

## **Designed to Regulate?**

### **A U.S. Manufacturer Seeks Entry into the EU Market.**

Dormont Manufacturing Company, a U.S. exporter of gas hose connector, has spent the past 10 years desperately trying to regain access to the European Union market. Their main obstacle has been design standards. Because of the lack of harmonization in EU standards, Evan Segal, the President of Dormont, has had to make the decision to challenge the EU members standards committee, go through costly certifications in each member country, or alter their already successful product to meet these European standards. Are design standards a form of non-tariff trade barriers, or does the U.S. simply have to follow the standards?

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“The formation of the European Union and the development of its standards policies has been a fascinating study for standards professionals and governments around the world”, (Helen Delaney, standards expert at the U.S. Mission to the European Union).

The U.S. company Dormont Manufacturing has found the EU’s development of standards not so much fascinating, but frustrating. The EU’s lack of integration in developing uniform product standards has sent Dormont on a market-access roller coaster ride.

## **Part A: The Dormont Side**

### **Dormont History**

Dormont Manufacturing Company is a United States gas hose connector manufacturer located in Export, Pennsylvania. Dormont produces gas hose connectors with numerous applications in residential, outdoor, and commercial environments. Dormont Manufacturing, founded in 1946, is the largest producer of flexible stainless steel gas appliance connectors and the inventor of the stainless steel connector. Dormont has proven to be a world leader in gas hose connector production and installation: currently over 25 million of their gas connectors have been installed around the world.

The two most important criteria when evaluating gas hose connectors are safety and performance. Performance and safety standards are pertinent to successful marketing and exportation. Dormont has repeatedly emerged as an industry leader in the area of safety. Its design, which utilizes helical “304” stainless steel tubing, also features flared end fittings to guard against the metal fatigue associated with welded fittings. Dormont’s products have consistently satisfied and surpassed the rigorous testing requirements established by the American National Standards Institute (ANSI). Dormont’s history for safety and successful completion of performance and safety testing have produced recognition from not only domestic agencies but international agencies such as the Australian Gas Association (AGA), the Canadian Gas Association (CGA).

### **Market Access Prior to 1988**

Prior to 1988, Dormont freely exported gas hose connectors to European countries. Dormont’s customers were mainly fast-food restaurant chains such as McDonald’s and Kentucky Fried Chicken.

In 1989, Dormont was notified by McDonald’s, one of their largest customers, that they could no longer use Dormont hoses in their British restaurants. Shortly thereafter their clients in France at EuroDisney also said they could no longer use Dormont’s hoses. The roller coaster ride had begun.

In the late 1980’s, because there was no harmonized EU standard, each European country began to implement individual national standards for gas hose connectors. Unlike their counterparts, such as the Canadians and Australians, the Europeans established national standards that included design standards on top of the normal performance standards.

Design standards do not address safety requirements but deal with issues such as compatibility and material composition of a product. Design standards can be created to possess very simple requirements; for example such a requirement might be that all

tubing must be colored blue. The design requirement can also be complex, such as all tubes must be manufactured into three separate pieces then welded together.

Standards that are not harmonized in the EU force foreign competitors wanting to do business in the EU to alter their product to satisfy each national standard. The cost of obtaining each national standard certification is very high, not to mention very time consuming. This could conceivably require a producer to undergo 15 separate tests, which could result in 15 different products for exportation. Each country now required a seal of certification on gas hose connectors.

### **Market Access to the United Kingdom (UK)**

If Dormont wanted to continue selling in Europe, they had to apply for certification in each country and address each individual national standard. Dormont decided to first seek approval from the British Standards Institute (BSI). The BSI is the body that sets standards for the UK. To obtain certification, gas connector hoses must pass BS 669 testing under the BSI. This testing includes two parts: BS 669 Part I applies to connectors in residential settings, BS 669 Part II is relevant for commercial gas hose connectors for catering appliances (i.e., McDonalds). Both parts of BS 669 contain safety, performance, and design requirements.

