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Consumer Protection in the EU

Legislative Materials

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PART ONE

PRINCIPLES

Article 1

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.

Article 2

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b) a common commercial policy;

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

(d) measures concerning the entry and movement of persons as provided for in Title IV;

(e) a common policy in the sphere of agriculture and fisheries;

(f) a common policy in the sphere of transport;

(g) a system ensuring that competition in the internal market is not distorted;

(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;

(i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;

(j) a policy in the social sphere comprising a European Social Fund;

(k) the strengthening of economic and social cohesion;

(l) a policy in the sphere of the environment;

(m) the strengthening of the competitiveness of Community industry;

(n) the promotion of research and technological development;

(o) encouragement for the establishment and development of trans-European networks;

(p) a contribution to the attainment of a high level of health protection;

(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;

(r) a policy in the sphere of development cooperation;

(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;

(t) a contribution to the strengthening of consumer protection;

(u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 4

1. For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in this Treaty and in accordance with the timetable and the procedures set out therein, these activities shall include the irrevocable fixing of exchange rates leading to the introduction of a single currency, the ecu, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Community shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

Article 5

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

Article 27

In carrying out the tasks entrusted to it under this chapter the Commission shall be guided by:

(a) the need to promote trade between Member States and third countries;

(b) developments in conditions of competition within the Community in so far as they lead to an improvement in the competitive capacity of undertakings;

(c) the requirements of the Community as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;

(d) the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Community.

CHAPTER 2

PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 28

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 30

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 31

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

Article 93

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.

CHAPTER 3

APPROXIMATION OF LAWS

Article 94

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

Article 95

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

Article 96

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission, acting by a qualified majority, issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in this Treaty.

Article 97

1. Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 96, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.

(c) incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt recommendations for the purposes set out in this article.

5. Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care. In particular, measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

TITLE XIV

CONSUMER PROTECTION

Article 153

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.

3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).

5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

TITLE XV

TRANS-EUROPEAN NETWORKS

Article 154

1. To help achieve the objectives referred to in Articles 14 and 158 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions

Consumer policy strategy 2002-2006

(COM(2002) 208 final)

(2002/C 137/02)

(Text with EEA relevance)

1. INTRODUCTION

1.1. Content

This communication sets out the Commission's strategy for consumer policy at European level over the **next five years** (2002-2006). Last year, the Commission issued an interim report [1] on progress made under the past action plan (1999-2001) in order to prepare this new strategy. It sets out **three mid-term objectives**, implemented through **actions included in a short-term rolling programme**, which will be regularly reviewed through a working document of the services of the Commission. The three objectives are:

— a high common level of consumer protection,

— effective enforcement of consumer protection rules,

— involvement of consumer organisations in EU policies.

These three objectives are designed to help achieving integration of consumer concerns into all other EU policies, to maximise the benefits of the single market for consumers and to prepare for enlargement.

Under the first objective 'A high common level of consumer protection', the chief actions are initiatives on follow-up to commercial practices issues addressed by the Green Paper on EU Consumer Protection [2] and on the safety of services. The priority actions, under the second objective 'Effective enforcement of consumer protection rules', are the development of an administrative cooperation framework between Member States and of redress mechanisms for consumers. And to achieve the third objective 'Involvement of consumer organisations in EU policies', the main actions consist in the review of mechanisms for participation of consumer organisations in EU policymaking and in the setting up of education and capacity-building projects.

European consumer policy is central to one of the Commission's strategic objectives, that of contributing to a better quality of life for all [3]. It is also an essential element of the Commission's strategic objective of creating new economic dynamism and modernising the European economy. The creation of a Directorate-General for Health and Consumer Protection in 1999 and a reorganisation of scientific and regulatory work in order to ensure independence, transparency and better protection of consumer interests, demonstrates the increased importance attached to consumer policy.

This communication invites the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and all interested parties to support the overall approach and the three objectives in particular. The Commission also invites them to foster the adoption of the key measures proposed and to support their implementation.

1.2. Scope

Consumer policy in this communication covers safety, economic and legal issues relevant to consumers in the market place, consumer information and education, the promotion of consumer organisations and their contribution with other stakeholders to consumer policy development. The scope of this strategy does not cover food safety issues. Food issues are now dealt with separately and have their own legislative agenda. The White Paper on Food Safety adopted on 12 January 2000 [4] contains proposals for a major programme of legislative reform in this area.

2. THE RATIONALE OF THE NEW CONSUMER POLICY STRATEGY

The development of consumer policy at EU level has been the essential corollary of the progressive establishment of the internal market. The free circulation of goods and services has required the adoption of common, or at least convergent, rules to ensure at one and the same time sufficient protection of consumer interests and the elimination of regulatory obstacles and competitive distortions.

Measures have frequently sought to give consumers the means to protect their own interests by making autonomous, informed choices. This typically ensures that consumers will have sufficient, correct information before engaging in transactions and certain legal rights in case the transaction does not deliver the required outcome. These measures seek to redress structural imbalances between individual consumers and business flowing from limits on the former's access to information and legal expertise as well as on their economic resources.

[1] COM(2001) 486 final.

[2] COM(2001) 531 final of 2 October 2001.

[3] Commission communication COM(2000) 154 final of 9 February 2000; Strategic Objectives 2000-2005 'Shaping the new Europe'.

[4] COM(1999) 719 final.

However, in some situations, providing a basis for informed choice and legal redress has been regarded as insufficient, notably as regards protection of physical health and safety. In such situations, harmonised rules are considered necessary to guarantee an adequate level of protection to all consumers quite independently of their ability to protect themselves by making informed choices. The decision to adopt such a measure depends to a large extent on a political assessment of the importance of the interest to be protected and the feasibility of consumers being able to protect themselves by informed choices in practice.

2.1. **The scope of EU consumer policy**

EU consumer policy should provide **essential health and safety requirements** and safeguard economic interests to ensure a **high level of protection** and meet the expectations of citizens throughout the EU. Products and services placed on the market should be safe and consumers should receive the relevant information to make appropriate choices. Consumers should also be protected from abusive practices. Much of the work in this domain concerns legislation and other actions having a direct impact on market behaviour, such as standardisation, codes of conduct or best practice.

EU consumer policy should also **empower consumers** to understand policies that affect them and to make an input into these policies. Consumers should have the **capacity** to promote their interests in order to be on the same footing as other civil society stakeholders represented at the EU level.

It is also important that consumers have comparable opportunities to benefit fully from the potential of the internal market in terms of greater choice, lower prices, and the affordability and availability of essential services. Barriers to cross-border trade should therefore be overcome in order that the consumer dimension of the internal market can develop in parallel with its business dimension. EU consumer policy therefore aims at setting a **coherent and common environment ensuring that consumers are confident in shopping across borders throughout the EU**.

As well as specific consumer protection rules, consumers are also affected by other important EU policies such as the internal market, environment and sustainable development, transport, financial services, competition, agriculture, external trade and more. Consumer policy as such cannot be developed in isolation without taking into account other areas that have an impact on consumers. **Systematic integration of consumer concerns into all relevant EU policy areas is essential.** In recent years significant progress has been made toward achieving this. The aim for the future should be to build on these achievements in order to make integration of consumer interests into other policies more systematic.

Similarly consumer policy must take into account concerns of other areas to ensure a coherent approach to Community policy as a whole. Also, consumers' choices are very important for these other areas, e.g. sustainable development in its social, environmental and economic dimensions.

Consumer policy is an area where the EU can add value. It is a **shared responsibility** between the EU and national public authorities. EU rules are enforced at the national level. Integration of consumer interests into all policies can only be effective if there is a similar approach at national level. This means that consumer policy is a **collective endeavour** of all European Union policy sectors and at all levels, regional, national and European.

The principles outlined above are enshrined in Articles 153 and 95 of the Treaty establishing the European Community.

2.2. **The process of the new strategy**

2.2.1. *Impact assessment*

The success of a consumer policy strategy can only be measured by the **impact** it has for consumers in Europe. It is therefore essential that the rationale for the strategy is clearly set out in advance, that progress on the strategy is **regularly monitored** and that the success of individual actions is clearly **evaluated** and lessons learned for the future. This would allow lessons to be drawn and suggest any necessary policy adaptation.

2.2.2. *A knowledge-based policy*

Consumer policy needs to be backed by relevant information and data in order to adjust policies and prioritise in the most appropriate ways. A more comprehensive, systematic and continuous effort is needed to develop a suitable knowledge base as an essential tool for policy makers. There is also a need for information and data for the general public, especially since the introduction of the euro, which increases price transparency across the euro area. Consumers also require accurate data on the safety of goods and services to make informed decisions, and many consumers desire information on other aspects of products, such as the environmental effects associated with them. The Commission will continue to provide detailed information on relevant issues for consumers through its 'Dialogue with citizens' publications and website (http://europa.eu.int/citizens).

Due to the diversity of consumer issues, comprehensive consumer-related information and data has to include general quantitative data (such as on consumption, living conditions and other socioeconomic aspects), data linked to consumer activities (such as on the participation to consumer associations) and consumer economic interests (such as on prices). Policy makers need to complement quantitative data available with qualitative data, which can be provided by opinion surveys on consumer attitudes, knowledge and satisfaction. Monitoring of consumer complaints and their handling is also a key issue for better information about consumers' interests and market responses.

The Commission will continue to develop its **'knowledge-base' on information and data on consumers and the market**. It intends to continue the publication 'Consumers in Europe — facts and figures', surveys on consumer prices, Eurobarometer and focus group surveys on services of general interest. The Commission will also carry out Eurobarometer surveys on cross-border consumer problems and consumer information and representation. It also intends to develop indicators on consumer satisfaction, and will make use of the interactive policy-making initiative which uses internet-based mechanisms to gather feedback and to conduct consultations. The Commission will also make use of scientific research where relevant, in particular through the Framework Programmes for research and technological development.

2.3. **Key factors underlying the new strategy**

Five key factors have been taken into account in developing this new strategy.

2.3.1. *The euro*

The long-awaited arrival of the euro in consumer pockets is beginning to fundamentally change business and consumer attitudes. The introduction of the euro has removed an important psychological barrier to consumers shopping in other Member States and has made it easier to compare prices. Cross-border opportunities should, therefore, become more evident for consumers.

2.3.2. *Social, economic and technological changes*

Internet use and its household penetration rates are increasing. In November 2001, almost 50 % of the population (over 15 years) used the internet either at home, at work, at school, in public access places or on the move. Internet penetration in EU households increased from 18 % in March 2000 to 38 % in December 2001 ([5]). These trends will raise awareness amongst a growing number of consumers of the possibilities of electronic commerce.

E-commerce and the information society reduce the relevance of distance in advertising, marketing and retailing for many products but above all, for services.

Consumption patterns are also changing. The **service sector** is growing. In the EU, it is now at least double the size of the manufacturing sector in terms of GDP; three times the size if social and public services are included ([6]). This means that services, including their safety aspects, will have to be increasingly taken into account in EU consumer policy.

2.3.3. *Reaping the full benefits of the internal market*

With these changes, cross-border trade is now a more realistic proposition. However, obstacles to realising the full potential of the retail internal market still remain.

Surveys show that there are still wide differences in price for many consumer goods and services across the EU, of which consumers would be able to take advantage if they were able to have more confidence in shopping across borders. In addition, prices might be reduced if companies could sell across border without having to establish specific arrangements for different countries.

Wide divergences in prices

The last Commission report ([7]) on the functioning of product and capital markets shows that the retail prices of food and consumer goods continue to vary widely between Member States and that the narrowing of such price variations has slowed down considerably in recent years. In general, prices vary three to five times more across the EU than inside a country. The report concludes that different national regulations, company behaviour and competition problems may be combining to keep prices apart across the Community.

Different consumer protection rules apply in different Member States. Unsure of what protection they do or do not have when they shop abroad, consumers restrict their choices to the products and services available in their own Member State.

Lack of consumer confidence in buying across border

Across the EU, consumers have significantly less confidence about shopping cross-border than in their own countries — only 31 % of consumers think they would be well protected in a cross-border dispute with a supplier, against an average of 56 % who would feel well protected regarding a similar dispute within their own country ([8]).

([5]) E-Europe benchmarking report, 5 February 2002, COM(2002) 62 final.

([6]) *Source:* Eurostat.

([7]) COM(2001) 736.

([8]) EOS Gallup Europe 'Consumers survey', January 2002, the overall report of the survey is available on: http://europa.eu.int/comm/dgs/health_consumer/events/event42_en.html

Likewise businesses are frequently unclear about what practices they should follow if they sell to consumers in other Member States. It is therefore essential for the European Union to ensure that internal market rules and practices promote **consumer confidence in cross-border transactions**. This implies simpler and more common rules, a similar level of enforcement across the EU, more accessible consumer information and education and effective redress mechanisms.

Cross-border shopping will not replace routine shopping, except for those who live very near borders. But even just **making cross-border shopping a realistic possibility** can itself have a major **knock-on impact on competition** in local markets. Even if a small percentage of consumers shop abroad, it will have an effect on the prices in each Member State's overall market. This impact has already been seen for example in the UK car sector ([9]).

2.3.4. *Implementing governance reform*

The Lisbon European Council, the White Paper on Governance adopted in July 2001 ([10]) and the better regulation action plan to be presented shortly to the Commission, together represent a dynamic expression of political will to reform. These initiatives opened an important debate to improve the quality, effectiveness and simplicity of regulatory acts and to better consult and involve civil society in the EU decision-making process.

Consumers have high expectations of the European Union, its ability to ensure their safety, to protect their interests and to enable them to realise directly some of the benefits of European integration. But alongside that, citizens also feel increasingly alienated from the EU and its processes and institutions. This means that future EU consumer protection policy should both produce concrete benefits for citizens in their daily life, and engage consumers in the development and implementation of that policy. The five principles for good governance of openness, participation, accountability, effectiveness and coherence are directly relevant to consumer policy and should form an integral part of the future strategy.

2.3.5. *Preparing for enlargement*

Accession of the candidate countries to the EU will have an important impact on the functioning of the internal market. This is particularly true in the area of consumer protection, where citizens, in their capacity as consumers, will directly experience the effects of an enlarged market. The EU will be faced with **new regulatory and enforcement structures** and, more generally, with new attitudes towards consumer protection.

Many consumer protection rules are currently covered by national law rather than European legislation. Though the detail of these provisions varies across the current Member States, their fundamentals are broadly similar. However, with the accession of the current candidate countries the heterogeneity of national provisions will significantly increase. Enforcement structures are not always as strong in the candidate countries and the experience and expectations of their consumers are also very different. The consumer movement of the candidate countries has still a long way to develop in order to play its full role of informing consumers, representing them and playing their full role in market surveillance.

The challenge will be to meet the legitimate expectations of new members while safeguarding and improving the present level of consumer protection both in terms of safety and legal and economic rights of consumers. Enlargement issues are therefore taken into account throughout this strategy, and the Commission will continue to make every effort to help consumers, their representatives and national authorities from the candidate countries prepare for accession.

2.4. **The structure of the new consumer policy strategy**

This communication provides the Commission's strategy for consumer policy at the European level over the **next five years** (2002-2006). It sets out **three mid-term objectives**, implemented through **actions included in a short-term rolling programme**, which will be reviewed regularly. The regular update of the rolling programme will be carried out through a working document of the services of the Commission. The medium-term strategy will provide a consistent orientation, while the short-term plan can be more quickly adapted to changing circumstances.

The Commission also plans to better integrate the preparation of the policy strategy with the financial instrument for consumer protection actions ([11]), which currently runs to a different timetable.

3. THE POLICY OBJECTIVES OF THE NEW CONSUMER POLICY STRATEGY

The key factors outlined above have led us to identify **three mid-term objectives**:

Objective 1: 'A high common level of consumer protection'. We must go further to enable consumers and business to realise the benefits of the internal market. Central to this is the establishment of common consumer protection rules and practices across Europe. This means moving away from the present situation of different sets of rules in each Member State towards a more consistent environment for consumer protection across the EU.

([9]) http://europa.eu.int/comm/competition/car_sector/price_diffs

([10]) COM(2001) 428 final.

([11]) Decision No 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers (OJ L 34, 9.2.1999, p. 1).

Objective 2: 'Effective enforcement of consumer protection rules'. There is no good law if it is not properly enforced. As the degree of economic integration in the internal market steadily increases and more opportunities are open for consumers, consumers should be given in practice the same protection throughout the EU, and even more so in an enlarged EU. Business has also a keen interest in a more uniform application of rules. Public authorities should have practical and effective means of cooperating to that end.

Objective 3: 'Involvement of consumer organisations in EU policies'. The input of consumer organisations into policies is essential both in terms of content and in terms of process.

These objectives are mutually reinforcing. Enforcement of EU policies is easier if a high common level of consumer protection is achieved; but common EU rules, which are not uniformly enforced creates uncertainty and reduces benefits for consumers. The benefits of a common level of protection can not be reaped fully if consumer organisations are not strong enough to play their role by providing policy makers with policy input, evidence of problems and by helping to enforce rules through market surveillance.

Priority has been given in the strategy to actions which complement each other and which, together, form a critical mass of actions, which reinforces their leverage effect. These priority actions address mainly cross-border issues. They are chosen to maximise impact at EU level. Some of these actions propose pooling scarce resources, from EU or national level. They often serve more than one objective. Particular prominence is given to actions promoting integration of consumer concerns into other policies and preparing for enlargement.

3.1. **Mid-term objective 1: A high common level of consumer protection across the EU**

This objective does not mean regulating all consumer protection in detail at European level. That would be neither desirable nor practical. It means harmonising, by whatever means is most appropriate (framework directive, standards, best practices), not just the safety of goods and services, but also those aspects of consumer economic interests that give consumers the confidence necessary to conduct transactions anywhere in the internal market. It could mean setting in place a common set of simple and clear EU rules and safety requirements, on commercial practices and on consumer contractual rights. It could also mean filling gaps between existing EU rules, which will require reform of existing directives. In line with the governance initiative, it would mean reinforcing business and consumer responsibility through making better use of alternative forms of regulation, such as self-regulation and co-regulation, standardisation. A high common level of consumer protection also requires incorporating the integration principle by ensuring that other EU policies, such as internal market, financial services, transport, energy, environment, competition, agriculture, external trade and more, systematically and specifically address consumer interests. Provisions, which are essential to consumers and which ensure a high level of protection across the EU, should be fully taken into account in the definition of all EU policies. Likewise, consumer policy initiatives should also of course take into account their impact on business and other interested parties. The Commission is also developing an integrated approach to assessing the impact of initiatives across the full range of policies and groups affected by them.

A high level of consumer protection is required. This will be fully taken into account into the definition of other policies.

