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The Importance of the EC-Machinery Guideline for Farm Machinery Manufacturers

Sufficiently taking safety questions into account in machine design should be standard procedure, in order to prevent accidents and - from the point of view of manufacturing companies - later from product liability lawsuits. The EC Machinery Guideline has been in effect in the European Union for over a decade, whereby the technical safety requirements are binding, and hence not only recommendations. If a manufacturing company builds a machine with lower safety standards than in the machinery guideline, it may be insignificant, as long as nothing happens - however, if an accident occurs, the offence against the machinery guideline can have devastating effects. This paper takes a closer look at this.

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All countries have safety regulations, and indeed this has been the case for many decades now. Manufacturers of equipment for sale must comply with these regulations, otherwise, even though technically speaking it (more or less) works, the machine produced will stand outside the law of the land. As a result, despite being complete in the technical sense, such a machine may not legally form the subject of a contract. Furthermore, since safety regulations are intended to provide a safeguard against warranty claims of the other contracting party and liability claims from injured users (who may not necessarily be the same as the contracting party), observance of such safety regulations should also be understood to be in the enlightened self-interest of agricultural machinery manufacturers.

Without regulations standardised across the whole of the EU, however, a German manufacturer would have to determine and comply with the relevant safety regulations of each and every export country individually. Instead of being able to produce on a sensible European-wide scale, the manufacturer would be forced to adopt small-scale solutions that could vary greatly from country to country - obviously not a sensible approach from an industrial point of view. For this reason, machine design and construction was one of the first areas to be harmonised across Europe: the original EC Machinery Directive 89/392/EEC was issued in 1989, and was re-issued following some revision in 1998 as Directive 98/37/EC with otherwise unchanged contents.

As a result, only this Machinery Directive now applies throughout the EU. Those who comply with it can sell their machines throughout Europe, while those who do not, have a legal problem throughout Europe. Following a transitional period, only this Machinery Directive will apply in all the new EU accession states as well (for example our Eastern neighbours in the near future).

The imperatives of the Machinery Directive

From a legal practitioner's point of view, the Machinery Directive is rather ingenious. It simply states - no doubt in an intentionally somewhat imprecise fashion - that a machine must be safe, i.e. that it must conform to the health and safety requirements set out in Annex I. On reading these, one will very quickly see that the latter represent not merely trivial bureaucratic or academic tinkering, but in fact set out what amounts to the state of the art in engineering. It is therefore no wonder that the European standards organisations have simply copied and appended Annex I of the Machinery Directive in Annex A of their EN 292 standard. This is worth emphasising, because one often reads EC declarations of conformity in which it is stated that both parts of EN 292 have been observed, but when one talks to these same manufacturers, they confess to almost complete ignorance of the Machinery Directive.

Let there be no doubt about one thing here: although these requirements do not appear until the Annexes to the Directive, they are no less valid and absolute for that. They must be observed in their entirety. Greater safety would be permitted, of course, but never less - even if the contracting parties agreed to this in the contract of sale: European safety legislation is not at the whim of private companies to pick and choose which parts they do and do not like. How such contracts would be judged in individual cases under sales and commercial law could very quickly become problematic, but if an accident did occur and the trading standards authorities and/or trade associations were able to demonstrate non-compliance with the EC Machinery Directive, referring to a contract would be a futile exercise anyway.

The unfortunately injured party is also hardly likely to be put off by objections to his claim which are based on a contract between the manufacturer and the buyer.

The role of technical standards

It is left entirely to manufacturers themselves as to how they ensure conformity of their machine design and construction with the aforesaid safety stipulations of the Directive including Annex 1. The EC is solely concerned with the goal of safety, not with the ways and means of achieving it. In fact, the inten-

tion is actually to promote technical „competition“ between the various inventive ideas, not to suppress it.

There is no need for manufacturers to reinvent the wheel here however. Technical standards have been around for decades (and have long been established in the rest of the world too), and in the meantime have been anchored at EC level too. The European standards institute is not DIN, but CEN. Within CEN, the Technical Committee CEN/TC 144 is responsible for the field of agricultural machinery. Technical standards are designated EN, while draft standards bear the abbreviation prEN.

However, since standardisation bodies not only need to take account of safety aspects but also, naturally, must represent the interests of their member organisations, the legislature is wary of simply adopting all existing standards as they stand. On many occasions the German federal administrative court has also highlighted the potential for vested interests in the standardisation process. The EC has therefore mandated standards, the adoption of which must be seen specifically in the light of the EC Machinery Directive and its safety requirements. Namely those who comply with this harmonised European standard, will derive a benefit under the law, since compliance with this standard will automatically create the presumption of conformity with the Machinery Directive as well.