After submitting their hoses for approval Dormont was notified that they passed the safety and performance section of the tests but failed the design section of the test.

Dormont was confused, although they had to submit their hoses for certification, they found out that the BSI claimed that BS 669 was supposedly voluntary standard, yet, under British law, all installers of gas connectors are required to use products that meet the BS 669 standard. Formal compliance with BS 669 is not required to enter the British Market, however, if United Kingdom installers use non-BSI certified connectors, they face prohibitive costs and risks. The Council for Registered Gas Installers (CORGI) is a mandatory registration body for gas installing businesses in the United Kingdom. CORGI must enforce compliance with BS 6173, which in turn enforces compliance with BS 669. CORGI registered installers face professional liability and revocation of their license if they use products that are not affixed with BSI certification.

In 1988, Dormont met with BSI officials to petition to changes in the design specifications so that the standards included Dormont gas hose connectors. Dormont argued that the revision would not compromise the current safety and performance requirements of BS 669. BSI refused to alter the design requirements of BS 669 Part I and II, under the reasoning that these standards fell under the jurisdiction of the United Kingdom and they represented British businesses of which Dormont was not.

In 1991, in an attempt to gain access to the gas hose connector decision-making committee, Dormont purchased Sureflex, a small British gas hose manufacturer, they

renamed the company Dormont Europe Ltd. Now, because they owned a British company, they were entitled to have a representative on the GSE/1 committee. GSE/1 is a technical committee in the BSI that developed and oversaw the BS 669 standard. GSE/1 is made up of mostly British manufacturers of gas fittings and gas connectors. Acting as a British company, Dormont once again petitioned BSI and GSE/1 to revise the design requirements of BS 669 Part I and II. The effort was once again pursued in vain, the design requirements remained the same. Dormont and the Association of Catering Engineers (ACE)<sup>1</sup>[1] accused the GSE/1 committee of being biased towards manufacturers in designing the standard by. It became clear to Dormont that altering BS 669 standardization was not an option for them; they were at an impasse. Just as things started to look bleak, the clouds started to clear, offering Dormont a possible new opening for market access.

### **The Rise and Fall of the CE Approval**

In 1992 the European Union (EU) created a number of Directives that harmonized standards in many different product areas. The Directives provided guidelines for the affixing of the CE marking, this was a “Declaration of Conformity”. Through these directives the European Union harmonized the standards of all member states. A difference in the EU standard was that only safety and performance standards not design standards were used when testing products. The CE mark must be physically affixed to the product. The act of affixing the mark to the product shows that the product meets all of the requirements stated under the Directive and can be sold in all member states; without the CE mark the product must meet individual member state requirements to enter their prospective markets.

Dormont now saw a window of opportunity to finally get certification and regain market access. This certification would allow Dormont to sell their product to all countries in the European Union.

The European Commission authorizes six notifying bodies to review applications for CE approval on harmonized products<sup>2</sup>[2]. Each notifying body was to comply with the national standards established by their authorized standardization body. The notifying body in England was the British Standards Institute (BSI). This was ideal for Dormont since they historically had a strong presence in England and language would not be a hindrance to the application process.

After undergoing CE certification was notified that they met BS 669’s “essential safety requirement”, and therefore, was granted the CE mark in August of 1993. Now

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<sup>1</sup>[1] ACE is an industry group of gas connector users.

<sup>2</sup>[2] The six bodies in the EU that are allowed to issue the CE mark, they are the British Standards Institute (BSI), AFNOR, Deutscher Verein des Gas- und Wasserfaches, TUV, NSAI, LNE. All organizations follow the Directives adopted by the Commission.

that Dormont had obtained the CE mark, they could re-enter the gas hose market not only in the UK but the entire EU.