This objective requires actions in the following policy areas:

3.1.1. *Safety of consumer goods and services*

Community action has been successful in ensuring free circulation of consumer products within the EU and a strategy for achieving similar results in the case of services is being pursued. However, it is still necessary to reinforce Community action intended to ensure that a high and consistent level of protection in relation to consumer goods is guaranteed through the EU. In the case of services, Community initiatives to contribute to consumer safety have been limited so far to a few areas, notably transport. It is therefore necessary to examine the needs for further Community action in this respect and launch the appropriate initiatives.

The priorities in this policy area include **the implementation of the revised Directive on general product safety** ([12]), in particular the development of **standards** under this new Directive, the appropriate initiatives in the area of the **safety of services** provided to consumers and tackling **specific safety problems** as they arise. The preparation of new legislation on **chemicals** will provide for adequate risk reduction measures and will increase the level of consumer safety.

([12]) Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4).

3.1.2. *Legislation on consumer economic interests*

3.1.2.1. Commercial practices

The Green Paper on Consumer Protection ([13]) set out options for the further harmonisation of rules on commercial practices, either on a case-by-case basis or supplementing this through framework legislation. There is also a need to review and reform existing EU consumer protection directives, to bring them up to date and progressively adapt them from minimum harmonisation to 'full harmonisation' measures. The Green Paper and the Commission's strategy on services ([14]) make it clear that the simple application of mutual recognition, without harmonisation, is not likely to be appropriate for such consumer protection issues. However, provided a sufficient degree of harmonisation is achieved, the country of origin approach could be applied to remaining questions.

The Commission will present a follow-up communication to the **Green Paper on Consumer Protection in 2002**, which will further clarify its intentions in relation to new and existing initiatives regarding commercial practices and provide for further consultation.

3.1.2.2. Review of existing Community legislation relating to consumer protection

The Commission's Reports ([15]) on the Directives on timeshare ([16]) and on package travel ([17]) indicated a number of shortcomings and further evidence has come to light in the form of complaints to the European Parliament and to the Commission. These two Directives provide for a mixture of contract law remedies and rules on commercial practices (e.g. selling techniques). Reform of the latter could be partially completed under any initiative subsequent to the Green Paper on EU Consumer Protection. For these directives, one of the key priorities for the Commission would be to propose full harmonisation in order to minimise variations in consumer protection rules across the EU that create fragmentation of the internal market to the detriment of consumers and business.

Moreover, the Commission will report on the implementation of several of the existing directives, which require it. These reports could be accompanied by proposals for amendment, if appropriate.

The Commission will review the existing Directives on **timeshare, package travel** and **indication of prices**.

([13]) COM(2001) 531 final.

([14]) COM(2000) 888.

([15]) SEC(1999) 1795 final and SEC(1999) 1800 final.

([16]) Directive 94/47/EC of the European Parliament and of the Council (OJ L 280, 1994, p. 83).

([17]) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990).

3.1.2.3. Law governing consumer contracts

In 2001, the Commission adopted a communication on European Contract Law ([18]), which launched a consultation process on potential problems for the internal market and the uniform application of Community law resulting from the divergence of national contract laws. Consumer contract law represents an important part of the EC contract law. The Council has invited the Commission to communicate the results of the consultation and its observations and recommendations if necessary in the form of a Green or a White Paper at the end of 2002. The European Parliament has called on the Commission to draw up an action plan.

The follow-up to the communication will respond to the requests of the Council and of the European Parliament. It could suggest a mix of regulatory and non-regulatory measures. Among the non-regulatory measures it could propose coordination of research activities. These activities could lead to the elaboration of a general frame of reference, establishing common principles and terminology. Furthermore it could explain which measures would be taken to ensure coherence of the existing and future acquis, taking into account the general frame of reference. In this context, a **review of existing consumer contract law** in order to remove existing inconsistencies, to fill gaps and to simplify could be envisaged. **Harmonisation of the cooling-off periods** of several Directives ([19]) would also be part of this review.

3.1.3. *Financial Services*

The financial service action plan ([20]) sets out a programme of initiatives designed to complete the internal market in retail financial services. Much has already been done, such as the Regulation on cross-border payments in euro ([21]) which will greatly benefit consumers and contribute to enhancing cross-border trade by aligning bank charges for cross-border and national transactions. However, more is needed, as the action plan sets out. This includes both actions to facilitate the cross-border provision of financial services and measures to ensure the proper protection of consumers, wherever they are in the EU and to increase their confidence in cross-border transactions. The Commission will reinforce a regulatory approach in the field of financial services based on early, broad and systematic consultation of all interested parties, including consumers and end-users.

([18]) COM(2001) 398 final.

([19]) Directive 94/47/EC of the European Parliament and of the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.94, p. 83), Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts (OJ L 144), Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

([20]) COM(1999) 232 final.

([21]) Regulation (EC) No 2560/2001 of 19 December 2001 (OJ L 344, 28.12.2001, p. 13).

To these ends, the Commission will, in particular, propose to revise and update the **Directive on consumer credit** ([22]).

The Commission will make **a proposal for a comprehensive legal framework for payments in the internal market**. The forms that money and payments take are changing rapidly: plastic money, electronic money. The introduction of the euro is speeding up this development. Efficient and secure payment instruments and networks are indispensable in a well-functioning internal market. The legislator will have to address the developments in the areas of prices, time periods and the relationships between the issuers and holders of these new forms of payments. Existing legislation will also have to be reviewed.

In the securities field, the Commission has adopted proposals for directives on market abuse ([23]) and prospectus ([24]) that have a high level of consumer protection. The revision of the directive on investment services will lead to harmonisation of the conduct of business rules. The Commission intends to also make a proposal on the transparency obligations of quoted companies. These proposals would all benefit consumers by creating a fairer and more transparent internal market for financial services.

3.1.4. *Electronic commerce*

Consumers are still wary of shopping online, with less than 2 % of retail sales being made online. In the context of the e-Europe Action Plan adopted in 2000 ([25]), the Commission has developed a strategy to build consumer confidence online, made up of four elements: high quality e-commerce codes; quality alternative dispute resolutions (ADRs); clear and consistent laws and effective enforcement.

Whilst there are many codes, trustmarks and other schemes, their sheer number and variety make it difficult for consumers to decide whether they can be confident about dealing with any particular site. The Commission's e-confidence initiative was launched in May 2000. This brought together a wide range of stakeholders, including consumer and business representatives, in an effort to reach agreement on common requirements of good practice. In December 2001, stakeholders presented a broad agreement to the Commission proposing European trustmark requirements and a structure to monitor their implementation in practice.

On the basis of this agreement, the Commission intends to adopt a **Recommendation on consumer confidence in electronic commerce** and will work with stakeholders to monitor the implementation of their agreement.

Secure networks, secure access and the protection of privacy are also vital elements in building consumer confidence in electronic commerce. The 2002 e-Europe Benchmarking Report ([26]) states that progress to improve protection against security threats is still slow despite several initiatives initiated by the public and private sectors such as the adoption of the electronic signature Directive ([27]). In the last two years, there has been an increase in threats and security incidents, for example virus attacks. Against this background, the e-Europe security approach has evolved towards a more comprehensive approach of network and information security.

The Commission and Member States will take a series of **measures to improve electronic commerce security** encompassing awareness-raising, technological support, regulation and international coordination ([28]).

3.1.5. *Services of general interest (SGI)*

Services of general interest are defined in the Commission communication on 'Services of general interest in Europe' ([29]) as being services which the public authorities class as being of general interest and subject to specific public service obligations. They cover such areas as **transport, energy (electricity, gas), telecommunications** ([30]) **and postal services** ([31]). A guarantee of **universal access, high quality** and **affordability** of these services constitutes the basis of the consumer needs as well as other obligations to accompany the liberalisation process. The Commission report on services of general interest to the Laeken European Council ([32]) announced the Commission's intention to produce a regular series of reports monitoring market performance in this field. The first such report has been produced and it has identified the **quality** of services as a big challenge for the future.

([22]) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as amended by Directive 90/88/EEC of 22 February 1990; European Parliament and Council Directive 98/7/EC of 16 February 1998, (OJ L 42, 12.2.1987, OJ L 61, 10.3.1990, OJ L 101, 1.4.1998).

([23]) COM(2001) 281 final.

([24]) COM(2001) 280 final.

([25]) http://europa.eu.int/information_society/eeurope/action_plan/index_en.htm

([26]) E-Europe benchmarking report, 5 February 2002, COM(2002) 62 final.

([27]) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L 13, 19.1.2000, p. 12): entry into force 19.7.2001.

([28]) Commission communication, COM(2001) 298 of 6 June 2001; Council Resolution 14378/01 of 6 December 2001.

([29]) COM(2000) 580 of 20 September 2000.

([30]) Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002, 'Universal Service Directive' (OJ L 108, 24.4.2002, p. 51).

([31]) However, not all activities in these sectors are subject to public service obligations and some operate under normal market conditions, for example in the sectors of transport and energy, though some consumer protection measures apply across these sectors.

([32]) COM(2001) 598 of 17 October 2001.

There is currently a lack of quality indicators sufficiently developed to conduct an evaluation of these services. The Commission intends to produce a **communication defining a methodology to conduct horizontal evaluations of services of general interest**. This methodology will pay special attention to consumers' views on the performance of these services.

3.1.5.1. SGI — Transport

In the **transport** area, certain services have given rise to a high level of consumer dissatisfaction as expressed in Eurobarometer ([33]) and qualitative focus group surveys. Considerable progress is being made as regards passenger rights in air transport. There is, however, a need to extend this progress to other modes of transport.

The Commission White Paper 'European transport policy for 2010: time to decide' ([34]) states the Commission's intention by 2004 and as far as possible **to extend consumer protection measures for air transport to other modes of transport**, and in particular the railways, maritime transport and as far as possible, urban transport services.

3.1.5.2. SGI — Energy

In the **energy** sector, the Commission has made proposals ([35]) to further open up to competition the **electricity** and **gas** markets. These proposals foresee that all customers would be free to choose their supplier by 1 January 2005.

The proposals contain a detailed set of **consumer basic rights** including, in the case of electricity, a right to a universal service. They also provide for a minimum set of conditions in contracts, transparency of information on applicable prices and tariffs, measures to protect vulnerable customers and the availability of low-cost and transparent complaint handling and dispute settlement mechanisms.

The Commission will continue to monitor the implementation of the internal electricity and gas market rules, in particular regarding their effect on consumers, and to continue research on a wide range of energy options for the future.

([33]) Eurobarometer on SGI, September 2000, available at: http://europa.eu.int/comm/dgs/health_consumer/library/surveys/facts_euro53_en.pdf

([34]) COM(2001) 370 of 12 September 2001.

([35]) Proposed Directive amending Directives 96/92/EC and 98/30/EC concerning common rules for the internal market in electricity and natural gas — Commission communication COM(2001) 125 of 13 March 2001.

3.1.6. *International trade, standardisation and labelling issues*

The world trading system is governed by the World Trade Organisation agreements. Apart from trade liberalisation itself, various aspects of these agreements are relevant for consumers.

A new round of WTO trade negotiations was launched in Doha in November 2001 comprising both further trade liberalisation and new rule making. Many aspects of these negotiations are relevant to consumers, including, for example: WTO negotiations on services, including financial services, discussions on labelling, on product safety and on deceptive practices in the context of the TBT ([36]) agreement, the use of precaution and intellectual property issues.

In addition to the WTO the EC has negotiated or is in the process of negotiating trade agreements with several countries and regions, which are also relevant to consumers' interests.

International standards, in particular those established by ISO ([37]), have an important status under the TBT agreement and may influence the safety or interests of European consumers. It is therefore important to ensure transparency and adequate representation of consumer interests in the international standardisation process.

Private schemes, such as codes of conduct, guidelines and private, voluntary labelling, that aim at informing consumers about the origin, production and potential impact of the product in question can complement public policy measures, in view of promoting sustainable development.

The Commission will **promote and protect consumer interests** in the WTO as well as in the context of bilateral trade relations and in other forums. The Commission will maintain a dialogue with consumer organisations to this end. It will also promote consumer participation in international standardisation.

3.2. **Mid-term objective 2: Effective enforcement of consumer protection rules**

Effective cooperation on enforcing consumer protection rules is the second objective of this strategy. There are both legal and practical obstacles to enforcement cooperation at the moment, which need to be overcome if consumer protection principles are to be effectively applied in practice. While there is a coordination role at EU level, enforcement remains principally a national, regional or local competence. Actions in the following areas should be considered to achieve this mid-term objective:

([36]) WTO Agreement on technical barriers to trade.

([37]) International Standards Organisation.

3.2.1. *Enforcement cooperation between Member States*

Cooperation between the public authorities responsible for the enforcement of rules on commercial practices and product safety is key to the functioning of the internal market. The ability of rogue traders to act cross-border unimpeded would have a detrimental effect on consumer and business confidence. The Green Paper on EU Consumer Protection ([38]) outlined the case for a legal instrument, similar to what exists in other EU policies, to formalise this cooperation. Such a legal instrument could also provide the basis for cooperation agreements with third countries. The ideas in the Green paper on these issues were the subject of a very large consensus.

Reinforced structures for enforcement cooperation on product safety, such as the Consumer product safety network have already been foreseen in the revised Directive on general product safety.

The Commission intends to propose a **legislative framework for enforcement cooperation** on consumer protection between Member States, including the setting-up of a committee of representatives of national enforcement bodies.

Existing ad-hoc and informal cooperation instruments, such as IMSN or CLAB have pioneered this form of cooperation and will continue to be important:

3.2.1.1. The International marketing supervision network (IMSN)

The IMSN is an organisation consisting of the law enforcement authorities of 29 countries. In principle these authorities are members of the Organisation for Economic Cooperation and Development (OECD). The mandate of the network is to share information about cross-border commercial activities that may affect consumer interests, and to encourage international cooperation among law enforcement agencies. The European Commission participates as observer to the biannual IMSN conferences. The European sub-group 'International marketing supervision network — Europe' (IMSN-Europe) is a network of governmental authorities involved in the enforcement of fair trade practice laws and other consumer protection activities from the European Economic Area countries.

To ensure a permanent and systematic exchange of information between the members of IMSN-Europe, the Commission intends to develop its existing **website** for information exchange purposes and the **database**, which registers enforcement related information.

([38]) COM(2001) 531 final.

3.2.1.2. The CLAB ([39]) — 'unfair contract terms' — database

The Unfair Contract Terms Directive ([40]) was adopted to eliminate unfair terms from contracts drawn up between a professional and a consumer. The Commission launched the CLAB database to create an instrument for monitoring the practical enforcement of the Directive in the form of a database on 'national jurisprudence' governing unfair terms. 'Jurisprudence' as understood by CLAB covers not only court judgments but also decisions by administrative bodies, voluntary agreements, out-of-court settlements and arbitration awards.

The Commission intends to **complete and improve the CLAB database** in the next years.

3.2.2. *Information and data on the safety of goods and services*

The effectiveness of the systems in place in the EU for ensuring a high level of consumer health and safety protection should be monitored closely in order to identify any weaknesses, determine the priorities for reinforcing or completing the safety provisions applicable, intervene rapidly in case of emergencies and assist the decision makers in defining new policy orientations. This involves, in particular, collecting and assessing information and data on dangerous consumer products, the risks posed by certain services, the accidents related to consumer products and services.

Collecting and exchanging at EU level such information is also important in order to contribute to ensuring a consistent enforcement of Community provisions on product and service safety.

The 'rapid alert system' (RAPEX) and the programmes to collect and exchange data on product-related injuries should be developed further. A **reinforcement of RAPEX** will be part of the implementation of the revised General Product Safety Directive ([41]). The **development of a scheme to collect, assess and exchange data and information on service safety** and on the accidents in certain service sectors may be considered as part of the initiative on the safety of services. Moreover, the existing scheme to collect and assess data on product-related injuries under the Injury Prevention Programme ([42]), will be continued as part of the new health programme, and reinforced if necessary by appropriate specific initiatives.

([39]) CLAB refers to the French term 'clauses abusives', i.e. unfair contract terms.

([40]) Directive 93/13/EEC (OJ L 95, 21.4.1993).

([41]) Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4).

([42]) http://europa.eu.int/comm/health/ph/programmes/injury/index_en.htm

Enlargement will add the challenge of integrating in the Community system weaker enforcement mechanisms. In order to facilitate such integration, the Commission is assisting candidate countries in the difficult task of steadily **putting in place adequate administrative structures and enforcement powers** to implement and monitor the consumer protection *acquis*.

Candidate countries will be involved in the implementation of the revised general product safety directive, in particular through their **participation in the reinforced 'rapid alert system'** (RAPEX).

3.2.3. *Redress*

If consumers are to have sufficient confidence in shopping outside their own Member State and take advantage of the internal market, they need assurance that if things go wrong they have effective mechanisms to seek redress. Better and easier access to courts and out-of-court mechanisms for resolving cross-border disputes are therefore necessary to facilitate more effective access to justice for consumers.

3.2.3.1. Alternative dispute resolution

Where cross-border disputes arise, resorting to traditional litigation is not always practical nor cost effective for consumers and business alike. The Commission has responded with a number of initiatives aimed at promoting simple, low cost and effective means of resolving cross-border disputes such as alternative dispute resolutions ([43]) (ADRs).

In order to coordinate out-of-court-settlement procedures throughout Europe, the European extra-judicial network (EEJ-Net) has been launched in October 2001. The EEJ-Net provides a communication and support structure made up of national contact points (or 'clearing houses') established by each Member State. The clearing house will help the consumer with information and support in making a claim to an appropriate out-of-court alternative dispute resolution system. The EEJ-Net is complemented by FIN-NET; the EU-wide out-of-court network dealing with cross-border complaints related to financial services set up in February 2001.

The Commission will develop the **EEJ-Net** with Member States. It will ensure minimum guarantees for **ADRs** by encouraging the application of the principles under the 1998 and 2001 Commission Recommendations. The Commission will further develop and improve FIN-NET and will promote the development of **EU-wide ADR schemes, particularly online schemes**. The Commission also adopted a Green Paper on Alternative Dispute Resolution ([44]) to take stock of the existing situation with a view to setting future priorities, and will propose a communication on Online Dispute Resolution.

3.2.3.2. European consumer centres (Euroguichets)

The European consumer centres network (ECC-Network) acts as an interface between the Commission and European consumers to support better use of the internal market and to give feedback to the Commission on market problems. The ECCs provide information on legislation and on case-law both at the European and at the Member State level. The ECCs also give assistance and advice on mediation, information concerning the procedures, first legal aid and orientation towards other authorities. The ECCs cooperate closely within their network and with other European networks such as EEJ-net and FIN-NET. The Commission would like to see one European Consumer Centre in every Member State and, as soon as possible, also in the candidate countries.

