely favourable position of the producer is aggravated by the extra-contractual obligation to monitor the product (*obligation de suivi*).

VIII
ON PROSPECTIVE AFTEREFFECTS OF INTRODUCING DEVELOPMENT RISKS DEFENSE IN SERBIAN LAW

The Code of Obligations proceeds from the position that defective product has features of a dangerous item. The Code prescribes the lia-

defective products from the market (from distribution or from the end-user) when this is necessary. To ignore this obligation is an offence punishable by the state and not a condition for establishing liability for damages. *Cf.* Article 5 (1.b) of the Council Directive 92/59/EEC of 29 June 1992 on general product safety; amended by Directive 2001/95/EC of the European Parliament and of the Council, of 3 December 2001 on general product safety.

65 Y. Markovits, Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits déféctueux*, p. 227.

66 *Ibidem*.

bility of a producer in the section that refers to strict liability for dangerous item or dangerous activity, without distinguishing between discoverable and undiscoverable defects.[67]

For almost thirty years, the single statutory provision on liability for defective products in Serbian law was Article 179 of the Code of Obligations. This provision was broadly read by the courts and it practically outgrew itself through a vast number of court interpretations. According to these interpretations, the final producer, or the person who is designated as the producer on the product, is strictly liable for the damage from a defective product. The final producer is liable even if the defect existed in the raw material, semi-product or component part that was produced by someone else[68] – provided that the final producer who paid compensation to the damaged party can address the producer of the raw material, semi-product or component part for indemnification. The importer bears extra-contractual liability for damage from the imported defective product; and, in case that the identity of the importer was not indicated on the product, liability lies with the seller.

Article 2 of the new Serbian Product Liability Act defines *the producer* as the person who manufactures final products, raw materials or component parts. The producer is also considered to be the person who presents himself as the producer by placing his name, trademark or other marks on the product; or the person who imports a product intended for sale. At this point, Article 2 of the new Serbian Act departs from the provisions of the Directive. Namely, under Article 3 of the Directive, not only the person who imports a product intended for sale into the Community is considered the producer, but also the person who imports the product intended for hire, leasing or any form of distribution in the course of his business.[69]

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67 J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom (Liability of the Producer of Defective Products)*, p. 412.

68 "In our earlier court practice, the viewpoint emerged according to which the final or primary producer was exclusively liable to the damaged party. However, such an interpretation of the law would be mistaken because it is more logical to leave it to the damaged party to decide whether he will also sue the manufacturer of the component part of the product which caused the damage. Apart from the genuine producer, a quasi-producer should also be liable, i.e. the person who presents himself as the producer by placing his own name, stamp or other distinguishing feature on someone else's product." J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom (Liability of the Producer of Defective Products)*, p. 411.

69 "(1) *Producer* means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer. (2) Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the

Furthermore, the new Serbian Act provides that, if the product does not contain data about the producer, the seller is in the position of the producer except if, within a reasonable period of time, he informs the damaged party about the identity of the producer, i.e. the person from whom he obtained the product. Next, if the imported article does not contain data about the importer, the seller is in the position of the producer even though the product contains data about the producer. Here also the new Serbian Act deviates from the Directive which stipulates liability not solely of the seller, but also that of every supplier of defective product.

According to the Directive, liability for damage lies with the person who imported a defective product into the European Union. With regard to this solution, it has been argued in literature that the interests of the consumer would be better served if *the importer to the plaintiff's EU member state* were to be liable for damage from a defective article and not *the importer to the Union*. That is because it is difficult for the consumer to identify and sue the person who imported the product in question into the Union when that person is located in some other EU member state.[70] Moreover, the regime of strict liability stipulated in the Directive does not refer to servicing companies or warehouse companies.[71]

In the context of keeping to the solution envisaged in the Code of Obligations, our importers, in the majority of cases, would be liable for damage from a product with a defect they knew nothing about without the right to indemnification from the European producer.[72] An exception would exist with regard to producers from Finland and Luxembourg, and with regard to German, French and Spanish producers of particular types of products – and they, as a rule, are food, products obtained from the human organism and pharmaceutical products. In other words, our importers could effectuate the right to indemnification only from European producers in those countries whose producers bear the development risk.