With the CE mark affixed to their products, Dormont attempted to market its gas hose connectors in other European countries, starting with France. To their dismay and frustration, Dormont was quickly told that the CE mark issued by BSI would not be recognized in France. The French authorities said the gas hose connectors did not fall under the EU Gas Appliance Directive and therefore they would not except Dormont's hoses. After much discussion the European Commission concluded that gas connectors were not covered by the scope of the Gas Appliance Directive. In December 1994 the British Government's Department of Trade and Industry (DTI) informed BSI that it must withdraw the CE mark from Dormont's gas hose connectors. Dormont once again lost access to the European market. They were now losing patience and started looking into their rights as an international exporter. They consulted a lawyer and the regulations of World Trade Organization (WTO).

### **International WTO Obligations**

Dormont felt that the UK was in violation of several of its World Trade Organization (WTO) obligations. They wanted to prove that the UK was violating the Technical Barriers to Trade (TBT) Agreement of the WTO (see Annex 1). Under Article 2.1 of the TBT it states that:

"Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that afforded to like products of national origin and to like products originating in any other country."

Article 2.2 states:

"Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products."

Article 2.5 states:

"A Member preparing, adopting or applying a technical regulation which may have significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4 of Article 2. Whenever a technical regulation is prepared, adopted or

applied for one of the legitimate objectives explicitly mentioned in paragraph 2 of Article 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.”

Dormont emphasized Article 2.8:

“Whenever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive requirements.”

## **BSI and the British Government**

According to the UK government, they were not violating any WTO regulations. BSI is an independent, non-governmental body, therefore the UK government does not have a say in drawing up the standards. Dormont, on the other hand, points to the Memorandum of Understanding (MOU) (see appendix 2) between the United Kingdom Government and the British Standards Institution as providing the link between the UK government and BSI. The first sentence of the MOU states: “[t]he Government will use all appropriate means to support and foster the achievement by BSI of the objects for which it was constituted by Royal Charter.” The second sentence of Article 1 indicates that the UK Government will financially contribute to the BSI’s annual budget in the form of an annual grant-in-aid. One must not overlook Articles 2, 3, and 5 of the MOU that authorizes direct government supervision of and participation in BSI’s standard setting process. Article 2(i) offers a direct interpretation of the role the government will play in standardization processes:

“In particular, it will, in accordance with priorities agreed between BSI and the Government review and where appropriate revise existing British Standards and seek to ensure that these and where appropriate new standards will be suitable for reference in Government regulations as unambiguous statements of technical requirement.”

Further indication that the UK government and BSI have a close relationship is stipulated in Article 2 (iv):

Where the Government considers that no existing British Standards are suitable for its purposes, the Government and BSI will seek to agree a timetable for the development of the necessary standards. Where such a timetable has been agreed, the Government will refrain from developing standards or purchasing specifications for these purposes, unless in its view circumstances change, in which it will consult BSI before so doing. BSI will amend or, if this is not feasible, withdraw or withhold publication of any British Standard which may be in conflict with technical regulations.

Despite this interpretation, the UK government maintains that they do not have direct jurisdiction over BSI standardization. This case cannot be presented to the WTO unless there is substantive evidence that there is direct involvement from the UK government in creating these standards with the BSI.

However, the relation between the two bodies becomes more questionable when looking at the hierarchy in the government. The Health and Safety Executive (HSE) is the government body that supervises BSI. It is responsible for the enforcement of some of the standards BSI establishes (including BS 6173 and 669). HSE also has the authority to direct BSI to eliminate or revise an existing BSI product standard if it deems it deficient. HSE is under the supervision of the Department of Trade and Industry (DTI).

### **Revision of BS 669**

In 1997, after ten years of arduous work, frustrating work, Dormont finally had the design standard revised in Part II of BS 669 (for commercial hoses). The revision would include the design specifications of Dormont hoses.

CORGI has stated that they were instrumental in instigating the revision of BS669 Part II, published in March 1997 that led to the inclusion of the Dormont catering hose in British national standards. However, Dormont still does not meet the standards for Part I (residential hoses). They are still awaiting completion of final documentation and have begun to sell again in the UK commercial market, and are still trying to revise Part I (residential use) of BS 669.