The Commission will continue to **build up the ECCs' network** within the EU Member States and the candidate countries. In order to help the Commission to better identify consumer needs, the ECCs will participate to the Commission initiative **'Interactive policymaking'**, which is a new feedback mechanism to deliver valuable information from the market place.

3.2.3.3. Judicial cooperation in civil matters

The main objective of cooperation in civil law is to establish better collaboration between Member States in order to encourage free movement of citizens. The European Council of Tampere (15 and 16 October 1999) established a map for the effective implementation, among others, of the civil cooperation provisions introduced by the Amsterdam Treaty. The three priorities in this field are better access to justice, mutual recognition of judicial decisions, and increased convergence in the field of procedural law.

([43]) The Commission has adopted two Recommendations on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes (98/257/EC, OJ L 115, 17.4.1998, p. 31) and on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC, OJ L 109, 19.4.2001, p. 56).

([44]) COM(2002) 196 final.

The Commission will pursue the targets set for the effective **implementation of the civil cooperation provisions introduced by the Amsterdam Treaty and developed by the conclusions of the European Council of Tampere**. The Commission will continue to update, at regular intervals, a 'Scoreboard', to monitor the progress in the adoption and implementation of the range of measures needed to meet these targets.

An EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([45]), which has entered into force on 1 March 2002, provides for a new set of rules of immediate consumer relevance. New rules for the applicable law on contractual and non-contractual obligations are also about to be established ([46]).

The Commission will take into account the consumer's interest **when Community rules on international private law** are established.

3.2.4. *Support to consumer associations*

Consumer associations can make an important contribution to the proper enforcement of consumer policy measures both through their use of injunctions and their general market surveillance role. They are able to identify consumer products and services that are, for example, unsafe or of unacceptably poor quality. In this way they complement the enforcement and market surveillance role of the public authorities. This is resource intensive work that frequently requires a high level of expertise.

Many of the actions envisaged in support of Objective 3, such as the training programme for consumer associations professionals or the online education platform, will serve to strengthen the ability of consumer associations and of individual consumers themselves to contribute to market surveillance. In addition, the Commission will undertake some specialised initiatives relating to general product safety.

The Commission will organise in 2003 a special **training course for consumer associations relating to market surveillance** in the context of the revised General Product Safety Directive. It will also explore the possibility of launching further coordinated initiatives with Member States when the Directive comes into force.

([45]) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

([46]) Revision of the 1980 Rome Convention on the law applicable to contractual obligations ('ROME I') and completion by a new instrument governing conflict of laws rules for non-contractual aspects of commercial transactions ('ROME II').

3.3. **Mid-term objective 3: Proper involvement of consumer organisations in EU policies**

In order for consumer protection policies to be effective, consumers themselves must have an opportunity to provide an input into the development of policies that affect them. This goes beyond the immediate scope of consumer policy as such and is essential to achieve the integration of consumer protection requirements into all other EU policies. For example, the variety of public services and other services of general interest which are provided through some form of market structure is steadily increasing, and consumer interests should be taken into account in those areas. Involving consumer organisations also acts as a valuable 'reality check' on what is being proposed. Specific actions should be developed in the following areas:

3.3.1. *Reviewing mechanisms for participation of consumer organisations in EU policymaking*

3.3.1.1. Consultation requirements

To achieve more effective and transparent legislation at the EU level, the White Paper on Governance ([47]) proposes that the consultation process, as a whole, should take place in accordance with commonly agreed standards. The White Paper also recognises the impact this process will have on the resources of civil society and that this will have to be taken into account in the future by all public authorities concerned.

Consumer organisations have a forum, the Consumer Committee, for inputting into consumer policy as such. The Consumer Committee is an advisory committee composed of consumer representatives from all Member States and of European-wide organisations. The current challenge for consumer organisations is to have the opportunity and the capacity to make an input into wider EU initiatives, which have a consumer dimension, at all stages of the EU decision-making process.

A communication establishing **minimum requirements** for the conduct of the Commission's consultation processes will be presented shortly to the Commission.

3.3.1.2. Participation in consultation bodies and working groups

Consumer participation within consultative bodies and working groups will also help to ensure integration of consumer concerns in all EU policies. Most of these consultative bodies are in the agricultural field. New consultative bodies have also been set up in certain fields such as transport, energy, telecommunications or fisheries. Throughout the years, consumer representation in such bodies has increased haphazardly, without a general coordinated approach.

([47]) COM(2001) 428 final.

The Commission is working towards greater transparency as regards the activities of the **different advisory bodies**. In this context, the Commission will examine whether consumer organisations are properly represented across the spectrum of policies which concern them.

3.3.1.3. Standardisation work

Voluntary standards, established by the European standardisation bodies, play an important part in the concrete application of many Community measures related to consumer protection. The use of standards for achieving public policy objectives gains legitimacy through the transparency of the standardisation process and through the full and effective involvement of all stakeholders, including consumers. The participation of consumers in the European standardisation is still insufficient and does not match the dominant position of producers and other economic interests.

The Commission will examine how it can ensure **better consumer participation** in the work of standards-setting bodies. European standardisation involves activities both at EU level and in the national standardisation committees. Therefore, the Commission and the Member States should cooperate to ensure that the EU level activities are properly coordinated and that consumer representatives are properly involved at national level.

3.3.1.4. Consumer participation in the work of other EU institutions

The proper involvement of consumer organisations in EU policies concerns all EU institutions. Consultation of European and national consumer organisations already takes place with the Parliament and the Council. The Nice Treaty specifically adds 'consumers' to the list of civil society representatives in the Economic and Social Committee ([48]). However, consumer participation could be more systematic.

The Commission **urges other EU institutions** to examine how to improve the involvement of consumers in policy-making.

3.3.2. Consumer information and education

Subsidiarity implies that much of the responsibility for consumer information and education rests with the national, regional and local authorities.

([48]) Article 257 TEC.

3.3.2.1. Information

The growing expectations of citizens to have full and easy access to information on European affairs call for a modern, efficient and reliable information policy taking into account the latest developments in research and knowledge. This is an ongoing challenge for the Commission and for other EU institutions, which are committed to a policy of openness and accountability. This is particularly true for consumers as EU consumer protection policies and activities have a direct impact on their lives. Over the last few years, the Commission has developed various information tools, which are aimed at the general public, at consumers or at specific target groups. These include its website, the Consumer Voice newsletter and information campaigns. The European consumer centres network (Euroguichets) plays an important role by directly informing consumers about EU initiatives.

The Commission will pursue its efforts to improve its **information policy** towards consumers. Future actions will include information campaigns on tobacco prevention for young people.

3.3.2.2. Education

In recent years, particularly in the context of the single market, it has become increasingly evident that more attention should be given to the education of consumers so that they can shop with confidence in the full knowledge of their rights. Action at EU level should address specific problems related to cross-border transactions, the European dimension of consumer rights and the exchange of experience and good practice between Member States. Enlargement reinforces the necessity of this type of action.

The Commission will develop **online interactive education tools** that can be used by consumer associations for further training of their own staff in specific aspects of cross-border transactions, for example financial services, and of the EU consumer rights in the internal market. To this end, the Commission will make full use of best practices developed by Member States and consumer organisations.

3.3.3. *Support and capacity building of consumer organisations*

3.3.3.1. Training programme for staff members from consumer organisations

The consumer movement varies substantially across the EU, both in terms of strength, structure and capacity. The Commission will concentrate its own efforts on capacity building (management, lobbying, consumer law) and will encourage the Member States to do likewise.

An ambitious **training programme for consumer professionals has been launched and will be developed over the coming years**. This should help the consumer organisation professionals to make an effective input into the elaboration of EU policies in the main area of consumer interest. This effort will be combined with already existing measures to provide support to consumer organisations.

3.3.3.2. Review of the legal instrument establishing a general framework for Community activities in favour of consumers

At EU level, the Decision of the European Parliament and the Council establishing a general framework for Community activities in favour of consumers [49] provides the financial legal basis for initiatives to support and strengthen consumer organisations. This Decision will expire at the end of 2003. The new general framework will reflect and support the objectives outlined in this strategy.

The Commission intends to adopt a **proposal establishing a new general framework for Community activities in favour of consumers** in 2002. This proposal will also provide for the possibility of candidate countries participating in these activities, in conformity with the general rules of participation of candidate countries to EC programmes.

4. **CONCLUSION**

EU Consumer Policy is at a critical juncture. During the coming years, consumers should reap tangible benefits from the single market and the euro. They should see the concrete results of integration of consumer interests into all EU policies. And consumers in the enlarged European Union of 470 million citizens should all benefit from the same high level of protection.

This Commission Strategy for Consumer Policy at EU level will provide a consistent orientation for the next five years. The objectives are mutually reinforcing and will be implemented through a short-term rolling programme, which will be reviewed regularly. Each review will assess the actions achieved on the basis of new data and of progress indicators in order to adjust ongoing actions, as appropriate, and to identify new ones.

The Commission invites the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and all interested parties to support the overall approach and the three objectives in particular. The Commission also invites them to foster the adoption of the measures proposed and to support their implementation.

[49] Decision No 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers (OJ L 34, 9.2.1999, p. 1).

ANNEX

ROLLING PROGRAMME FOR CONSUMER POLICY (2002-2006)

INDICATIVE LIST OF ACTIONS

OBJECTIVE 1: A HIGH COMMON LEVEL OF CONSUMER PROTECTION

Action	Description	Timeframe
Safety of consumer goods and services		
Commission communication on the safety of services	Identify the needs, possibilities and priorities for Community action on the safety of services and prepare a report on the issue	4th quarter 2002
Commission proposals on the safety of services	Finalise the appropriate proposals for Community action on the safety of services	4th quarter 2003
Guidelines to ensure coordination between the new General Product Safety Directive (GPSD) and vertical Community legislation on product safety	Finalise a guidance document on the relationships between the GPSD and Community vertical legislation on product safety	2nd quarter 2003
Guidelines on notification by producers and distributors of dangerous products	Prepare a guide on the contents, criteria and forms for information on dangerous products to be provided, according to the GPSD, by producers and distributors to the competent authorities	2nd quarter 2003
Decision to launch the assessment of certain product safety standards	Identify the priorities for publication of safety standards under the new GPSD	4th quarter 2002
Decision to publish the reference of certain product safety standards and launch new standardisation mandates	Publish the references of certain existing safety standards and launch some standardisation mandates under the new GPSD	4th quarter 2003
Workshop on chemicals in products/articles	Identify safety issues and potential questions for scientific committees in relation to the release of chemicals from products and articles	2nd quarter 2002
Revision of the Toys Directive	Finalise a proposal for a revision of the Toys Directive	2003
Revision of the Low Voltage Directive	Finalise a proposal for the revision of the Low Voltage Directive regulating the safety of electrical products	2003
Revision of the Cosmetics Directive	Finalise a proposal for the revision of the Directive regulating the safety of cosmetics	2003
Revised proposal for a Directive on phthalates in toys	Ensure a permanent solution for preventing risks to child health from phthalates in toys	2002
Proposal for a revised Council Recommendation on fire safety in hotels	Finalise a proposal to update and reinforce the Council Recommendation on fire safety in hotels	3rd quarter 2003
Legislation on consumer economic interests		
Commercial practices		
Proposals following the Commission's Green Paper on EU Consumer Protection	Follow-up communication to Green Paper and associated actions Further research on consumer and business attitudes to the internal market	2nd quarter 2002

Action	Description	Timeframe
Review of the existing acquis		
Amendment to the Timeshare Directive	Submit a proposal amending the Directive on Timeshare in order to update it and protect consumers against the new developments that have appeared in the timeshare market since the adoption of the Directive	2003
Amendment to the Package Travel Directive	Submit a proposal amending the Directive on package travel in order to update it and strengthening consumer protection in this area	2003-2004
Report on the Directive on price indication	Report on the application of the Directive on price indication (98/6/EC) accompanied by a proposal as requested by the Directive	1st quarter 2003
Report on the Directive on injunctions	Report on the Directive on injunctions for the protection of consumers' interests (98/27/EC) and propose any revisions considered necessary	3rd quarter 2003
Report on the Directive on distance selling	Report on the Directive on the protection of consumers in respect of distance contracts (97/7/EC) and propose any revisions considered necessary	2nd quarter 2001
Report on the Directive on certain aspects of the sale of consumer goods and associated guarantees	— Report on the Directive on certain aspects of the sale of consumer goods and associated guarantees (99/44/EC); in particular regarding the use made by Member States of consumers' obligation to report a lack of conformity within a time limit	1st quarter 2003 (notification requirement)
	— Report on the application of this Directive examining in particular the case for introducing the producer's direct liability and, if appropriate, accompanied by a proposal	3rd quarter 2006
Law governing consumer contracts		
Follow-up to the communication on European contract law	— Identify areas in which the diversity of national legislation in the field of contract law may undermine the proper functioning of the internal market and the uniform application of Community law — Describe in more detail the option(s) in the area of contract law selected following the consultation. In this context, the improvement of existing EC legislation will be pursued — Develop an action plan for the chronological implementation of the Commission policy conclusions — Propose the coordination of research activities. These activities could lead to the elaboration of a general frame of reference establishing common principles and terminology	4th quarter 2002
Review of existing consumer contract law	Review existing contract law in order to identify inconsistencies and gaps, with a view to simplifying and completing the consumer contract law *acquis*	2004-2006
Financial services		
Implementation of the measures set out in the Financial Services action plan and the road map	Many of the individual legislative proposals make, or will make, provision for the protection of consumers. This will require wide consultation with all stakeholders including consumers	2002-2006
Retail payments and fraud prevention action plan on non-cash means of payment	In particular work on aspects of retail payment security and the deployment of new means of payments. The legal and technical security aspects are covered in the fraud prevention action plan for non-cash means of payments and in the revision of some existing legislative acts. The intention is to create a single phone line in the EU for 'card stop' (for lost or stolen cards). It is also proposed to include several consumer education and awareness-raising projects	2002-2006

Action	Description	Timeframe
Replace the Consumer Credit Directive (87/102) and its two modifications by a new, substantially updated Directive	Amend the existing Directive in order to extend its scope to cover all forms of consumer credit all suppliers of consumer credit; to achieve a better balance of rights and obligations between the consumer and the supplier of credit, and to increase the degree of harmonisation	2nd quarter 2002
Proposal for a comprehensive legislative framework for payments in the internal market (including provisions on refunds)	Transform Recommendation 97/489 on electronic means of payment into binding legislation; update Directive 97/5 on cross-border payments in order to add supplementary legal aspects for retail payments in the internal market	2nd quarter 2002
Creation of a forum for financial services users (Finuse)	Obtain input from consumers and other users of financial services on EU initiatives	4th quarter 2002
Electronic commerce		
Commission Recommendation on consumer confidence in electronic commerce	Contribute to the introduction of EU Guidelines for good online business practice and help to develop consumers' confidence in cross-border e-commerce by a Recommendation setting out principles for good online business practice and their effective implementation	2nd quarter 2002
Measures to improve electronic commerce security	Take a series of measures encompassing awareness-raising, technological support, regulation and international coordination	2002
Services of general interest (SGI)		
Involve consumer representatives in policy, evaluation and monitoring of SGI	— Develop mechanisms at EU level for involving consumer representatives in the development of policies for SGIs, and to ensure their participation in the monitoring and evaluation of outcomes delivered for consumers — Promote, in cooperation with Member States and consumer groups, the setting-up of bodies representing the interests of consumers in individual SGIs	2002-2006
Improve the sector reporting and to strengthen the consumer focus	Work in cooperation with sectoral DGs and consumer groups to highlight consumer issues in sector reporting	2002-2006
Communication on a methodology for conducting horizontal evaluations and Commission annual report on horizontal evaluation	Produce a coherent and consistent methodology for evaluating the performance in SGI sectors, including assessments of the quality of services and consumer satisfaction and to report annually on this	2002-2006
Development of a system of benchmarking in certain areas of services of general interest	Work with Member States and other public authorities on a system of benchmarking in areas of SGI not covered by sector reporting or the regular horizontal evaluation	2002-2006
Monitoring of consumer satisfaction in the area of services of general interest	— Continue regular Eurobarometer surveys and qualitative focus group surveys in order to monitor levels of consumer satisfaction in the SGI — Develop more rigorous indicators for measuring consumer satisfaction in the SGI	2002-2006
SGI — Transport		
Commission proposal for a regulation concerning requirements relating to air transport contracts	Clarify air passenger contracts and improve the rights of consumers	2003

Action	Description	Timeframe
Produce consumer reports on air service quality	Focus on indicators of service quality including notably flight punctuality, flight cancellations, denied boarding because of overbooking, loss and damage of baggage and complaints filed by passengers	2002-2006
Commission proposals extending Community measures protecting air passengers' rights to other modes of transport	Extend the Community measures protecting passengers' rights as far as possible to include other modes of transport other than air transport, and in particular the railways, maritime transport and, as far as possible, urban transport services. This concerns in particular service quality and the development of quality indicators, contract conditions, transparency of information and extra-judicial dispute settlement mechanisms	2002-2004
Commission proposal for a regulation on international rail passenger rights	Include provisions on fair contracts; consumer consultation; complaint handling and dispute settlement mechanisms; and compensation for delays	By the end of 2002, beginning of 2003
Promotion of rail transport users' organisations	Promote the setting-up of a European platform of rail passenger organisations for negotiation and consultation purposes	2002-2004
Promotion of voluntary actions by rail companies to improve service quality and information	Encourage rail operators to develop a voluntary charter on service quality covering such issues as punctuality, provision of information in electronic form, accessibility for groups with special needs, such as persons with reduced mobility or persons travelling with their bike, and protection of non-smokers	2002-2003
SGI — Energy		
Monitor the implementation of the internal electricity and gas market rules	Continue to monitor the implementation of the internal electricity and gas market rules, in particular regarding their effect on consumers	ongoing
SGI — Telecommunications		
Monitor the implementation of the telecommunication market rules	Continue to monitor the implementation of the telecommunications market rules, in particular regarding their effect on consumers	ongoing
Competition		
Studies on the efficiency and functioning of markets	Identify 'less efficient' markets with a view to remedial actions in the interests of consumers	2002-2003
Actions to inform consumers about competition policy and its impact on them	Enable consumers to identify and thus help them to bring to the Commission's attention anti-competitive activities	2002-2003
Organisation of the biannual 'European Competition Day'	Organisation together with the Presidency of the biannual 'European Competition Day' focusing on topics which illustrate the benefits for the consumer deriving from competition	2002-2006
Environment		
Communication on environment and health	The communication will establish a strategy consisting of a holistic approach integrating health aspects into various environmental policies with the purpose of limiting the impact of environmental hazards to human health, paying special attention to children	2002
White Paper on Integrated Product Policy	This will seek to draw up a strategy for implementing IPP on an EU level. Taking the environmental problems caused by products across their life cycle as the starting point it will seek to reduce their environmental impacts. All actors having an influence on these — designers, manufacturers, distributors, retailers, consumers and waste experts will be involved	2002

Action	Description	Timeframe
Development and marketing of the EU Eco-label	The EU Eco-label provides a guarantee for consumers that wherever they are in the EU, any product they purchase that bears the EU Eco-label will meet the highest European environmental standards. Criteria for further product groups will be developed. Increased marketing activities will be pursued to increase the Eco-label's visibility	2002
Commission proposal on chemicals	New legislation on chemicals will be prepared, as the large majority of chemicals have been on the market for many years without sufficient knowledge about their risks. This will provide for adequate risk reduction measures, and will increase the level of protection of human health and the environment. All stakeholders, including consumers, will have better access to information about chemicals to make better-informed choices about the chemicals they use and are exposed to	4th quarter 2002
Commission initiatives on sustainable consumption	As a follow-up to the Sixth environment action programme, take forward appropriate initiatives for Community action on promotion of sustainable production and consumption patterns	4th quarter 2004
Commission proposal for a directive to reduce further the volatile organic compounds (VOC) emissions during the use of products	A *possible* proposal for a directive to reduce further the VOC emissions during the use of products. Consumer goods, such as paints would be under its scope	3rd quarter 2002
Commission Recommendations on consumer information on the fuel economy and CO_2 emissions of new passenger cars	Under the Directive [1] the Commission is required to take measures to enable the provisions on promotional literature to non-printed material. This may include internet marketing and radio and TV advertising	2003
International trade		
Promotion of the consumer interests within EC positions during the next Round of WTO negotiations, in bilateral negotiations, and in the standardisation process	Promote and protect consumer interests, the consumer interests in the WTO in general and in the on-going WTO Round of negotiations launched in Doha in particular, as well as in the context of bilateral trade relations. Maintain a dialogue with consumer organisations to this end. Promote consumer participation in international standardisation	ongoing
Examine existing private labelling schemes	Examine existing private labelling schemes, such as organic labelling, Fair Trade and Corporate Social Responsibility measures, to assess their effectiveness and the need for further measures in achieving the objectives of transparency and information for consumers with a view to sustainable development	2002-2003

[1] Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO_2 emissions in respect of the marketing of new passenger cars (OJ L 12, 18.1.2000, p. 16).

