

protect the consumer. First, as stated above, the present enormous number of products militates against a consumer receiving and using accurate information as to any one product. Second, common anecdotal evidence indicates that the market alone will not protect the consumer. One need not look hard in a US supermarket to see canned goods of 16, 15½, and 15 ounces. Or one may learn in the popular press that certain goods are selling quite well even though they contain so much sodium that high blood pressure is certain to follow after only a short period of regular consumption. Third, even though the market will protect the consumer to a certain extent, it only does so in the long term, and even then imperfectly. In the short term, the consumer will be harmed.

Disclosure not enough to protect consumers

Recognising this, the EC has decided to set product standards. The question becomes what type of standards to set. Is requiring disclosure of certain information on labels and in advertisements enough? Is the progressive strategy discussed above necessary? An objective consideration of the market reveals that disclosure standards are not enough to ensure that competition remains on-the-merits. The first two arguments of the previous paragraph apply with equal force against the adequacy of disclosure standards. First, the number of products is so large a consumer could not possibly read and analyse every label of every product of interest. Second, the heavy reliance in the United States on disclosure standards has not prevented an enormous amount of non-meritorious competition. A final reason exists to mistrust disclosure standards: resources are wasted when producers concentrate on non-meritorious competition. As has already been pointed out, society as a whole is not benefited by non-meritorious competition. In addition, no benefit accrues to society from having consumers choose a particular food product because it tastes good; it tastes good because it contains an excessive amount of an unhealthy taste enhancer. Resources are simply not allocated efficiently when the consumer's choice is based on factors such as taste enhancers.

A look at the specifics of a given progressive approach standard provides an example. Why allow the sale of an 80 gramme chocolate bar when the nearest prescribed weight is 100 grammes? The only possible reason to use such a sales tactic is to fool the consumer. Similarly, why allow a producer to label a chocolate-looking bar as chocolate when it contains only a small amount of chocolate? Some may be totally artificial chocolate. Apparently, no good reason exists to allow production of a non-standard product.

Practical limitations to the philosophy

A new issue then becomes apparent: how high should the standards be? If the standards were high enough, all products would be essentially the same. What degree of similarity is desired? The answer is bound to be difficult to apply in practice. But a relatively simple theoretical principle can be stated: the standard should be set at a point below which any benefits to society are outweighed by costs. In the minimum chocolate content example, the proper minimum level is where the benefits to a particular group of consumers who desire an inferior product is outweighed by the costs to consumers who buy the inferior chocolate unaware and at an inflated price. This principle leads to the conclusion that standards will be set relatively high since few justifications for an inferior product will ever exist. Of course some consumers will desire a product such as a chocolate bar with a lower concentration of chocolate not because they prefer an inferior product but because of different 'tastes and habits'.²⁷ However,

national standards tend to shape customer preference for products . . . More European standardization can gradually eliminate these hidden technical barriers to trade [that is customer preference for certain products] by building up a degree of commonality in technical specifications where the market considers it useful.²⁸

That this principle is inherently vague is no reason to disregard it. It serves as a valuable point of departure for analysing any standard.

Future of the Progressive Strategy and its Implications

Status within the EC

The existence of standards aimed at competition-on-the-merits in the EC is somewhat surprising. When harmonising standards, the EC was in a sense starting from scratch. It could have adopted any standardisation philosophy it wanted. The EC consciously rejected other approaches in favour of competition-on-the-merits oriented standards.²⁹ That the EC adopted a sophisticated policy is especially surprising considering that several Member States were not using this policy. For example, the United Kingdom seems especially hostile to competition-on-the-merits oriented standards. The

27 2 Common Market Rep. (CCH), paragraph 3341.

28 Green Paper, see Note 2 above, at 7.

29 For example Legislation on Foodstuffs, Note 5 above, at 18.