## **Part B – The United Kingdom Side**

### **The British Standards Institute**

In 1988, the British Standards Institute (BSI) created a new standard for gas hose connectors, the BS 669 Part I and II. The standard included performance and design standards. All gas hose connector importers must satisfy these standards in order to sell in the UK.

All BSI standards are drawn up by committees made up of representatives from manufacturers, users, research organizations, government departments and consumers who have a vested interest in the products being standardized. BSI ensures the views of British industries are represented in this area. BSI is an independent authority and its standards are voluntary. Before any standard is published, it is made available for public comment. BSI is also a member of the International Organization for Standardization (ISO) and follows many of their guidelines.

Part I of the gas connector standard involves testing for residential-use hoses, Part II pertains to commercial/catering-use hoses. Under Part II standards involve the specification that hoses be covered in white plastic, have annular tubing, and rubber hosing. It also requires the use of fittings with a welded construction as opposed to a flared design; the hose is initially in three separate pieces then welded together. BS 6173 is the Gas Hose Installation standard that allows for the installation of gas hoses and its connectors to catering equipment. It requires that where an appliance is to be joined to the fixed pipe work, it must be connected using flexible pipe that complies to the British Standard manufacturing specification BS 669 Part II.

The Department of Trade and Industry (DTI) works in partnership with businesses and the scientific community to ensure that science supports the efforts of business to “become as competitive as possible” by promoting open and competitive markets. According to a representative from DTI, the DTI has no role to play in drawing up or the approval of standards in the BSI process. That is the job of the GSE/1 committee.

GSE/1 is a technical committee in the BSI that developed and oversaw the BS 669 standard. It is made up of mostly British manufacturers of gas fittings and gas connectors. BS 669 is a voluntary standard, yet you do need to pass the test in order to have the hose installed by the Council for Registered Gas Installers (CORGI).

Installers must be registered with CORGI before installing gas connectors, basically they are the policing authority under the HSE. Registration ensures that installers are following UK codes and standards that certify that the gas connector components are operative, tested and inspected. Inspectors must check to make sure correct gas appliances are used. Installation of gas appliances follow British Standards. For catering equipment the standard that applies is BS 6173. This standard requires that



an appliance joined to the fixed pipework must be connected using a flexible pipe that falls under the British Standard specification BS 669 Part II.

Dormont hoses did not pass BS 669 Part I or II. Yet it should be noted that even though the hoses did not pass the testing, CORGI still believed that the hoses were suitable for use and continued to accept the Dormont hose. In essence, they unofficially relaxed the standard and continued to install Dormont hoses.

When asked to give their side of the story, the British/American Chamber of Commerce in San Francisco, California claimed that there is no story, the standards exist to maintain safety and meet specifications of the British gas hose connector, and foreign producers exporting connectors to the UK and EU must abide by this standard, end of story.

## **Part C – The European Union Side**

### **Background in Standards**

In 1992, the Council of the European Communities adopted a series of Directives designed to remove technical barriers to trade by creating one norm to provide a level playing field for product safety requirements in the European Community. This would allow importers easier access to all EU markets by having to pass only one standard.

The European Committee on Standardization (CEN), established in 1961 and located in Brussels, is responsible for standardization throughout the European Union. The Committee is made up of central standardizing bodies in all of the EU countries, one in each member country. CEN collaborates with the standardizing bodies in preparing European standards<sup>3[3]</sup>. New standards were developed on a European-wide basis under the control of CEN.

CEN continues to support the use of international standards from the International Standards Organization (ISO), whenever possible; 42% of all CEN standards are adopted from ISO. CEN has a close liaison with several Directorates of the Commission because they give them mandates to draw up European standards supporting Union standards, but they are two separate bodies.

### **European Union and Dormont**

Dormont applied to the BSI under the Gas Appliance Directive to receive the CE marking. In 1993 BSI tested Dormont's gas hose connectors using tests relating only safety and performance requirements in the British Standards BS669 Part I.