OBJECTIVE 2: EFFECTIVE ENFORCEMENT OF CONSUMER PROTECTION RULES

Action	Description	Timeframe
Enforcement cooperation between Member States		
Commission proposal for a legal basis for administrative cooperation between Member States	This proposal is intended to include the setting-up of a committee of representatives of national administrations	4th quarter 2002

Action	Description	Timeframe
Establish a website and database for International marketing supervision network — Europe (IMSN-Europe)	Website for information exchange purposes and a database to register enforcement-related information	Pilot phase: 4th quarter 2002, first review: 4th quarter 2003
Update of the CLAB ('unfair contract terms') database	Update the European database on case-law about unfair contract terms established to monitor practical enforcement of Directive 93/13/EEC	Call for tender for the years 2000 to 2005

Enforcement aspects of product and service safety

European framework for the collection and assessment of data on product-related injuries	Finalise the appropriate initiatives to ensure systematic collection and assessment of data on product-related injuries	3rd quarter 2003
Guidelines to ensure the effective functioning of the rapid alert system (RAPEX) of the GPSD	Finalise and implement guidelines on the functioning of a reinforced RAPEX system	4th quarter 2002
Establishment of the consumer product safety network under the GPSD	Launch administrative cooperation activities between market surveillance and enforcement authorities to facilitate the effective and consistent application of the new GPSD	1st quarter 2003
Strengthening of product safety enforcement in candidate countries	Implementation of the revised General Product Safety Directive, in particular through candidate country participation in the reinforced rapid alert system' (RAPEX)	2nd quarter 2003

Redress

Alternative dispute resolution (ADRs)

Support and development of the EEJ-Net	In the first phase, completion of the one-year pilot phase and report upon its effectiveness. In the second phase continue to improve cooperation and the service that the EEJ-Net will provide to users	2002
Support and development of FIN-NET	FIN-NET, the EU-wide complaints network for financial services, was set up in 2001 to facilitate consumers access to out-of-court settlement of cross-border disputes when the consumer and their financial service provider come from different Member States	ongoing
Promotion of the principles under the 1998 and 2001 Commission Recommendations on ADRs	An update of the existing database of out-of-court bodies under the 1998 Recommendation [1] will be conducted. In addition, Member States have been invited to notify the Commission of the details of their national ADRs that apply the principles of the 2001 Recommendation in order to create a second database and to monitor the effectiveness of the application of both Recommendations on ADRs by the Member States. Both databases will be accessible to the public on the Europa website.	ongoing
Communication on the promotion of online dispute resolution (ODR) services in the global information society	As part of the e-Europe initiative the Commission will adopt a communication on promoting confidence in ODR services for settling cross-border disputes in the Information Society. It will aim to encourage consensus with stakeholders at global level on criteria and guidelines for ODR certification schemes	2002-2003
Establishment of an EU-wide online ADR schemes, 'Ecodir'	Ecodir will provide a pan-European online consumer mediation service	4th quarter 2002

Action	Description	Timeframe
European consumer centres (Euroguichets) ECCs		
Development of the network	— To have a centre in each Member State and extend the network to the candidate countries. EEA countries can participate if they wish — Develop record system	2nd quarter 2004 4th quarter 2002
Interactive policymaking — 'your voice in Europe'	IPM involves the development of two Internet-based mechanisms to enable the Commission to assess the impact of EU policies on the ground. These are a feedback mechanisms which help to collect spontaneous reactions in the marketplace, and a consultation mechanism designed to receive stakeholders views to new legislative proposals or other policy initiatives. The European consumer centres will become an active partner in the IPM initiative by encoding problems that consumers have in the internal market	2002-2006
Effective problem-solving in the internal market — Solvit		
Effective problem-solving in the internal market — Solvit	Solvit, which is due to be fully operational in June 2002, is a network of coordination centres and contact points in the Member States involving officials involved in the day-to-day practised administration of the internal market. It will contribute to the resolution of cross-border problems emanating from the misapplication of internal market rules for the benefit of both citizens and businesses. A key element is a database and the use of electronic communications to connect administrations in Member States	2002-2006
Judicial cooperation in civil matters		
Commission proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings	The proposal aims to: — improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid — guarantee that an adequate level of legal aid is granted, under certain conditions, to persons whose financial situation makes it impossible for them to bear the cost of the proceedings, and — facilitate the compatibility of national laws on this subject and to establish cooperation mechanisms between Member State authorities	Proposal adopted on 18 January 2002 [2]
Green Paper on measures to create a uniform European procedure for a payment order and on measures to simplify and speed up cross-border litigation on small claims	Examine the systems existing in Member States with a view to consulting on possible measures at EU level	4th quarter 2002
Green Paper on Alternative Dispute Resolution	Take stock of the existing situation and consult broadly with the view of setting future priorities in this area	Green Paper adopted on 19 April 2002 [3]
Support to consumer associations		
Organisation of a training course for consumers' associations	Organise a special training course for consumer associations relating to market surveillance in the context of the revised GPSD. It will also explore the possibility of launching further coordinated initiatives with Member States when the Directive comes into force	2003

[1] The Commission has adopted two Recommendations on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes (98/257/EC, OJ L 115, 17.4.1998, p. 31) and on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC, OJ L 109, 19.4.2001, p. 56).

[2] COM(2002) 13 final.

[3] COM(2002) 196 final.

OBJECTIVE 3: PROPER INVOLVEMENT OF CONSUMER ORGANISATIONS IN EU POLICIES

Action	Description	Timeframe
Reviewing mechanisms for participation of consumer organisations in EU policymaking		
Consultation standards		
Commission proposal for minimum standards for the conduct of the consultation process	As part of the White Paper on Governance and of the better regulation action plan, the Commission intends to establish minimum standards for the conduct of the consultation process	2nd quarter 2002
Participation in EC committees and working groups		
Assessment of consumer participation within EU consultative committees	The inter-service group on consumer policy will assess and coordinate consumer participation within EU consultative committees to determine whether and where consumer input is lacking could be improved and further developed	2nd quarter 2002
Standardisation work		
Launch of a cooperation project to promote consumer participation in standardisation	Launch coordinated action at Community and national level to ensure the effective participation of consumer representatives in standardisation work and the decision-making process of European standardisation bodies	2003
Reinforce the cooperation between Commission Directorates-General		
Organisation of regular meetings of the inter-service group on consumer policy	Reinforce the cooperation between Commission Directorates-General on consumer policy to improve integration of consumer concerns with other EU policy areas	2002-2006
Consumer information and education		
Information		
Development of information policy tools for consumers	The Commission will pursue its efforts to improve its information policy towards consumers. It will focus its future information campaigns on tobacco prevention for young people	2002-2006
Education		
Development of online interactive education tools	The Commission will develop **online interactive education tools** that can be used by consumer associations for further training of their own staff in specific aspects of cross-border transactions and of the EU consumer rights in the internal market. The Commission will also develop sector-specific tools on consumer items more likely to be traded, such as cross-border services, and in particular financial services. The Commission will explore with Member States how to capitalise similar work done by Member States or by consumer organisations so that tools can be developed to exchange best practices	2002
Support and capacity building of consumer organisations		
Training		
Training programme for staff members from consumer organisations	— In its first phase (year 2002) the contractor will create training material, select trainers and train them in three different areas: management, public relations and lobbying and EC consumer law	2002-2004
	— In its second phase (from beginning of 2003 until end of 2004) the trainers coming out of the first phase will train the staff of consumer organisations in these three areas	From beginning of 2003 until end of 2004

Action	Description	Timeframe
Review of the legal instrument establishing a general framework for Community activities in favour of consumers		
Commission proposal establishing a new general framework for Community activities in favour of consumers	Proposal of a general framework, which will reflect and support the objectives and actions outlined in this strategy, on the basis of which specific projects can be adopted and receive Community support. It will propose provisions to allow participation of candidate countries	3rd quarter 2002

ACTIONS TO IMPROVE THE QUALITY OF CONSUMER POLICIES

Action	Description	Timeframe
Impact assessment		
Commission communication establishing a comprehensive impact assessment mechanism	Ensuring that the impact on consumers' economic interests (in terms of price, choice, quality, affordability, accessibility and market transparency and fairness) is properly taken into account in relevant legislative and policy initiatives is essential to fulfilling the obligations of Article 153(2) of the Treaty. The development of a comprehensive impact assessment mechanism, as recognised by the White Paper on Governance [1] and the Commission communication on better regulation [2] is therefore essential	2nd quarter 2002
The development of a knowledge-based policy		
Organisation of a conference with the Danish Consumer Authority on consumer policy statistics	This conference would take stock and draw attention to this particular field in statistics (combining both quantitative and qualitative data), highlighting economic consumer detriment studies	3rd quarter 2002
Continuation of the 'Consumers in Europe' publication with Eurostat	Build on the first edition (2001) to develop the publication as a major element of the knowledge base used for consumer policymaking	2002-2006
Production of a Eurobarometer survey on consumer information and representation	Produce a Eurobarometer survey to be published for the Consumer Day (15 March 2002) and other surveys of the same kind in the subsequent years	2002-2006
Scanner data price surveys for 'supermarket goods'	Continue the work done during the pilot phase (covering data 1999-2000) to produce data allowing price comparisons on supermarket goods throughout Europe	2002-2006
Surveys on business and consumer attitudes to cross-border trading	Two surveys will analyse business and consumer attitudes to trading and shopping cross-border in the internal market	3rd quarter 2003
Survey on the prices of services, as a complement to the regular surveys coordinated by Eurostat	If necessary, to conduct complementary surveys on prices of services	2002-2006
Development of more comprehensive information systems and data on the safety of goods and services, building on RAPEX and Ehlass	— Continue and reinforce the collection and assessment of data on product-related injuries and to examine the possible extension to service-related injuries — Reinforce the operation of the RAPEX system by introducing new operational guidelines and an Internet-based exchange framework — Complete RAPEX by a framework for the direct exchange of information between market surveillance authorities, as part of the establishment of the product safety network of the General Product Safety Directive	2002-2006

[1] COM(2001) 428 final.

[2] Commission communication 'Simplifying and improving the regulatory environment', 5 December 2001, COM(2001) 726 final.

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(Acts whose publication is obligatory)

DECISION No 20/2004/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 8 December 2003

establishing a general framework for financing Community actions in support of consumer policy for the years 2004 to 2007

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 153 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Consumer policy makes a crucial contribution to two of the Commission's strategic objectives laid down in the Commission communication on the strategic objectives 2000 to 2005 'Shaping the new Europe' [3], namely promoting a new and economic social agenda in order to modernise the European economy and ensuring a better quality of life for Europe's citizens.

(2) The consumer policy strategy 2002 to 2006 establishes three key objectives. These will be implemented through actions included in a rolling programme to be reviewed regularly by the Commission.

(3) The objectives and actions in the consumer policy strategy should steer the allocation of funds for actions implemented under this framework. In addition, activities intended to integrate consumer interests into other areas of activity in accordance with Article 153 of the Treaty should be given high priority together with the three key objectives of the consumer policy strategy.

(4) In line with the consumer policy strategy, consumer policy within the scope of this framework should cover the safety of services and non-food products, and the economic interests of EU consumers. Actions related to food safety are not covered by this framework.

(5) The general objectives of the European Union include, according to Article 2 of the Treaty on European Union, the achievement of balanced and sustainable development. In line with the Johannesburg Declaration on Sustainable Development, the plan of implementation of the World Summit on Sustainable Development and the Cardiff process, actions should be taken in order to achieve sustainable development.

(6) This framework should provide for actions by the Community, in accordance with the principle of subsidiarity as laid down in Article 5 of the Treaty, to support and build the capacity of organisations and bodies which work to promote consumer interests at Community, national or regional level.

(7) In addition to the actions contained in this framework, the Commission should also ensure that consumer organisations and other relevant non-governmental organisations can contribute to the implementation of the consumer policy strategy through their involvement in the work of the European consumer consultative group as set up by Commission Decision 2003/709/EC [4].

(8) This framework should provide for actions jointly undertaken by the Commission and one or more Member States to implement the objectives of consumer policy.

[1] OJ C 234, 30.9.2003, p. 86.
[2] Opinion of the European Parliament of 24 September 2003 (not yet published in the Official Journal) and Council decision of 1 December 2003.
[3] OJ C 81, 21.3.2000, p. 1.
[4] OJ L 258, 10.10.2003, p. 35.

(9) It is of general European interest within the meaning of Article 108(1)(b) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [1], hereinafter referred to as 'the Financial Regulation', that the health, safety and economic interests of consumers, as well as consumer interests in the development of standards for products and services, be represented at Community level.

(10) This Decision lays down, for the entire duration of this framework, a financial framework constituting the prime reference, within the meaning of point 33 of the Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure [2], for the budgetary authority during the annual budgetary procedure.

(11) To improve the effectiveness and impact of the activities of European consumer organisations and of consumer organisations representing consumer interests in the development of standards for products and services at Community level, financial contributions for eligible organisations may be subject to framework partnership agreements for the duration of this framework.

(12) In order to improve administrative efficiency, and the effectiveness and impact of specific projects, calls for specific projects should be published at least every two years and support should be provided for up to a maximum of 75 % of the cost of the eligible expenses for implementing the projects.

(13) The Agreement on the European Economic Area (hereinafter referred to as 'the EEA Agreement') provides that the countries of the European Free Trade Association participating in the European Economic Area (hereinafter referred to as 'EFTA/EEA countries') should, *inter alia*, strengthen and broaden cooperation within the framework of the Community's activities in the field of consumer protection.

(14) This general framework should be open to the participation of associated countries, in accordance with the conditions laid down in the respective bilateral agreements establishing the general principles for their participation in Community programmes.

(15) In order to increase the value and impact of this framework, continuous monitoring and regular evaluation of the actions undertaken should be carried out, with a view, where appropriate, to making necessary adjustments.

(16) The measures necessary for the implementation of this Decision should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [3],

HAVE DECIDED AS FOLLOWS:

Article 1

Scope

1. This Decision establishes a general framework for Community actions in support of consumer policy, hereinafter referred to as 'the framework', for the period set out in Article 5(1).

2. The actions to be undertaken under this framework shall supplement the actions undertaken by and in the Member States to protect the health, safety and economic interests of consumers and to promote their right to information and education and to organise themselves in order to safeguard their interests.

Article 2

Areas of action

The actions to be undertaken under this framework shall concern the following specific areas:

(a) protection of consumer health and safety with respect to services and non-food products;

(b) protection of the economic and legal interests of consumers;

(c) promotion of consumer information and education;

(d) promotion of the capacity of consumer organisations to contribute at European level.

Article 3

Objectives of the actions

The actions to be taken under this framework shall help to achieve the following general objectives:

(a) a high common level of consumer protection, in particular through the establishment of common consumer protection rules and practices and the integration of consumer interests into other Community policies;

(b) effective enforcement of consumer protection rules, in particular through market surveillance, administrative and enforcement cooperation, consumer access to information about services and non-food products and consumer access to mechanisms for the resolution of complaints and disputes and

[1] OJ L 248, 16.9.2002, p. 1.
[2] OJ C 172, 18.6.1999, p. 1. Agreement as amended by Decision 2003/429/EC of the European Parliament and of the Council (OJ L 147, 14.6.2003, p. 25).
[3] OJ L 184, 17.7.1999, p. 23.

(c) proper involvement of consumer organisations in the development of consumer policy and other Community policies affecting consumer interests.

Article 4

Types of action

1. The actions to be taken under this framework are listed in the Annex by objectives.

2. Actions 1 to 8, 11 to 15 and 19 are directly implemented by the Commission.

3. Actions 9 and 10 are jointly financed by the Community and one or more Member States, or by the Community and the competent authorities of the third countries participating pursuant to Article 9.

4. Actions 16, 17 and 18 benefit from financial contributions by the Community.

Article 5

Funding

1. The financial framework for the implementation of this Decision for the period from 1 January 2004 to 31 December 2007 is set at EUR 72 million, of which EUR 54 million shall cover the period until 31 December 2006.

2. For the period following 31 December 2006, the amount proposed shall be deemed to be confirmed if it is consistent with the financial perspectives in force for the period commencing in 2007.

3. The annual appropriations shall be authorised by the budgetary authority within the limits of the financial perspectives.

Article 6

Financial contribution

1. The Community contribution to joint actions 9 and 10 will, in principle, be 50 %, and in no event exceed 70 %, of the total cost of the action. The Commission shall set out clearly which joint actions will be eligible for a financial contribution of more than 50 %.