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course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer. (3) Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated." Article 3 of the Directive.

70 J. Stapleton, *International Torts: A Comparative Study*, pp. 374-375.

71 Y. Markovits, Markovits, *La Directive C.E.E. du juillet 1985 sur la responsabilité du fait des produits défféctueux*, p. 153.

72 *Cf.* J. Radišić, *Odgovornost proizvođača stvari sa nedostatkom (Liability of the Producer of Defective Products)*, p. 412.

Furthermore, our domestic producers would be exposed to greater risk when they sell their products to domestic consumers than when they export to the European Union countries.[73]

It is possible that some of the aforesaid circumstances are taken into consideration by the Slovenian legislator, who has decided that the Consumer Protection Law *shall* make allowance for producers, which Slovenia's Code of Obligations does not – to quote development risks defense.

And so, acquitting the producer of liability for damage from undiscoverable defects in our law could ease the position of domestic producers and importers, compared to European producers. However, the *rationale* of the provision of the Code of Obligations does not concern the position of our producers on the European market, but the scope of protection that is offered to the damaged party. Under the Code of Obligations, the damaged party is fully protected from defects in a product, regardless of them being manifest or undiscoverable. The Code stipulates a solution based on a coherent theory – the one that consistently elaborates the concept of strict liability. According to this solution, the producer cannot be acquitted of strict liability by invoking the absence of his own fault, that is, by quoting the difficulties in discovering the defect that was the cause of the damage.

Without going into possible strategies whereby the participants in economic relations adjust to amendments to any rule and regulation, it seems that the new Serbian Product Liability Act strengthens the previously existed position of domestic importers in relation to European producers. However, the same Act also strengthens their position – the position of the domestic importer – in relation to the domestic consumer. In other words, the aforesaid clause reaches far beyond simply favouring domestic importers and producers in the European context. Thereby, the risk of all damages, which can arise from undiscoverable defects, is shifted to the damaged party as the economically weaker side with less information at his disposal.

On the other hand, the interests of domestic importers and producers can also be protected in other ways – with the establishment of public and private compensation funds of producers in particular industries, such as already exist in many countries of Europe, and whose establishment at the level of the European Union is envisaged in the aforesaid Analysis of the Fondazione Rosselli, which was made for the needs of the European Commission.

The aforesaid Analysis envisages as the consequence of the producer's liability for undiscoverable defects a decline in radical innovations and pioneer scientific research, as well as the re-orientation of

73 *Ibidem*.

producers to conventional and less risky research, chiefly in the aim of improving the safety and quality of what is already being produced. If our legislator wanted to adopt this argument as relevant for domestic circumstances, it was necessary beforehand to examine what the existing volume of radical innovations and pioneer scientific research was in our country, as well as how great the really positive effect would have been of introducing the development risks defense in our law in terms of these innovations and research.

Furthermore, the Analysis highlights the certainty that in the case of repealing the institution of development risks, it would lead to increasing the costs of insurance and producers would not be able to obtain insurance against particular types of development risks. It was necessary to examine whether, under the existing provision of the Code of Obligations, producers had complained about the difficulties of obtaining the insurance against liability for undiscoverable risks.

IX
INSTEAD OF A CONCLUSION

There is no better way of learning about something than to try to change it. However, to learn about something that does function through the attempt to change it can be very expensive. The implied provision of the Code of Obligations, concerning liability for undiscoverable defects, subsists for quite some time. It is logically ordered, based on a coherent theory and consistently rounded off. It does not contravene the Directive on liability for defective products. To be exact, the Directive explicitly leaves the possibility open to the member states to deny the producer the development risks defense – to maintain or to provide for in their national regulations that the producer *shall be liable* even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

Moreover, this provision offers full protection to the damaged party, whereas it appears that there are no remarks in Serbian legal literature on the externalities of liability for undiscoverable risks on the business of domestic producers and importers. In other words, Article 179 of the Code of Obligations has not provoked so far any debate on difficulties producers might experience in obtaining the insurance against liability or in keeping on with the radical innovations. Therefore, it seems that the provision of the Code of Obligations – with regard to liability for undiscoverable defects – should not be changed without a thorough cost/benefit analysis.