EN 292, EN 294 or EN 349 are the generally applicable EN standards relating to the safety of machinery. In addition, the following standards for agricultural machinery should also be mentioned for example:

- EN 632 („Agricultural machinery - Combine harvesters and forage harvesters - Safety“)
- EN 690 („Agricultural machinery - Manure spreaders - Safety“)
- EN 704 („Agricultural machinery - Pick-up balers - Safety“)
- EN 706 („Agricultural machinery - Vine shoot tipping machines - Safety“)
- EN 707 („Agricultural machinery - Slurry tankers - Safety“)
- EN 708 („Agricultural machinery - Soil working machines with powered tools - Safety“)
- EN 709 („Agricultural and forestry machinery - Pedestrian controlled tractors with mounted rotary cultivators, motors hoes, motor hoes with drive wheel(s) - Safety“)
- EN 745 („Agricultural machinery - Rotary mowers and flail-mowers - Safety“)
- EN 13140 („Agricultural machinery - Sugar beet and fodder beet harvesting equipment - Safety“).

Hazard assessment, declaration of conformity and CE marking

Hazard assessment

According to Annex I of the Machinery Directive, the manufacturer must conduct a hazard assessment at the outset and then design and construct the machine taking this assessment into account.

The hazard assessment (which incidentally is advisable not only from a safety point of view, but also for sound commercial reasons) is intended to ensure that safety issues are identified and integrated in the design process as early as possible. Experience has namely shown that any potential hazard identified at a later date either cannot be eliminated satisfactorily, or can only be eliminated at the cost of disproportionately high technical (and management) outlays. European legislation also specifies that trading standards authorities may ask to inspect these hazard assessments, and that non-presentation (which in reality will arise not from reluctance, but because the assessment does not exist) may constitute prima facie legal grounds for doubting the general conformity of the machine with the European Machinery Directive (Annex V, 3b).

Attempts are then often made, through a third party such as a certification body, to draw up a hazard assessment retrospectively. Apart from the fact that this actually constitutes an improper circumvention according to the letter of the law, it is also a complete sham from the point of view of safety since the finished machine has already been constructed so the design cannot be adapted to take the findings of the assessment into account.

Declaration of conformity

The EC declaration of conformity confirms compliance with the Directive in its entirety. It must be signed by a natural person - preferably the person ultimately responsible for safety issues - and must accompany the machine on handover.

CE marking

The CE marking is the visible confirmation that the manufacturer has completed this safety assessment of the machine. No third party - be it a private or public body - is responsible for measuring the conformity of the machine against the EC Machinery Directive and „releasing“ it in any way. On the contrary, EC machinery legislation operates in the opposite fashion, with the manufacturer alone being responsible for „self-certifying“ compliance with all EC regulations, i.e. first and foremost the EC Machinery Directive (and similarly the Electromagnetic Compatibility (EMC) Directive). The CE marking is then the outwardly visible symbol of the manufacturer's statement „My machine conforms to EC legislation“ and must be permanently affixed to every machine (not simply attached to the operating instructions or posted on the company's home page).

Possible consequences of infringement of the EC Machinery Directive

Under civil law, difficulties may arise with machines that do not conform to EC legislation on the one hand in relation to aspects of sales and commercial law, specifically in the case of export business, which does not as a rule fall under the German Civil Code but - and this is unfortunately not widely known - is subject to UN Sales Law. Looming on the other hand is the manifest threat of product liability claims, compensation for damages and, depending on the consequences of the accident, often pension claims as well. In the case of exports, this is further compounded by the fact that these occur in foreign jurisdictions.

With respect to administrative law, under the Equipment Safety Act trading standards authorities have effective means at their disposal to prevent manufacturers from selling their goods unhindered. The authorities can forbid further sales of unsafe machines, or even order a (global) recall. The commercial consequences of this need hardly be described.

As far as criminal law is concerned, manufacturers should be in no doubt about the risks involved, especially those holding positions of responsibility such as chief executives or department heads. If accidents or indeed fatalities occur, the respective prosecuting authorities will have no option but to open an investigation. Several responsible people in the company may even be investigated simultaneously. Alongside the criminal proceedings, the injured party (or their heirs) will also have the opportunity to pursue their own case in a derivative action. One should also bear in mind here that, at the latest following assistance and clarification from the trading standards authorities, the prosecuting authorities will be well aware of the stipulations of the EC Machinery Directive.