2. The financial contributions for action 16 shall not exceed 50 %, of the expenditure for carrying out eligible activities.

3. The financial contributions for action 17 shall not exceed 95 % of the expenditure for carrying out eligible activities.

4. The renewal of the financial contributions for actions 16 and 17 to eligible organisations that in the preceding year have proved actively and effectively to represent consumer interests shall not be subject to the rule of gradual decrease.

5. The financial contributions for action 18 will, in principle, be 50 %, and in no event exceed 75 %, of the eligible expenses for implementing the project. The Commission shall set out clearly which specific projects will be eligible for a financial contribution of more than 50 %.

Article 7

Beneficiaries

1. The financial contributions for joint actions 9 and 10 may be awarded to a public body or a non-profit-making body designated by the Member State or the competent authority concerned and agreed by the Commission.

2. The financial contributions for action 16 may be awarded to European consumer organisations which:

(a) are non-governmental, non-profit making, independent of industry, commercial and business or other conflicting interests, and have as their primary objectives and activities the promotion and protection of the health, safety and economic interests of consumers in the Community;

(b) have been mandated to represent the interests of consumers at Community level by national consumer organisations in at least half of the Member States that are representative, in accordance with national rules or practice, of consumers and are active at regional or national level, and

(c) have provided to the Commission satisfactory accounts of their membership, internal rules and sources of funding.

3. The financial contributions for action 17 may be awarded to European consumer organisations which:

(a) are non-governmental, non-profit-making, independent of industry, commercial and business or other conflicting interests, and have as their primary objectives and activities to represent consumer interests in the standardisation process at Community level, and

(b) have been mandated in at least two thirds of the Member States to represent the interests of consumers at Community level:

— by bodies representative, in accordance with national rules or practice, of national consumer organisations in the Member States, or

— in the absence of such bodies, by national consumer organisations in the Member States that are representative, in accordance with national rules or practice, of consumers and are active at national level.

4. The financial contributions for action 18 may be awarded to any legal person or association of legal persons, including appropriate independent public bodies and regional consumer organisations, that acts independently of industry and commerce and is actually responsible for the implementation of the projects.

Article 8

Exclusions

Applicants or tenderers and contractors who are found guilty of making false declarations, or are found to have seriously failed to meet their contractual obligations, shall be excluded from the award of further contracts as set out in Article 96 of the Financial Regulation.

Article 9

Participation of third countries

The framework shall be open to the participation of:

(a) the EFTA/EEA countries in accordance with the conditions established in the EEA Agreement;

(b) the associated countries, in accordance with the conditions laid down in the respective bilateral agreements establishing the general principles for their participation in Community programmes.

Article 10

Consistency and complementarity

1. The Commission shall ensure that the actions implemented under this framework are consistent with the consumer policy strategy.

2. The Commission shall ensure that there is consistency and complementarity between the actions implemented under this framework and other Community programmes and initiatives.

Article 11

Work programme

The Commission shall adopt an annual work programme including:

(a) the priorities for action under each objective;

(b) the breakdown of the annual budget among the types of action identified in Article 4;

(c) the planned timing of the calls for tenders, the joint actions and the calls for proposals;

(d) in the case of calls for proposals, the selection and award criteria for actions 16, 17 and 18, the criteria for financial contributions of more than 50 % for action 18, and the indicative amount available for each of these calls for proposals, in accordance with the relevant provisions of the Financial Regulation and taking into account to the extent possible the need to set simple administrative requirements in particular in the case of small amounts of financial contributions for specific projects.

Article 12

Publication and procedures

1. The Commission shall publish the following in the *Official Journal of the European Union* and on the Internet site of the Commission:

(a) a call for proposals for actions 16 and 17 and

(b) a call for proposals for action 18 describing the priorities for action to be undertaken, at least every two years.

2. At an early stage in the evaluation process of applications for financial contributions, the Commission shall inform the applicants if they are not eligible or if their application does not provide the information that is necessary to verify the application's conformity with the selection criteria.

3. The Commission shall, within three months of the deadline for the submission of applications, decide on the attribution of financial contributions for actions 16, 17 and 18.

4. A list of the recipients of financial contributions and a list of the actions funded under this framework shall be published each year on the Internet site of the Commission with indication of the amounts.

Article 13

Monitoring and evaluation

1. The Commission shall ensure effective and regular monitoring of the actions undertaken under this framework and shall present to the European Parliament and to the Council a midterm report on the implementation of this framework by 31 December 2005. The Commission shall inform the European Parliament annually if the decision-making procedure concerning applications for actions 16, 17 and 18 exceeds the three-month period as set out in Article 12(3).

2. The Commission shall present to the European Parliament and to the Council an evaluation report on actions carried out under this framework before submitting a proposal for its possible renewal, and in any case by 31 December 2007 at the latest.

Article 14

Implementation of measures

1. The Commission shall be responsible for the management and implementation of this Decision in accordance with the Financial Regulation.

2. The measures provided for in Article 4(3) and (4) and in Article 11 shall be adopted in accordance with the procedure referred to in Article 15(2).

Article 15

Committee procedure

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

Article 16

Entry into force

This Decision will enter into force on the third day after its publication in the *Official Journal of the European Union*.

Done at Brussels, 8 December 2003.

For the European Parliament	*For the Council*
The President	*The President*
P. COX	F. FRATTINI

ANNEX

THE ACTIONS REFERRED TO IN ARTICLE 4 LISTED BY OBJECTIVES

Objective (a) A high common level of consumer protection

Action 1: Scientific advice, risk analysis including comparative assessment and assessment of risk reduction options relevant to consumer health and safety regarding non-food products and services.

Action 2: Preparation of legislative and other regulatory initiatives and promotion of self-regulatory initiatives, including, *inter alia*:

2.1. Comparative analysis of markets and regulatory systems

2.2. Legal and technical expertise for policy development on the safety of services

2.3. Technical expertise for the development of standardisation mandates for products and services

2.4. Legal and technical expertise for policy development on the economic interests of consumers

2.5. Workshops with stakeholders and experts.

Action 3: Monitoring and assessment of market developments with an impact on the economic and other interests of consumers, including, *inter alia*, price surveys, inventory and analysis of consumer complaints and surveys of changes in the structure of markets.

Action 4: The collection and exchange of data and information that provide an evidence base for the development of consumer policy and for the integration of consumer interests in other EU policies, including, *inter alia*, surveys of consumer and business attitudes, collection and analysis of statistical and other relevant data.

Objective (b): Effective enforcement of consumer protection rules

Action 5: Coordination of surveillance and enforcement actions, including, *inter alia*:

5.1. Development of IT tools (e.g. databases, information and communication systems) for enforcement cooperation

5.2. Training, seminars and exchanges of enforcement officials for joint enforcement actions

5.3. Planning and development of joint enforcement actions

5.4. Pilot joint enforcement actions.

Action 6: Development of easily and publicly accessible databases covering the application of and case-law on consumer rights deriving from Community consumer protection legislation, including the completion and improvement of the database on unfair contract terms.

Action 7: Monitoring and assessment of the safety of non-food products and services, including, *inter alia*:

7.1. Reinforcement and extension of the scope of the RAPEX alert system, taking developments in market surveillance information exchange into account

7.2. Technical analysis of alert notifications

7.3. Collection and assessment of data on the risks posed by specific consumer products and services

7.4. Development of the consumer product safety network as provided for in Directive 2001/95/EC [1].

Action 8: Monitoring of the functioning and assessment of the impact of alternative dispute resolution schemes, in particular of on-line schemes and their effectiveness in settling cross-border complaints and disputes, as well as technical assistance for the further development of the European extrajudicial network system.

[1] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4).

Action 9: (Joint Action) Financial contributions for public or non-profit bodies constituting Community networks that provide information and assistance to consumers to help them exercise their rights and obtain access to appropriate dispute resolution (the European consumer centres network and the clearing houses of the European extrajudicial network, under the conditions set out in Article 7(1).

Action 10: (Joint Action) Financial contributions for specific joint surveillance and enforcement actions to improve administrative and enforcement cooperation on Community consumer protection legislation, including the General Product Safety Directive, and other actions in the context of administrative cooperation, under the conditions set out in Article 7(1).

Objective (c): Proper involvement of consumer organisations in EU policies

Action 11: Provision of specific technical and legal expertise to consumer organisations to support their participation in, and input into, consultation processes on Community legislative and non-legislative policy initiatives, in relevant policy areas, such as internal market policies, services of general interest and the 10-year framework programme on sustainable production and consumption, as well as to support their contribution to market surveillance.

Action 12: Representation of the interests of European consumers in international forums, including international standardisation bodies and international trade organisations.

Action 13: Training for staff members of regional, national and European consumer organisations and other capacity building actions, including training courses in project development and project application procedures, Internet forum on specific projects, workshops and meetings to promote project partnership.

Action 14: Information actions about consumer rights conferred by consumer protection legislation and other Community consumer protection measures, particularly in the new Member States, in cooperation with their consumer organisations.

Action 15: Consumer education, including the actions targeted at young consumers, and the development of on-line interactive consumer education tools on consumer rights in the internal market and on cross-border transactions.

Action 16: Financial contributions to the functioning of European consumer organisations, under the conditions set out in Article 7(2).

Action 17: Financial contributions to the functioning of European consumer organisations representing consumer interests in the development of standards for products and services at Community level, under the conditions set out in Article 7(3).

Objectives (a), (b) and (c):

Action 18: Financial contributions for specific projects at Community or national level in support of consumer policy objectives as defined in Article 3, under the conditions set out in Article 7(4), including, amongst others, financial contributions for:

— specific projects undertaken by consumer organisations and aiming to accelerate the effective implementation of the *acquis communautaire* on consumer protection in the new Member States,

— specific projects promoting the cross-border exchange of information and best practice concerning the integration of consumer rights into other policies.

Action 19: Evaluation of actions undertaken under this framework.

DIRECTIVE 2001/95/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 3 December 2001

on general product safety

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure referred to in Article 251 of the Treaty [3], in the light of the joint text approved by the Conciliation Committee on 2 August 2001,

Whereas:

(1) Under Article 16 of Council Directive 92/59/EEC of 29 June 1992 on general product safety [4], the Council was to decide, four years after the date set for the implementation of the said Directive, on the basis of a report of the Commission on the experience acquired, together with appropriate proposals, whether to adjust Directive 92/59/EEC. It is necessary to amend Directive 92/59/EEC in several respects, in order to complete, reinforce or clarify some of its provisions in the light of experience as well as new and relevant developments on consumer product safety, together with the changes made to the Treaty, especially in Articles 152 concerning public health and 153 concerning consumer protection, and in the light of the precautionary principle. Directive 92/59/EEC should therefore be recast in the interest of clarity. This recasting leaves the safety of services outside the scope of this Directive, since the Commission intends to identify the needs, possibilities and priorities for Community action on the safety of services and liability of service providers, with a view to presenting appropriate proposals.

(2) It is important to adopt measures with the aim of improving the functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is assured.

(3) In the absence of Community provisions, horizontal legislation of the Member States on product safety, imposing in particular a general obligation on economic operators to market only safe products, might differ in the level of protection afforded to consumers. Such disparities, and the absence of horizontal legislation in some Member States, would be liable to create barriers to trade and distortion of competition within the internal market.

(4) In order to ensure a high level of consumer protection, the Community must contribute to protecting the health and safety of consumers. Horizontal Community legislation introducing a general product safety requirement, and containing provisions on the general obligations of producers and distributors, on the enforcement of Community product safety requirements and on rapid exchange of information and action at Community level in certain cases, should contribute to that aim.

(5) It is very difficult to adopt Community legislation for every product which exists or which may be developed; there is a need for a broad-based, legislative framework of a horizontal nature to deal with such products, and also to cover lacunae, in particular pending revision of the existing specific legislation, and to complement provisions in existing or forthcoming specific legislation, in particular with a view to ensuring a high level of protection of safety and health of consumers, as required by Article 95 of the Treaty.

(6) It is therefore necessary to establish at Community level a general safety requirement for any product placed on the market, or otherwise supplied or made available to consumers, intended for consumers, or likely to be used by consumers under reasonably foreseeable conditions even if not intended for them. In all these cases the products under consideration can pose risks for the health and safety of consumers which must be prevented. Certain second-hand goods should nevertheless be excluded by their very nature.

(7) This Directive should apply to products irrespective of the selling techniques, including distance and electronic selling.

[1] OJ C 337 E, 28.11.2000, p. 109 and OJ C 154 E, 29.5.2000, p. 265.
[2] OJ C 367, 20.12.2000, p. 34.
[3] Opinion of the European Parliament of 15.11.2000 (OJ C 223, 8.8.2001, p. 154), Council Common Position of 12.2.2001 (OJ C 93, 23.3.2001, p. 24) and Decision of the European Parliament of 16.5.2001 (not yet published in the Official Journal). Decision of the European Parliament of 4.10.2001 and Council Decision of 27.9.2001.
[4] OJ L 228, 11.8.1992, p. 24.

(8) The safety of products should be assessed taking into account all the relevant aspects, in particular the categories of consumers which can be particularly vulnerable to the risks posed by the products under consideration, in particular children and the elderly.

(9) This Directive does not cover services, but in order to secure the attainment of the protection objectives in question, its provisions should also apply to products that are supplied or made available to consumers in the context of service provision for use by them. The safety of the equipment used by service providers themselves to supply a service to consumers does not come within the scope of this Directive since it has to be dealt with in conjunction with the safety of the service provided. In particular, equipment on which consumers ride or travel which is operated by a service provider is excluded from the scope of this Directive.

(10) Products which are designed exclusively for professional use but have subsequently migrated to the consumer market should be subject to the requirements of this Directive because they can pose risks to consumer health and safety when used under reasonably foreseeable conditions.

(11) In the absence of more specific provisions, within the framework of Community legislation covering safety of the products concerned, all the provisions of this Directive should apply in order to ensure consumer health and safety.

(12) If specific Community legislation sets out safety requirements covering only certain risks or categories of risks, with regard to the products concerned the obligations of economic operators in respect of these risks are those determined by the provisions of the specific legislation, while the general safety requirement of this Directive should apply to the other risks.

(13) The provisions of this Directive relating to the other obligations of producers and distributors, the obligations and powers of the Member States, the exchanges of information and rapid intervention situations and dissemination of information and confidentiality apply in the case of products covered by specific rules of Community law, if those rules do not already contain such obligations.

(14) In order to facilitate the effective and consistent application of the general safety requirement of this Directive, it is important to establish European voluntary standards covering certain products and risks in such a way that a product which conforms to a national standard transposing a European standard is to be presumed to be in compliance with the said requirement.

(15) With regard to the aims of this Directive, European standards should be established by European standardisation bodies, under mandates set by the Commission assisted by appropriate Committees. In order to ensure that products in compliance with the standards fulfil the general safety requirement, the Commission assisted by a committee composed of representatives of the Member States, should fix the requirements that the standards must meet. These requirements should be included in the mandates to the standardisation bodies.

(16) In the absence of specific regulations and when the European standards established under mandates set by the Commission are not available or recourse is not made to such standards, the safety of products should be assessed taking into account in particular national standards transposing any other relevant European or international standards, Commission recommendations or national standards, international standards, codes of good practice, the state of the art and the safety which consumers may reasonably expect. In this context, the Commission's recommendations may facilitate the consistent and effective application of this Directive pending the introduction of European standards or as regards the risks and/or products for which such standards are deemed not to be possible or appropriate.

(17) Appropriate independent certification recognised by the competent authorities may facilitate proof of compliance with the applicable product safety criteria.

(18) It is appropriate to supplement the duty to observe the general safety requirement by other obligations on economic operators because action by such operators is necessary to prevent risks to consumers under certain circumstances.

(19) The additional obligations on producers should include the duty to adopt measures commensurate with the characteristics of the products, enabling them to be informed of the risks that these products may present, to supply consumers with information enabling them to assess and prevent risks, to warn consumers of the risks posed by dangerous products already supplied to them, to withdraw those products from the market and, as a last resort, to recall them when necessary, which may involve, depending on the provisions applicable in the Member States, an appropriate form of compensation, for example exchange or reimbursement.

(20) Distributors should help in ensuring compliance with the applicable safety requirements. The obligations placed on distributors apply in proportion to their respective responsibilities. In particular, it may prove impossible, in the context of charitable activities, to provide the competent authorities with information and documentation on possible risks and origin of the product in the case of isolated used objects provided by private individuals.

(21) Both producers and distributors should cooperate with the competent authorities in action aimed at preventing risks and inform them when they conclude that certain products supplied are dangerous. The conditions regarding the provision of such information should be set in this Directive to facilitate its effective application, while avoiding an excessive burden for economic operators and the authorities.

(22) In order to ensure the effective enforcement of the obligations incumbent on producers and distributors, the Member States should establish or designate authorities which are responsible for monitoring product safety and have powers to take appropriate measures, including the power to impose effective, proportionate and dissuasive penalties, and ensure appropriate coordination between the various designated authorities.

(23) It is necessary in particular for the appropriate measures to include the power for Member States to order or organise, immediately and efficiently, the withdrawal of dangerous products already placed on the market and as a last resort to order, coordinate or organise the recall from consumers of dangerous products already supplied to them. Those powers should be applied when producers and distributors fail to prevent risks to consumers in accordance with their obligations. Where necessary, the appropriate powers and procedures should be available to the authorities to decide and apply any necessary measures rapidly.

(24) The safety of consumers depends to a great extent on the active enforcement of Community product safety requirements. The Member States should, therefore, establish systematic approaches to ensure the effectiveness of market surveillance and other enforcement activities and should ensure their openness to the public and interested parties.

(25) Collaboration between the enforcement authorities of the Member States is necessary in ensuring the attainment of the protection objectives of this Directive. It is, therefore, appropriate to promote the operation of a European network of the enforcement authorities of the Member States to facilitate, in a coordinated manner with other Community procedures, in particular the Community Rapid Information System (RAPEX), improved collaboration at operational level on market surveillance and other enforcement activities, in particular risk assessment, testing of products, exchange of expertise and scientific knowledge, execution of joint surveillance projects and tracing, withdrawing or recalling dangerous products.

(26) It is necessary, for the purpose of ensuring a consistent, high level of consumer health and safety protection and preserving the unity of the internal market, that the Commission be informed of any measure restricting the placing on the market of a product or requiring its withdrawal or recall from the market. Such measures should be taken in compliance with the provisions of the Treaty, and in particular Articles 28, 29 and 30 thereof.

(27) Effective supervision of product safety requires the setting-up at national and Community levels of a system of rapid exchange of information in situations of serious risk requiring rapid intervention in respect of the safety of a product. It is also appropriate in this Directive to set out detailed procedures for the operation of the system and to give the Commission, assisted by an advisory committee, power to adapt them.