Dormont passed the test with flying colors, and subsequently BSI issued a CE mark. Dormont tried to then market the product, first in France, and was informed by French local authorities that the CE mark did not apply to gas connectors. The Gas Appliance Directive only covered the appliances themselves, and not gas hose connectors. BSI had made the determination that gas connectors were an integral part of the gas appliance and treated them as one apparatus. According to France, BSI had wrongly affixed the CE mark on the Dormont hoses.

In 1995, after discussions between the European Commission and Member States, it was announced that gas hose connectors were not appliances and therefore did not fall under the provisions of the Gas Appliance Directive. BSI then had to withdraw the EC

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<sup>3[3]</sup> In 1985 CEN “gained much greater importance with the advent of the EU’s ‘New Approach’ for harmonizing technical regulations and standards, with the goal of eliminating technical obstacles to trade”.

Type Examination Certificate issued to Dormont in 1993, in order to comply with its obligations as a notifying body for the EU.

The CE Mark was not withdrawn because of failure to meet requirements--Dormont's hoses had passed all relevant requirements for safety and performance--simply the hoses did not fall under the Gas Appliance Directive. According to the European Commission in March 1996, the Gas Appliance Directive will eventually be expanded to include gas hose connectors.

There is presently no Directive that applies to gas hose connectors, therefore Dormont must now apply to each member state in order to qualify to sell in their respective markets.

CEN was not involved in the Dormont case until 1997, simply because there wasn't a European Directive covering gas connector hoses. On May 7, 1996 CEN 236/WG2 held its organizational meeting and has included gas connector hoses on its work program. As of November 1997 the European Committee for Standardization is considering a new European-wide standard for gas connectors and has a working group discussing the development of a new directive.

After continuous attempts to get information from CEN about the Dormont situation, CEN claimed that it was not their policy to participate in such discussions about importers and that ANSI would have to answer any questions regarding the case. They claimed they had nothing to hide, and as far as they were concerned the case was closed long ago.

### Conclusion

Dormont has regained entry into the British "commercial" gas hose connector market, yet this approval does not allow them access to all other EU markets. They are slowly making their way back into the EU market, but it isn't easy. Dormont is now trying to build a Mutual Recognition Case, in which EU member states would be forced to accept a product in their market if it has received certification in another EU Member State. Dormont is still fighting the design standards that many of the member states still use in certification testing.

The following is a country by country review of what Dormont is now doing to enter each market:

**France:** Dormont must pass French standards in order to receive an "NF" mark (the French seal of certification) to sell gas hose connectors in France. This standard also includes design standards.

**Spain:** Spanish authorities have stated that there is no national standard, yet it is not legal to sell Dormont's connector in Spain. There is much confusion over what will happen in this market.

**Italy:** The Italians have their own standard, and are requiring that Dormont pay for additional testing. This also includes design standards.

**Belgium:** Dormont has received an approval from the Belgium Authorities (ARGB). They are now legally selling in Belgium, and trying to sell from Belgium into other EU nations.

**Denmark:** The Danish authorities have agreed to accept Belgium certification and BSI test results.

**Austria:** Austria requires that gas hose connector producers meet their national standards and become a part of their OVGW Association. Dormont must therefore pay for additional testing.

**Germany:** They will not accept other EU certification and Dormont must pay for additional testing in order to receive approval to sell in the German market.

**Sweden:** There is currently no national standard.

**Netherlands:** They will accept portions of the BSI and Belgium testing, but Dormont must also pay for additional testing in order to receive their certification.

**United Kingdom:** After a legal review of the situation, it was determined that the BSI standards were "de facto mandatory requirements" and that they were perceived by distributors and end-users as legal requirements. BSI has taken action to eliminate the design restrictions from the standard, and the UK government has stated that it is legal for Dormont to sell its products in the UK.