(28) This Directive provides for the establishment of non-binding guidelines aimed at indicating simple and clear criteria and practical rules which may change, in particular for the purpose of allowing efficient notification of measures restricting the placing on the market of products in the cases referred to in this Directive, whilst taking into account the range of situations dealt with by Member States and economic operators. The guidelines should in particular include criteria for the application of the definition of serious risks in order to facilitate consistent implementation of the relevant provisions in case of such risks.

(29) It is primarily for Member States, in compliance with the Treaty and in particular with Articles 28, 29 and 30 thereof, to take appropriate measures with regard to dangerous products located within their territory.

(30) However, if the Member States differ as regards the approach to dealing with the risk posed by certain products, such differences could entail unacceptable disparities in consumer protection and constitute a barrier to intra-Community trade.

(31) It may be necessary to deal with serious product-safety problems requiring rapid intervention which affect or could affect, in the immediate future, all or a significant part of the Community and which, in view of the nature of the safety problem posed by the product, cannot be dealt with effectively in a manner commensurate with the degree of urgency, under the procedures laid down in the specific rules of Community law applicable to the products or category of products in question.

(32) It is therefore necessary to provide for an adequate mechanism allowing, as a last resort, for the adoption of measures applicable throughout the Community, in the form of a decision addressed to the Member States, to cope with situations created by products presenting a serious risk. Such a decision should entail a ban on the export of the product in question, unless in the case in point exceptional circumstances allow a partial ban or even no ban to be decided upon, particularly when a system of prior consent is established. In addition, the banning of exports should be examined with a view to preventing risks to the health and safety of consumers. Since such a decision is not directly applicable to economic operators, Member States should take all necessary measures for its implementation. Measures adopted under such a procedure are interim measures, save when they apply to individually identified products or batches of products. In order to ensure the appropriate assessment of the need for, and the best preparation of such measures, they should be taken by the Commission, assisted by a committee, in the light of consultations with the Member States, and, if scientific questions are involved falling within the competence of a Community scientific committee, with the scientific committee competent for the risk concerned.

(33) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1].

(34) In order to facilitate effective and consistent application of this Directive, the various aspects of its application may need to be discussed within a committee.

(35) Public access to the information available to the authorities on product safety should be ensured. However, professional secrecy, as referred to in Article 287 of the Treaty, must be protected in a way which is compatible with the need to ensure the effectiveness of market surveillance activities and of protection measures.

(36) This Directive should not affect victims' rights within the meaning of 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 [2].

(37) It is necessary for Member States to provide for appropriate means of redress before the competent courts in respect of measures taken by the competent authorities which restrict the placing on the market of a product or require its withdrawal or recall.

(38) In addition, the adoption of measures concerning imported products, like those concerning the banning of exports, with a view to preventing risks to the safety and health of consumers must comply with the Community's international obligations.

(39) The Commission should periodically examine the manner in which this Directive is applied and the results obtained, in particular in relation to the functioning of market surveillance systems, the rapid exchange of information and measures adopted at Community level, together with other issues relevant for consumer product safety in the Community, and submit regular reports to the European Parliament and the Council on the subject.

(40) This Directive should not affect the obligations of Member States concerning the deadline for transposition and application of Directive 92/59/EEC,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

Objective — Scope — Definitions

Article 1

1. The purpose of this Directive is to ensure that products placed on the market are safe.

2. This Directive shall apply to all the products defined in Article 2(a). Each of its provisions shall apply in so far as there are no specific provisions with the same objective in rules of Community law governing the safety of the products concerned.

Where products are subject to specific safety requirements imposed by Community legislation, this Directive shall apply only to the aspects and risks or categories of risks not covered by those requirements. This means that:

(a) Articles 2(b) and (c), 3 and 4 shall not apply to those products insofar as concerns the risks or categories of risks covered by the specific legislation;

(b) Articles 5 to 18 shall apply except where there are specific provisions governing the aspects covered by the said Articles with the same objective.

[1] OJ L 184, 17.7.1999, p. 23.
[2] OJ L 210, 7.8.1985, p. 29. Directive as amended by Directive 1999/34/EC of the European Parliament and of the Council (OJ L 141, 4.6.1999, p. 20).

Article 2

For the purposes of this Directive:

(a) 'product' shall mean any product — including in the context of providing a service — which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned.

This definition shall not apply to second-hand products supplied as antiques or as products to be repaired or reconditioned prior to being used, provided that the supplier clearly informs the person to whom he supplies the product to that effect;

(b) 'safe product' shall mean any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:

(i) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;

(ii) the effect on other products, where it is reasonably foreseeable that it will be used with other products;

(iii) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;

(iv) the categories of consumers at risk when using the product, in particular children and the elderly.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be 'dangerous';

(c) 'dangerous product' shall mean any product which does not meet the definition of 'safe product' in (b);

(d) 'serious risk' shall mean any serious risk, including those the effects of which are not immediate, requiring rapid intervention by the public authorities;

(e) 'producer' shall mean:

(i) the manufacturer of the product, when he is established in the Community, and any other person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or the person who reconditions the product;

(ii) the manufacturer's representative, when the manufacturer is not established in the Community or, if there is no representative established in the Community, the importer of the product;

(iii) other professionals in the supply chain, insofar as their activities may affect the safety properties of a product;

(f) 'distributor' shall mean any professional in the supply chain whose activity does not affect the safety properties of a product;

(g) 'recall' shall mean any measure aimed at achieving the return of a dangerous product that has already been supplied or made available to consumers by the producer or distributor;

(h) 'withdrawal' shall mean any measure aimed at preventing the distribution, display and offer of a product dangerous to the consumer.

CHAPTER II

General safety requirement, conformity assessment criteria and European standards

Article 3

1. Producers shall be obliged to place only safe products on the market.

2. A product shall be deemed safe, as far as the aspects covered by the relevant national legislation are concerned, when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty, and in particular Articles 28 and 30 thereof, and laying down the health and safety requirements which the product must satisfy in order to be marketed.

A product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the *Official Journal of the European Communities* in accordance with Article 4. The Member States shall publish the references of such national standards.

3. In circumstances other than those referred to in paragraph 2, the conformity of a product to the general safety requirement shall be assessed by taking into account the following elements in particular, where they exist:

(a) voluntary national standards transposing relevant European standards other than those referred to in paragraph 2;

(b) the standards drawn up in the Member State in which the product is marketed;

(c) Commission recommendations setting guidelines on product safety assessment;

(d) product safety codes of good practice in force in the sector concerned;

(e) the state of the art and technology;

(f) reasonable consumer expectations concerning safety.

4. Conformity of a product with the criteria designed to ensure the general safety requirement, in particular the provisions mentioned in paragraphs 2 or 3, shall not bar the competent authorities of the Member States from taking appropriate measures to impose restrictions on its being placed on the market or to require its withdrawal from the market or recall where there is evidence that, despite such conformity, it is dangerous.

Article 4

1. For the purposes of this Directive, the European standards referred to in the second subparagraph of Article 3(2) shall be drawn up as follows:

(a) the requirements intended to ensure that products which conform to these standards satisfy the general safety requirement shall be determined in accordance with the procedure laid down in Article 15(2);

(b) on the basis of those requirements, the Commission shall, in accordance with Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services [1] call on the European standardisation bodies to draw up standards which satisfy these requirements;

(c) on the basis of those mandates, the European standardisation bodies shall adopt the standards in accordance with the principles contained in the general guidelines for cooperation between the Commission and those bodies;

(d) the Commission shall report every three years to the European Parliament and the Council, within the framework of the report referred to in Article 19(2), on its programmes for setting the requirements and the mandates for standardisation provided for in subparagraphs (a) and (b) above. This report will, in particular, include an analysis of the decisions taken regarding requirements and mandates for standardisation referred to in subparagraphs (a) and (b) and regarding the standards referred to in subparagraph (c). It will also include information on the products for which the Commission intends to set the requirements and the mandates in question, the product risks to be considered and the results of any preparatory work launched in this area.

2. The Commission shall publish in the *Official Journal of the European Communities* the references of the European standards adopted in this way and drawn up in accordance with the requirements referred to in paragraph 1.

If a standard adopted by the European standardisation bodies before the entry into force of this Directive ensures compliance with the general safety requirement, the Commission shall decide to publish its references in the *Official Journal of the European Communities*.

If a standard does not ensure compliance with the general safety requirement, the Commission shall withdraw reference to the standard from publication in whole or in part.

In the cases referred to in the second and third subparagraphs, the Commission shall, on its own initiative or at the request of a Member State, decide in accordance with the procedure laid down in Article 15(2) whether the standard in question meets the general safety requirement. The Commission shall decide to publish or withdraw after consulting the Committee established by Article 5 of Directive 98/34/EC. The Commission shall notify the Member States of its decision.

CHAPTER III

Other obligations of producers and obligations of distributors

Article 5

1. Within the limits of their respective activities, producers shall provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks.

The presence of warnings does not exempt any person from compliance with the other requirements laid down in this Directive.

Within the limits of their respective activities, producers shall adopt measures commensurate with the characteristics of the products which they supply, enabling them to:

(a) be informed of risks which these products might pose;

(b) choose to take appropriate action including, if necessary to avoid these risks, withdrawal from the market, adequately and effectively warning consumers or recall from consumers.

The measures referred to in the third subparagraph shall include, for example:

(a) an indication, by means of the product or its packaging, of the identity and details of the producer and the product reference or, where applicable, the batch of products to which it belongs, except where not to give such indication is justified and

(b) in all cases where appropriate, the carrying out of sample testing of marketed products, investigating and, if necessary, keeping a register of complaints and keeping distributors informed of such monitoring.

Action such as that referred to in (b) of the third subparagraph shall be undertaken on a voluntary basis or at the request of the competent authorities in accordance with Article 8(1)(f). Recall shall take place as a last resort, where other measures would not suffice to prevent the risks involved, in instances where the producers consider it necessary or where they are obliged to do so further to a measure taken by the competent authority. It may be effected within the framework of codes of good practice on the matter in the Member State concerned, where such codes exist.

[1] OJ L 204, 21.7.1998, p. 37. Directive amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

2. Distributors shall be required to act with due care to help to ensure compliance with the applicable safety requirements, in particular by not supplying products which they know or should have presumed, on the basis of the information in their possession and as professionals, do not comply with those requirements. Moreover, within the limits of their respective activities, they shall participate in monitoring the safety of products placed on the market, especially by passing on information on product risks, keeping and providing the documentation necessary for tracing the origin of products, and cooperating in the action taken by producers and competent authorities to avoid the risks. Within the limits of their respective activities they shall take measures enabling them to cooperate efficiently.

3. Where producers and distributors know or ought to know, on the basis of the information in their possession and as professionals, that a product that they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement, they shall immediately inform the competent authorities of the Member States thereof under the conditions laid down in Annex I, giving details, in particular, of action taken to prevent risk to the consumer.

The Commission shall, in accordance with the procedure referred to in Article 15(3), adapt the specific requirements relating to the obligation to provide information laid down in Annex I.

4. Producers and distributors shall, within the limits of their respective activities, cooperate with the competent authorities, at the request of the latter, on action taken to avoid the risks posed by products which they supply or have supplied. The procedures for such cooperation, including procedures for dialogue with the producers and distributors concerned on issues related to product safety, shall be established by the competent authorities.

CHAPTER IV

Specific obligations and powers of the Member States

Article 6

1. Member States shall ensure that producers and distributors comply with their obligations under this Directive in such a way that products placed on the market are safe.

2. Member States shall establish or nominate authorities competent to monitor the compliance of products with the general safety requirements and arrange for such authorities to have and use the necessary powers to take the appropriate measures incumbent upon them under this Directive.

3. Member States shall define the tasks, powers, organisation and cooperation arrangements of the competent authorities. They shall keep the Commission informed, and the Commission shall pass on such information to the other Member States.

Article 7

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 15 January 2004 and shall also notify it, without delay, of any amendment affecting them.

Article 8

1. For the purposes of this Directive, and in particular of Article 6 thereof, the competent authorities of the Member States shall be entitled to take, *inter alia*, the measures in (a) and in (b) to (f) below, where appropriate:

(a) for any product:

(i) to organise, even after its being placed on the market as being safe, appropriate checks on its safety properties, on an adequate scale, up to the final stage of use or consumption;

(ii) to require all necessary information from the parties concerned;

(iii) to take samples of products and subject them to safety checks;

(b) for any product that could pose risks in certain conditions:

(i) to require that it be marked with suitable, clearly worded and easily comprehensible warnings, in the official languages of the Member State in which the product is marketed, on the risks it may present;

(ii) to make its marketing subject to prior conditions so as to make it safe;

(c) for any product that could pose risks for certain persons:

to order that they be given warning of the risk in good time and in an appropriate form, including the publication of special warnings;

(d) for any product that could be dangerous:

for the period needed for the various safety evaluations, checks and controls, temporarily to ban its supply, the offer to supply it or its display;

(e) for any dangerous product:

to ban its marketing and introduce the accompanying measures required to ensure the ban is complied with;

(f) for any dangerous product already on the market:

(i) to order or organise its actual and immediate withdrawal, and alert consumers to the risks it presents;

(ii) to order or coordinate or, if appropriate, to organise together with producers and distributors its recall from consumers and its destruction in suitable conditions.

2. When the competent authorities of the Member States take measures such as those provided for in paragraph 1, in particular those referred to in (d) to (f), they shall act in accordance with the Treaty, and in particular Articles 28 and 30 thereof, in such a way as to implement the measures in a manner proportional to the seriousness of the risk, and taking due account of the precautionary principle.

In this context, they shall encourage and promote voluntary action by producers and distributors, in accordance with the obligations incumbent on them under this Directive, and in particular Chapter III thereof, including where applicable by the development of codes of good practice.

If necessary, they shall organise or order the measures provided for in paragraph 1(f) if the action undertaken by the producers and distributors in fulfilment of their obligations is unsatisfactory or insufficient. Recall shall take place as a last resort. It may be effected within the framework of codes of good practice on the matter in the Member State concerned, where such codes exist.

3. In particular, the competent authorities shall have the power to take the necessary action to apply with due dispatch appropriate measures such as those mentioned in paragraph 1, (b) to (f), in the case of products posing a serious risk. These circumstances shall be determined by the Member States, assessing each individual case on its merits, taking into account the guidelines referred to in point 8 of Annex II.

4. The measures to be taken by the competent authorities under this Article shall be addressed, as appropriate, to:

(a) the producer;

(b) within the limits of their respective activities, distributors and in particular the party responsible for the first stage of distribution on the national market;

(c) any other person, where necessary, with a view to cooperation in action taken to avoid risks arising from a product.

Article 9

1. In order to ensure effective market surveillance, aimed at guaranteeing a high level of consumer health and safety protection, which entails cooperation between their competent authorities, Member States shall ensure that approaches employing appropriate means and procedures are put in place, which may include in particular:

(a) establishment, periodical updating and implementation of sectoral surveillance programmes by categories of products or risks and the monitoring of surveillance activities, findings and results;

(b) follow-up and updating of scientific and technical knowledge concerning the safety of products;

(c) periodical review and assessment of the functioning of the control activities and their effectiveness and, if necessary, revision of the surveillance approach and organisation put in place.

2. Member States shall ensure that consumers and other interested parties are given an opportunity to submit complaints to the competent authorities on product safety and on surveillance and control activities and that these complaints are followed up as appropriate. Member States shall actively inform consumers and other interested parties of the procedures established to that end.

Article 10

1. The Commission shall promote and take part in the operation in a European network of the authorities of the Member States competent for product safety, in particular in the form of administrative cooperation.

2. This network operation shall develop in a coordinated manner with the other existing Community procedures, particularly RAPEX. Its objective shall be, in particular, to facilitate:

(a) the exchange of information on risk assessment, dangerous products, test methods and results, recent scientific developments as well as other aspects relevant for control activities;

(b) the establishment and execution of joint surveillance and testing projects;

(c) the exchange of expertise and best practices and cooperation in training activities;

(d) improved cooperation at Community level with regard to the tracing, withdrawal and recall of dangerous products.

CHAPTER V

Exchanges of information and rapid intervention situations

Article 11

1. Where a Member State takes measures which restrict the placing on the market of products — or require their withdrawal or recall — such as those provided for in Article 8(1)(b) to (f), the Member State shall, to the extent that such notification is not required under Article 12 or any specific Community legislation, inform the Commission of the measures, specifying its reasons for adopting them. It shall also inform the Commission of any modification or lifting of such measures.

If the notifying Member State considers that the effects of the risk do not or cannot go beyond its territory, it shall notify the measures concerned insofar as they involve information likely to be of interest to Member States from the product safety standpoint, and in particular if they are in response to a new risk which has not yet been reported in other notifications.

In accordance with the procedure laid down in Article 15(3) of this Directive, the Commission shall, while ensuring the effectiveness and proper functioning of the system, adopt the guidelines referred to in point 8 of Annex II. These shall propose the content and standard form for the notifications provided for in this Article, and, in particular, shall provide precise criteria for determining the conditions for which notification is relevant for the purposes of the second subparagraph.

2. The Commission shall forward the notification to the other Member States, unless it concludes, after examination on the basis of the information contained in the notification, that the measure does not comply with Community law. In such a case, it shall immediately inform the Member State which initiated the action.

Article 12

1. Where a Member State adopts or decides to adopt, recommend or agree with producers and distributors, whether on a compulsory or voluntary basis, measures or actions to prevent, restrict or impose specific conditions on the possible marketing or use, within its own territory, of products by reason of a serious risk, it shall immediately notify the Commission thereof through RAPEX. It shall also inform the Commission without delay of modification or withdrawal of any such measure or action.

If the notifying Member State considers that the effects of the risk do not or cannot go beyond its territory, it shall follow the procedure laid down in Article 11, taking into account the relevant criteria proposed in the guidelines referred to in point 8 of Annex II.

Without prejudice to the first subparagraph, before deciding to adopt such measures or to take such action, Member States may pass on to the Commission any information in their possession regarding the existence of a serious risk.

In the case of a serious risk, they shall notify the Commission of the voluntary measures laid down in Article 5 of this Directive taken by producers and distributors.

2. On receiving such notifications, the Commission shall check whether they comply with this Article and with the requirements applicable to the functioning of RAPEX, and shall forward them to the other Member States, which, in turn, shall immediately inform the Commission of any measures adopted.

3. Detailed procedures for RAPEX are set out in Annex II. They shall be adapted by the Commission in accordance with the procedure referred to in Article 15(3).

4. Access to RAPEX shall be open to applicant countries, third countries or international organisations, within the framework of agreements between the Community and those countries or international organisations, according to arrangements defined in these agreements. Any such agreements shall be based on reciprocity and include provisions on confidentiality corresponding to those applicable in the Community.