In the meantime, CEN continues to work on a Directive to include gas hose connectors, which if passed, would allow Dormont to test for certification that would allow them access to all EU markets under one recognized standard.

## **Questions**

Did the United Kingdom use non-tariff trade barriers to block international market access?

Were the BSI and GSE/1 acting on the behalf of British business to eliminate threatening international competition, or were they ensuring the quality and safety of a product? Is it their right to establish specification requirements?

Was the United Kingdom violating its WTO obligations or is BSI's sovereignty independent from the British government?

According to the Technical Barriers and Trade Agreement, what arguments could Dormont use in their defense?

## **The Case Plan: EU vs. Dormont**

### **· Brief Statement of Teaching Objective**

Students in the fields of international trade, business, political analysis, or negotiations can use this case study as a basis for discussion of the importance of design standards and whether they should be considered non tariff barriers (NTB) in international trade and business.

### **· Proposed Outline of the Case by Subtitles**

#### I. Dormont Side:

- Background;
- 1988 Current situation;
- Mid 1988 first problem;
- BSI gives certification;
- EU removes certification;
- Dormont response & approach USTR;
- Dormont Lobbies EU Standard.

#### II. EU Side:

- CE mark background;
- Problems due to the Europe's harmonization
- German manufacturers on the EU Standard Committee;
- EU affirms the one standard practice.

#### III. UK Side

- No problem with Dormont;
- BSI granted CE mark after Dormont qualified for the BS669;
- EU revokes CE mark.

Overall conclusion:

- The issue is ongoing.
- Dormont is getting certification by December 1997.

- **Data Requirements List for Case Inclusion**

Interviews or information with

Evan Segal

CORGI

HSE

German competitors

CEN

USTR

- **Proposed Schedule to Completion**

Individual sections completed by December 25.

The first final draft completed January 25.

## **Timeline**

### **Prior to 1988**

- Dormont free to market its gas appliance connectors throughout EU

### **August 1988**

- Dormont obtains ISO 9000 a model for a quality system that is not specific to a product, service or market, but to the quality process itself. (1957)

### **1988**

- Dormont is excluded from being part of GSE/1 (a BSI committee dominated by industry users, government departments, and research organizations) because it is a US manufacturer

### **1989**

- EU members and European connector manufacturers enact design standards to block Dormont access into their national markets
- Design standard - BS669
  - i.e. fittings with welded construction instead of flared design annular rather than helical tubing
- BS 669 is not mandatory but BS 6173 an installation standard is mandatory

### **1990**

- British Standard Institute (BSI) will not adjust BS 669 to include Dormont hoses

### **Jan 1992**

- Gas Appliance Directive by EU picks 6 notified bodies that could issue CE certification

### **1993**

- Dormont obtains CE mark under the Gas Appliance Directive
- Dormont now a member of GSE/1

### **August 1993**

- Dormont tries to obtain Kitemark based on equivalence of ANSI standards to BS669 - Kitemark refused from Britain in 1995 because “cannot issue kitemark to manufacturer who meets some of the requirements but not all”
- Application denied because of failure to comply with BS 669 design requirements.

### **December 1994**

- EU decides gas connectors not covered under Gas Appliance Directive
- BSI acknowledges Dormont’s product met the essential safety and performance standards of BS669 but not design requirements

### **January 1995**

- CE mark removed
- Dormont goes to USTR
- HSE assert the fundamental safety of Dormont products
- Dormont selling its product without certification begins to control 25% of the UK industrial market

### **October to December 1995**

- Dormont provide evidence to GSE/1 and BSI that BS669 not consistent to safety (allows for rubber hoses)
- GSE/1 refuses to alter BS669
- BSI will not intervene with GSE/1 because they say standard directly under GSE/1

### **Jan. 1996**

- CE mark required for installation of gas connectors in Europe by CORGI
- first 301 petition by Dormont to UST

### **Up to date**

- Dormont still selling its gas connectors without certification to the UK in its industry market



- Other strategies by Dormont and its European competitors will be covered as we get more information