Article 13

1. If the Commission becomes aware of a serious risk from certain products to the health and safety of consumers in various Member States, it may, after consulting the Member States, and, if scientific questions arise which fall within the competence of a Community Scientific Committee, the Scientific Committee competent to deal with the risk concerned, adopt a decision in the light of the result of those consultations, in accordance with the procedure laid down in Article 15(2), requiring Member States to take measures from among those listed in Article 8(1)(b) to (f) if, at one and the same time:

(a) it emerges from prior consultations with the Member States that they differ significantly on the approach adopted or to be adopted to deal with the risk; and

(b) the risk cannot be dealt with, in view of the nature of the safety issue posed by the product, in a manner compatible with the degree of urgency of the case, under other procedures laid down by the specific Community legislation applicable to the products concerned; and

(c) the risk can be eliminated effectively only by adopting appropriate measures applicable at Community level, in order to ensure a consistent and high level of protection of the health and safety of consumers and the proper functioning of the internal market.

2. The decisions referred to in paragraph 1 shall be valid for a period not exceeding one year and may be confirmed, under the same procedure, for additional periods none of which shall exceed one year.

However, decisions concerning specific, individually identified products or batches of products shall be valid without a time limit.

3. Export from the Community of dangerous products which have been the subject of a decision referred to in paragraph 1 shall be prohibited unless the decision provides otherwise.

4. Member States shall take all necessary measures to implement the decisions referred to in paragraph 1 within less than 20 days, unless a different period is specified in those decisions.

5. The competent authorities responsible for carrying out the measures referred to in paragraph 1 shall, within one month, give the parties concerned an opportunity to submit their views and shall inform the Commission accordingly.

CHAPTER VI

Committee procedures

Article 14

1. The measures necessary for the implementation of this Directive relating to the matters referred to below shall be adopted in accordance with the regulatory procedure provided for in Article 15(2):

(a) the measures referred to in Article 4 concerning standards adopted by the European standardisation bodies;

(b) the decisions referred to in Article 13 requiring Member States to take measures as listed in Article 8(1)(b) to (f).

2. The measures necessary for the implementation of this Directive in respect of all other matters shall be adopted in accordance with the advisory procedure provided for in Article 15(3).

Article 15

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at 15 days.

3. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

4. The Committee shall adopt its rules of procedure.

CHAPTER VII

Final provisions

Article 16

1. Information available to the authorities of the Member States or the Commission relating to risks to consumer health and safety posed by products shall in general be available to the public, in accordance with the requirements of transparency and without prejudice to the restrictions required for monitoring and investigation activities. In particular the public shall have access to information on product identification, the nature of the risk and the measures taken.

However, Member States and the Commission shall take the steps necessary to ensure that their officials and agents are required not to disclose information obtained for the purposes of this Directive which, by its nature, is covered by professional secrecy in duly justified cases, except for information relating to the safety properties of products which must be made public if circumstances so require, in order to protect the health and safety of consumers.

2. Protection of professional secrecy shall not prevent the dissemination to the competent authorities of information relevant for ensuring the effectiveness of market monitoring and surveillance activities. The authorities receiving information covered by professional secrecy shall ensure its protection.

Article 17

This Directive shall be without prejudice to the application of Directive 85/374/EEC.

Article 18

1. Any measure adopted under this Directive and involving restrictions on the placing of a product on the market or requiring its withdrawal or recall must state the appropriate reasons on which it is based. It shall be notified as soon as possible to the party concerned and shall indicate the remedies available under the provisions in force in the Member State in question and the time limits applying to such remedies.

The parties concerned shall, whenever feasible, be given an opportunity to submit their views before the adoption of the measure. If this has not been done in advance because of the urgency of the measures to be taken, they shall be given such opportunity in due course after the measure has been implemented.

Measures requiring the withdrawal of a product or its recall shall take into consideration the need to encourage distributors, users and consumers to contribute to the implementation of such measures.

2. Member States shall ensure that any measure taken by the competent authorities involving restrictions on the placing of a product on the market or requiring its withdrawal or recall can be challenged before the competent courts.

3. Any decision taken by virtue of this Directive and involving restrictions on the placing of a product on the market or requiring its withdrawal or its recall shall be without prejudice to assessment of the liability of the party concerned, in the light of the national criminal law applying in the case in question.

Article 19

1. The Commission may bring before the Committee referred to in Article 15 any matter concerning the application of this Directive and particularly those relating to market monitoring and surveillance activities.

2. Every three years, following 15 January 2004, the Commission shall submit a report on the implementation of this Directive to the European Parliament and the Council.

The report shall in particular include information on the safety of consumer products, in particular on improved traceability of products, the functioning of market surveillance, standardisation work, the functioning of RAPEX and Community measures taken on the basis of Article 13. To this end the Commission shall conduct assessments of the relevant issues, in particular the approaches, systems and practices put in place in the Member States, in the light of the requirements of this Directive and the other Community legislation relating to product safety. The Member States shall provide the Commission with all the necessary assistance and information for carrying out the assessments and preparing the reports.

Article 20

The Commission shall identify the needs, possibilities and priorities for Community action on the safety of services and submit to the European Parliament and the Council, before 1 January 2003, a report, accompanied by proposals on the subject as appropriate.

Article 21

1. Member States shall bring into force the laws, regulations and administrative provisions necessary in order to comply with this Directive with effect from 15 January 2004. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 22

Directive 92/59/EEC is hereby repealed from 15 January 2004, without prejudice to the obligations of Member States concerning the deadlines for transposition and application of the said Directive as indicated in Annex III.

References to Directive 92/59/EEC shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV.

Article 23

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 24

This Directive is addressed to the Member States.

Done at Brussels, 3 December 2001.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	F. VANDENBROUCKE

ANNEX I

REQUIREMENTS CONCERNING INFORMATION ON PRODUCTS THAT DO NOT COMPLY WITH THE GENERAL SAFETY REQUIREMENT TO BE PROVIDED TO THE COMPETENT AUTHORITIES BY PRODUCERS AND DISTRIBUTORS

1. The information specified in Article 5(3), or where applicable by specific requirements of Community rules on the product concerned, shall be passed to the competent authorities appointed for the purpose in the Member States where the products in question are or have been marketed or otherwise supplied to consumers.
2. The Commission, assisted by the Committee referred to in Article 15, shall define the content and draw up the standard form of the notifications provided for in this Annex, while ensuring the effectiveness and proper functioning of the system. In particular, it shall put forward, possibly in the form of a guide, simple and clear criteria for determining the special conditions, particularly those concerning isolated circumstances or products, for which notification is not relevant in relation to this Annex.
3. In the event of serious risks, this information shall include at least the following:
   (a) information enabling a precise identification of the product or batch of products in question;
   (b) a full description of the risk that the products in question present;
   (c) all available information relevant for tracing the product;
   (d) a description of the action undertaken to prevent risks to consumers.

ANNEX II

PROCEDURES FOR THE APPLICATION OF RAPEX AND GUIDELINES FOR NOTIFICATIONS

1. RAPEX covers products as defined in Article 2(a) that pose a serious risk to the health and safety of consumers.

   Pharmaceuticals, which come under Directives 75/319/EEC [1] and 81/851/EEC [2], are excluded from the scope of RAPEX.

2. RAPEX is essentially aimed at a rapid exchange of information in the event of a serious risk. The guidelines referred to in point 8 define specific criteria for identifying serious risks.

3. Member States notifying under Article 12 shall provide all available details. In particular, the notification shall contain the information stipulated in the guidelines referred to in point 8 and at least:

   (a) information enabling the product to be identified;

   (b) a description of the risk involved, including a summary of the results of any tests/analyses and of their conclusions which are relevant to assessing the level of risk;

   (c) the nature and the duration of the measures or action taken or decided on, if applicable;

   (d) information on supply chains and distribution of the product, in particular on destination countries.

   Such information must be transmitted using the special standard notification form and by the means stipulated in the guidelines referred to in point 8.

   When the measure notified pursuant to Article 11 or Article 12 seeks to limit the marketing or use of a chemical substance or preparation, the Member States shall provide as soon as possible either a summary or the references of the relevant data relating to the substance or preparation considered and to known and available substitutes, where such information is available. They will also communicate the anticipated effects of the measure on consumer health and safety together with the assessment of the risk carried out in accordance with the general principles for the risk evaluation of chemical substances as referred to in Article 10(4) of Regulation (EEC) No 793/93 [3] in the case of an existing substance or in Article 3(2) of Directive 67/548/EEC [4] in the case of a new substance. The guidelines referred to in point 8 shall define the details and procedures for the information requested in that respect.

4. When a Member State has informed the Commission, in accordance with Article 12(1), third subparagraph, of a serious risk before deciding to adopt measures, it must inform the Commission within 45 days whether it confirms or modifies this information.

5. The Commission shall, in the shortest time possible, verify the conformity with the provisions of the Directive of the information received under RAPEX and, may, when it considers it to be necessary and in order to assess product safety, carry out an investigation on its own initiative. In the case of such an investigation, Member States shall supply the Commission with the requested information to the best of their ability.

6. Upon receipt of a notification referred to in Article 12, the Member States are requested to inform the Commission, at the latest within the set period of time stipulated in the guidelines referred to in point 8, of the following:

   (a) whether the product has been marketed in their territory;

   (b) what measures concerning the product in question they may be adopting in the light of their own circumstances, stating the reasons, including any differing assessment of risk or any other special circumstance justifying their decision, in particular lack of action or of follow-up;

   (c) any relevant supplementary information they have obtained on the risk involved, including the results of any tests or analyses carried out.

   The guidelines referred to in point 8 shall provide precise criteria for notifying measures limited to national territory and shall specify how to deal with notifications concerning risks which are considered by the Member State not to go beyond its territory.

[1] OJ L 147, 9.6.1975, p. 13. Directive as last amended by Commission Directive 2000/38/EC (OJ L 139, 10.6.2000, p. 28).
[2] OJ L 317, 6.11.1981, p. 1. Directive as last amended by Commission Directive 2000/37/EC (OJ L 139, 10.6.2000, p. 25).
[3] OJ L 84, 5.4.1993, p. 1.
[4] OJ 196, 16.8.1967, p. 1/67. Directive as last amended by Commission Directive 2000/33/EC (OJ L 136, 8.6.2000, p. 90).

7. Member States shall immediately inform the Commission of any modification or lifting of the measure(s) or action(s) in question.

8. The Commission shall prepare and regularly update, in accordance with the procedure laid down in Article 15(3), guidelines concerning the management of RAPEX by the Commission and the Member States.

9. The Commission may inform the national contact points regarding products posing serious risks, imported into or exported from the Community and the European Economic Area.

10. Responsibility for the information provided lies with the notifying Member State.

11. The Commission shall ensure the proper functioning of the system, in particular classifying and indexing notifications according to the degree of urgency. Detailed procedures shall be laid down by the guidelines referred to in point 8.

ANNEX III

PERIOD FOR THE TRANSPOSITION AND APPLICATION OF THE REPEALED DIRECTIVE

(REFERRED TO IN THE FIRST SUBPARAGRAPHE OF ARTICLE 22)

Directive	*Period for transposition*	*Period for bringing into application*
Directive 92/59/EEC	29 June 1994	29 June 1994

ANNEX IV

CORRELATION TABLE

(REFERRED TO IN THE SECOND SUBPARAGRAPH OF ARTICLE 22)

This Directive	Directive 92/59/EEC
Article 1	Article 1
Article 2	Article 2
Article 3	Article 4
Article 4	—
Article 5	Article 3
Article 6	Article 5
Article 7	Article 5(2)
Article 8	Article 6
Article 9	—
Article 10	—
Article 11	Article 7
Article 12	Article 8
Article 13	Article 9
Articles 14 and 15	Article 10
Article 16	Article 12
Article 17	Article 13
Article 18	Article 14
Article 19	Article 15
Article 20	—
Article 21	Article 17
Article 22	Article 18
Article 23	Article 19
Annex I	—
Annex II	Annex
Annex III	—
Annex IV	—

DIRECTIVE 1999/34/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 10 May 1999

amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

(1) Whereas product safety and compensation for damage caused by defective products are social imperatives which must be met within the internal market; whereas the Community has responded to those requirements by means of Directive 85/374/EEC [4] and Council Directive 92/59/EEC of 29 June 1992 on general product safety [5];

(2) Whereas Directive 85/374/EEC established a fair apportionment of the risks inherent in a modern society in which there is a high degree of technicality; whereas that Directive therefore struck a reasonable balance between the interests involved, in particular the protection of consumer health, encouraging innovation and scientific and technological development, guaranteeing undistorted competition and facilitating trade under a harmonised system of civil liability; whereas that Directive has thus helped to raise awareness among traders of the issue of product safety and the importance accorded to it;

(3) Whereas the degree of harmonisation of Member States' laws achieved by Directive 85/374/EEC is not complete in view of the derogations provided for, in particular with regard to its scope, from which unprocessed agricultural products are excluded;

(4) Whereas the Commission monitors the implementation and effects of Directive 85/374/EEC and in particular its aspects relating to consumer protection and the functioning of the internal market, which have already been the subject of a first report; whereas, in this context, the Commission is required by Article 21 of that Directive to submit a second report on its application;

(5) Whereas including primary agricultural products within the scope of Directive 85/374/EEC would help restore consumer confidence in the safety of agricultural products; whereas such a measure would meet the requirements of a high level of consumer protection;

(6) Whereas circumstances call for Directive 85/374/EEC to be amended in order to facilitate, for the benefit of consumers, legitimate compensation for damage to health caused by defective agricultural products;

(7) Whereas this Directive has an impact on the functioning of the internal market in so far as trade in agricultural products will no longer be affected by differences between rules on producer liability;

(8) Whereas the principle of liability without fault laid down in Directive 85/374/EEC must be extended to all types of product, including agricultural products as defined by the second sentence of Article 32 of the Treaty and those listed in Annex II to the said Treaty;

(9) Whereas, in accordance with the principle of proportionality, it is necessary and appropriate in order to achieve the fundamental objectives of increased protection for all consumers and the proper functioning of the internal market to include agricultural products within the scope of Directive 85/374/EEC; whereas this Directive is limited to what is necessary to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty,

[1] OJ C 337, 7.11.1997, p. 54.
[2] OJ C 95, 30.3.1998, p. 69.
[3] Opinion of the European Parliament of 5 November 1998 (OJ C 359, 23.11.1998, p. 25), Council Common Position of 17 December 1998 (OJ C 49, 22.2.1999, p. 1) and Decision of the European Parliament of 23 March 1999 (not yet published in the Official Journal). Council Decision of 29 April 1999.
[4] OJ L 210, 7.8.1985, p. 29. Directive as amended by the 1994 Act of Accession.
[5] OJ L 228, 11.8.1992, p. 24.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 85/374/EEC is hereby amended as follows:

1. Article 2 shall be replaced by the following:

   'Article 2

   For the purpose of this Directive, "product" means all movables even if incorporated into another movable or into an immovable. "Product" includes electricity'.

2. In Article 15, paragraph 1(a) shall be deleted.

Article 2

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

They shall apply these measures as from 4 December 2000.

When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall comunicate to the Commission the text of the provisions of national law which they subsequently adopt in the field governed by this Directive.

Article 3

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 10 May 1999.

For the European Parliament	*For the Council*
The President	*The President*
J. M. GIL-ROBLES	H. EICHEL

31985L0374

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

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COUNCIL DIRECTIVE
of 25 July 1985
on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
(85/374/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production;

Whereas libility without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products; whereas the liability provided for in this Directive should also apply to movables which are used in the construction of immovables or are installed in immovables;

Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified;

Whereas, in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them;

whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances;

Whereas the protection of the consumer requires that the liability of the producer remains unaffacted by acts or omissions of other persons having contributed to cause the damage; whereas, however, the contributory negligence of the injured person may be taken into account to reduce or disallow such liability;

Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property; whereas the latter should nevertheless be limited to goods for private use or consumption and be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases; whereas this Directive should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case;

Whereas a uniform period of limitation for the bringing of action for compensation is in the interests both of the injured person and of the producer;

Whereas products age in the course of time, higher safety standards are developed and the state of science and technology progresses; whereas, therefore, it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product; whereas, therefore, liability should expire after a reasonable length of time, without prejudice to claims pending at law;

Whereas, to achieve effective protection of consumers, no contractual derogation should be permitted as regards the liability of the producer in relation to the injured person;

Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible;

Whereas, to the extent that liability for nuclear injury or damage is already covered in all Member States by adequate special rules, it has been possible to exclude damage of this type from the scope of this Directive;

Whereas, since the exclusion of primary agricultural products and game from the scope of this Directive may be felt, in certain Member States, in view of what is expected for the protection of consumers, to restrict unduly such protection, it should be possible for a Member State to extend liability to such products;

Whereas, for similar reasons, the possibility offered to a producer to free himself from liability 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 may be felt in certain Member States to restrict unduly the protection of the consumer; whereas it should therefore be possible for a Member State to maintain in its legislation or to provide by new legislation that this exonerating circumstance is not admitted; whereas, in the case of new legislation, making use of this derogation should, however, be subject to a Community stand-still procedure, in order to raise, if possible, the level of protection in a uniform manner throughout the Community;

Whereas, taking into account the legal traditions in most of the Member States, it is inappropriate to set any financial ceiling on the producer's liability without fault; whereas, in so far as there are, however, differing traditions, it seems

possible to admit that a Member State may derogate from the principle of unlimited liability by providing a limit for the total liability of the producer for damage resulting from a death or personal injury and caused by identical items with the same defect, provided that this limit is established at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market;

Whereas the harmonization resulting from this cannot be total at the present stage, but opens the way towards greater harmonization; whereas it is therefore necessary that the Council receive at regular intervals, reports from the Commission on the application of this Directive, accompanied, as the case may be, by appropriate proposals;

Whereas it is particularly important in this respect that a re-examination be carried out of those parts of the Directive relating to the derogations open to the Member States, at the expiry of a period of sufficient length to gather practical experience on the effects of these derogations on the protection of consumers and on the functioning of the common market,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The producer shall be liable for damage caused by a defect in his product.

Article 2

For the purpose of this Directive 'product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary agricultural products' means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. 'Product' includes electricity.

Article 3

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 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 4

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

Article 5

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

Article 6

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

(a) the presentation of the product;

(b) the use to which it could reasonably be expected that the product would be put;

(c) the time when the product was put into circulation.

2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Article 7
The producer shall not be liable as a result of this Directive if he proves:
(a) that he did not put the product into circulation; or
(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
(e) 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; or
(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.
Article 8
1. Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.
2. The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.
Article 9
For the purpose of Article 1, 'damage' means:
(a) damage caused by death or by personal injuries;
(b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:
(i) is of a type ordinarily intended for private use or consumption, and
(ii) was used by the injured person mainly for his own private use or consumption.
This Article shall be without prejudice to national provisions relating to non-material damage.
Article 10
1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.
2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive. Article 11
Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.
Article 12
The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.
Article 13
This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a

special liability system existing at the moment when this Directive is notified.

Article 14

This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member States.

Article 15

1. Each Member State may:

(a) by way of derogation from Article 2, provide in its legislation that within the meaning of Article 1 of this Directive 'product' also means primary agricultural products and game;

(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.

2. A Member State wishing to introduce the measure specified in paragraph 1 (b) shall communicate the text of the proposed measure to the Commission. The Commission shall inform the other Member States thereof.

The Member State concerned shall hold the proposed measure in abeyance for nine months after the Commission is informed and provided that in the meantime the Commission has not submitted to the Council a proposal amending this Directive on the relevant matter. However, if within three months of receiving the said information, the Commission does not advise the Member State concerned that it intends submitting such a proposal to the Council, the Member State may take the proposed measure immediately.

If the Commission does submit to the Council such a proposal amending this Directive within the aforementioned nine months, the Member State concerned shall hold the proposed measure in abeyance for a further period of 18 months from the date on which the proposal is submitted.

3. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect that rulings by the courts as to the application of Article 7 (e) and of paragraph 1 (b) of this Article have on consumer protection and the functioning of the common market. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal Article 7 (e).

Article 16

1. 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.

2. Ten years after the date of notification of this Directive, the Commission shall submit to the Council a report on the effect on consumer protection and the functioning of the common market of the implementation of the financial limit on liability by those Member States which have used the option provided for in paragraph 1. In the light of this report the Council, acting on a proposal from the Commission and pursuant to the terms of Article 100 of the Treaty, shall decide whether to repeal paragraph 1.

Article 17

This Directive shall not apply to products put into circulation before the date on which the provisions referred to in Article 19 enter into force.

Article 18

1. For the purposes of this Directive, the ECU shall be that defined by Regulation (EEC) No 3180/78 (1), as amended by Regulation (EEC) No 2626/84 (2). The equivalent in national currency shall initially be calculated at the rate obtaining on the date of adoption of this Directive.

2. Every five years the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts in this Directive, in the light of economic and monetary trends in the Community.

Article 19

1. Member States shall bring into force, not later than three years from the date of notification of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof (1).

2. The procedure set out in Article 15 (2) shall apply from the date of notification of this Directive.

Article 20

Member States shall communicate to the Commission the texts of the main provisions of national law which they subsequently adopt in the field governed by this Directive.

Article 21

Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it.

Article 22

This Directive is addressed to the Member States.

Done at Brussels, 25 July 1985.

For the Council

The President

J. POOS

(1) OJ No C 241, 14. 10. 1976, p. 9 and OJ No C 271, 26. 10. 1979, p. 3.

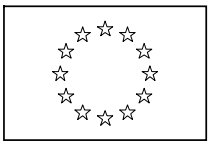
(2) OJ No C 127, 21. 5. 1979, p. 61.

(3) OJ No C 114, 7. 5. 1979, p. 15.

(1) OJ No L 379, 30. 12. 1978, p. 1.

(2) OJ No L 247, 16. 9. 1984, p. 1.

(1) This Directive was notified to the Member States on 30 July 1985.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.1.2001
COM(2000) 893 final

REPORT FROM THE COMMISSION

on the Application of Directive 85/374 on Liability for Defective Products

REPORT FROM THE COMMISSION

on the Application of Directive 85/374 on Liability for Defective Products

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1. BACKGROUND

Since 1985, the Directive on liability for defective products[1] introduced in the Community the principle of objective liability or liability without fault. According to it, any producer of a defective movable must compensate any damage caused to the physical well-being or property of individuals, independently whether or not there is negligence on the part of the producer.

1.1 Introduction

The liability laid down by this Community legislation is a coherent framework which takes account of the various interests involved:

- on the one hand, those of individuals in coping with the risks to their health and physical and material well-being from a modern society marked by a high degree of technical complexity,

- on the other, those of producers in avoiding distortions of competition resulting from diverging rules on liability, and in reducing the impact of those differences on innovation, competitiveness and job creation.

This framework of liability is capable of contributing to the well-being of consumers (by ensuring that victims are compensated and by discouraging the marketing of defective products) and of minimising the costs to industry so as to avoid excessive interference in their capacity for innovation, job creation and exporting, due to diverging national rules.

The Directive on product liability contains the following main elements:

- liability without fault of the producer;

- burden of proof on the victim as regards the damage, the defect and the causal relationship between the two;

- joint and several liability of all the operators in the production chain, so as to provide a financial guarantee for compensation of the damage;

- exoneration of the producer when he proves the existence of certain facts explicitly set out in the Directive;

- liability limited in time, by virtue of uniform deadlines;

- illegality of clauses limiting or excluding liability towards the victim.

In view of the different legal traditions, the Directive accepts that Member States derogate from the common rules ("options") with regard to three points by:

- including unprocessed agricultural products in its scope of application;

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[1] Council Directive of 25 July 1985 (85/374/EEC), OJ No L 210 of 7.8.1985, p. 29

- not exonerating the producer 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;

- by fixing a financial ceiling of not less than 70 million Euro for damage resulting from death or personal injury and caused by identical items with the same defect.

The Directive recognised that the harmonisation could not be total at that stage. It, therefore, foresees that the Commission presents every five years a report to the Community institutions on the general application and, if necessary, shall submit appropriate proposals to it (Article 21). According to Article 15(3) and 16(2), the Commission reports on development risks and the financial limit ten years after notification of the Directive. Every five years, it examines the question of revising the amounts laid down in the Directive (Article 18(2)).

The first report[2] was presented in 1995. It is considered that the Directive is generally perceived to have been an important piece of legislation. It has contributed towards an increased awareness of and emphasis on product safety. The Commission had concluded that experience is still limited and would only develop slowly. In 1995, the Member States had only a very limited case law in the field. On the basis of the information available at that stage, the Commission had considered it not appropriate to submit any proposals for amendments. However, certain aspects of the Directive relating to consumer protection and the functioning of the internal market called for ongoing attention. This was the case, for instance, with the exclusion of unprocessed agricultural products by the majority of Member States.

In the aftermath of the "mad cow" crisis, the Commission presented a proposal to extend the principle of liability without fault for defective products, as foreseen under Directive 85/374, to primary agricultural products and game. Directive 99/34[3] now obliges the Member States to extend the scope of strict product liability to unprocessed primary agricultural products.

1.2 The Green Paper

During the first reading of Directive 99/34, the European Parliament called for a substantial revision of the existing product liability system. Although the Commission did not share this view, it promised to open a wide discussion with all interested parties in the form of a Green Paper, which would prepare the second report on the application of Directive 85/374.

The Green Paper on Liability for defective products was adopted in July 1999.[4] It aimed at collecting information from all interested parties, in particular economic operators, consumers, insurance companies and public administrations on two points:

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2 The Commission presented its first report on the application of the Directive on 13.12.1995 (COM(95)617), based on an impact study carried out in 1994. This study is published on the Internet: www.europa.eu.int/comm/internal_market/en/goods/liability/index.htm.

3 OJ No L 141 of 4.6.1999, p. 20

4 COM(1999) 396 final of 28.7.1999

- as to how the 1985 Product Liability Directive has worked in practice and

- as to what extent it should be modified.

This document was intended to promote reflection and debate. An important part of the Green Paper called on all those involved to take a reasoned stance concerning the justification for any revision. This section addresses a wide range of issues: they include those points the European Parliament had raised in the discussion on Directive 99/34, such as burden of proof, development risks, mental damages, the threshold, prescription limit and the financial limit; they also consider other questions like the question of more transparency, supplier's liability or access to justice. The "options for revision" mentioned in chapter 3 of the Green Paper should guide the open discussion, without prejudice to any future Commission initiative.

The Commission invited the parties to provide replies which are based on facts, and not on mere positions of principle.

1.3 Reactions to the Green Paper

The Commission received some 100 comments to the Green Paper. They emanate from four different groups:

– national and European consumer organisations,

– national industry associations as well as national and European unions representing sectors of industry concerned (in particular pharmaceuticals, cars, insurance, chemicals, agricultural products, electrical equipment),

– public administrations of Member States (Austria, Denmark, Germany, Finland, France, Netherlands, Greece, Portugal, Spain, United Kingdom) and other European countries (Iceland, Norway, Slovenia, Switzerland),

– bodies specialising in product liability (e.g. Pan-European Organisation of Personal Injury Lawyers, US Defense Research Institute, Special Committee on European Product Liability Law).

As indicated in the Green Paper, the observations received were made public as far as confidentiality was not explicitly requested, and are available at the following internet address: http://europa.eu.int/comm/internal_market/en/goods/liability/replies.htm. A consultant made a summary of two-thirds of the replies which can be found at the same address.

The Economic and Social Committee adopted on 1 March 2000 an opinion on the Green Paper.[5] The European Parliament voted a resolution on the Green Paper at its session of 30 March 2000.

The present application report considered the information and observations received to the Green Paper as well as any other relevant information available. Generally it follows the structure of the Green Paper: chapter 2 gathers the (mainly) factual

[5] OJ No C 117 of 26.4.2000, p. 1

information on the practical application of Directive 85/374; chapter 3 assesses the information and arguments stakeholders put forward in view of the issues for discussion (the report's assessment is highlighted with grey colour); chapter 4 finally draws conclusions from the two previous chapters.

2. PRACTICAL EFFECTS OF DIRECTIVE 85/374/

The Green Paper proposed in chapter 2 to assess, under different angles, how the Directive meets the objectives it set out to achieve: the internal market, the protection of public health and safety and the effects on industry and the insurance sector.

2.1 The impact on the internal market

The Directive on producer liability constitutes a significant element of the legal environment in which intra- and extra-Community trade is conducted. The Commission asked those concerned to comment on its impact in the light of their experience since 1985, both with regard to its functioning in relation to Community trade and to the position of Community companies in relation to competitors from third countries.

2.1.1. The functioning of the Directive in practice

Many observations indicate that the Directive functions properly in practice. This is considered to be due to the fact that it has created a well-balanced and stable legal framework which takes into account the concerns of both the consumers and the producers. However, it is important to note that only little information about the application exist and statistics, if available, are not complete.

In most Member States, the national rules implementing the Directive are applied alongside other liability regulations in the majority of the cases. In Austria nearly all product liability cases are solved on the sole basis of the system provided by the Directive. Plaintiffs use other liability systems (contractual or tort law) mainly because they provide for compensation which is more protective (it covers namely damages under 500 Euro, non-material damages, damages to the defective product itself and to property intended for professional use; prescription periods are longer). In Germany case law constantly interprets applicable provisions of tort law in such a way that they come close to a no-fault based liability. Another reason for parallel application is that the "traditional" legislation is better known given that settled case law exists.

This co-existence of different product liability rules, which is permitted under Article 13 of the Directive, is perceived in various ways: the variety of rules has not discouraged the marketing of products in the Community, nor has it had any effect on insurance companies; it permitted a higher level of consumer protection which, on the other hand, might restrict the application of the rules under the Directive.

For these reasons, most of the observations are opposed to the Directive becoming the common and sole system of liability for defective products, but in favour of maintaining the present situation under Article 13.[6]

It was also asked whether each Member State should be able to adopt stricter liability rules with regard to the provisions of the Directive by introducing a "minimum clause". For some, such a minimum clause should be introduced given that all other Directives in the field of consumer protection follow this model. Another group of replies disagree with this proposal: such a provision would decrease the level of harmonisation which results from the Directive in its present form and create potential obstacles to the free movement of products.

2.1.2 The position of European businesses vis-à-vis their foreign competitors

It seems that the Directive does not weaken the position of European businesses in the global context. Foreign companies selling their products on the European market must also respect Community provisions. In their assessment of third countries, European industry notes that they don't encounter difficulties in those countries the product liability legislation of which follows the principles introduced by the Directive (such as Australia, Japan, Switzerland, Norway and others).

The situation in the United States is considered to constitute a particular case and to have an important impact on European businesses. The answers confirm the way in which the Green Paper assessed the legal framework of which US product liability law forms part: the trial by juries, the "no win, no fee" principle, the awarding of high punitive damages, the possibility of class actions are elements that encourage victims to go to court. This is claimed to create a climate of unpredictability of the outcome for producers. Due to this different situation, European companies, namely small and medium-sized ones, claim that they refrain to some extent from exporting their products to the United States. Another consequence is that they have to pay higher insurance premiums and to face a considerably higher level of litigation. According to figures presented by the Belgian industry, the US legislation renders exports from Europe to the United States two times (for textiles and steel), five times (for food stuffs) and ten times (for pharmaceuticals) more expensive than exports to other countries. These figures have not been assessed and verified by the Commission.

2.2. Protection of public health and safety

The Directive helps to increase the level of protection against defective products for two reasons: first, it encourages producers to do their best to produce safe products by complementing the regulatory measures of a given product group or those following the Directive on General Product Safety 92/59 and second, once these preventive measures have failed and accidents have happened, it allows the victims to obtain redress from the producers.

The first question addressed by the Green Paper in this respect concerned the compensation of victims. It is said that product liability cases have been mostly dealt

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[6] A preliminary ruling procedure, currently pending with the Court of Justice, concerns the interpretation of Article 13 (case C-183/00, González Sánchez).

with under traditional systems and much less under the legislation transposing the Directive. In Finland, the Consumer Complaint Board registered between 1.1.1993 and 22.11.1999 71 cases; 46 cases were decided on the basis of the Product Liability Act and 25 cases on the basis of the Finnish Consumer Protection Act. In Portugal, 200 claims were made since the date of the Directive's implementation; their legal basis is not indicated. In the UK, the number of cases is low.

There are only few reported Court cases based on the Directive: a recent case in Ireland, 2 cases in Italy, 3 cases in the UK, 3 or 4 cases in Belgium, Sweden and Finland, 20 to 25 decisions in Austria, some 30 decisions in Germany, 19 judgements in Portugal, no decision yet in France, Greece and Luxembourg.

The number of product liability cases seems to be relatively low. In the vast majority (90%, according to the German and Dutch insurers) these claims are settled out of court, in particular when the facts (i.e. the defect, the damage and the causal link) are clear. Business recognises the benefits of settling genuine, validated claims by avoiding the length and costs of litigation. In these cases, liability is not an issue and all that remains to discuss is compensation. While some consider the out-of-court settlement a mechanism which functions well, consumer organisations criticise it since the details of the settlement often remain confidential and because producer and insurers have an inequitably advantageous position.

Given the high number of out-of-court settlements, it is said that victims are compensated in general quickly and efficiently. With regard to cases brought before the national courts, the question of a swift solution is more a question of the speed and efficiency of the national systems of civil procedure than of the adequacy of the substantive law. Spanish procedural law is said to be very formal and strict concerning the submission of evidence.

Another question of the Green Paper concerned the impact of the Directive on the victim's interests. The number of claims based on defective products seems not to have increased. It is stated that the level of product safety increased considerably since the Directive was adopted in 1985. This situation results from the existence of a high safety level ensured by a strict regulatory framework, namely in certain product sectors, such as pharmaceuticals, chemicals, machinery, electrical equipment, while the other sectors are covered by the Directive 92/59 on General Product Safety. Industry is said to take into account these safety features in design, production, labelling and post-marketing systems and uses extensively good practice standards. The replies confirm that the Directive on Product Liability has a deterrent effect on manufacturers and suppliers and gives them a strong incentive, alongside the obligations under the afore-mentioned safety regulations, to improve the safety level.

The view of industry is that the Directive found the right balance between the protection of victims and the interests of producers. Consumer organisations disagree on this point and call for several changes. Several Member States (Germany, the Netherlands, Austria and the UK) state in their comments that at the moment there is no concrete information which could justify any changes of the Directive in favour of the consumers. Another group of Member States (France, Finland, Denmark, Greece

and Portugal) indicate areas where some changes could be made; however, in certain cases, no arguments are given.[7]

The observations reveal some differences among the Member States as far as the relationship between the national social security systems and the compensation awarded according to the Directive is concerned. As a general rule, a person injured by a defective product receives a payment under the social security schemes, independent of the existence of a liable person and as a counterpart to his contributions to the insurance scheme. Compensation of the victim under the Directive is additional to this payment. The level and scope of social security provisions in Europe is generally high, but differs between Member States. It is unclear whether in those cases where a large proportion of the damages are covered by these schemes victims initiate compensation proceedings.

In some Member States, such as the Netherlands[8] and Scandinavian countries[9], social security schemes do not have the possibility to take proceedings against the producer of a defective product. In other countries (as for example in Austria, the United Kingdom[10] or Italy), social security schemes have such a possibility, but have not yet used it in practice on the basis of the rights conferred upon the victim under the Directive. No figures exist with regard to the number of cases in those Member States where the social security actually took redress against the producer.[11]

It was also asked whether cases existed where the producer liability scheme set up under Directive 85/374 was insufficient to fulfil its compensatory role so that it was necessary to fall back on the solidarity of society as a whole to compensate victims. Those few replies addressing this point confirm the information contained in the Green Paper (blood transfusions in France, rape-seed oil case in Spain, blood products in Denmark). In Germany haemophiliacs were infected with the HIV virus by contaminated blood products during the period of 1980 to 1993 and a compensation fund was established.[12] Several Member States (Germany, France, Denmark, United Kingdom, Sweden, Italy, Finland and Austria) enacted legislation under which schemes administered by governments provide compensation payments to persons with vaccine-associated injuries. They are financed by the general public except for Denmark, Sweden and Finland where manufacturers contribute to a insurance fund.

2.3. The effects on industry and the insurance sector

The Green Paper asked industry whether it were aware of any cases of defective products in which the Directive was actually applied and how this affected its activities. There were very few claims of this nature which were normally covered by the company's insurance policy. Activities may have been affected in so far as companies had to insure higher risks.

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7 Where replies identify specific shortcomings of the present system, they are discussed in the relevant part of chapter 3 of this report.

8 Article 197 of Book 6 of the Civil Code

9 The introduction of a redress mechanism is at present under discussion in Sweden.

10 Social Security (Recovery of Benefits) Act 1997

11 In France one case is known, in Portugal none; in Germany few cases are known.

12 BGBl. I 1995, 972

The pharmaceutical sector indicates that the introduction of a comprehensive regulatory system since 1965 lead to an increase in costs. However, no figures are given with regard to the Directive's impact.

No research or studies have been undertaken on the Directive's potential impact on companies' activities.

Another set of questions was specifically addressed to the insurance sector. It asked for data on the number of claims it had dealt with after accidents caused since 1990, whether the guarantee given by the insurer is related specifically to the producer's liability under the Directive and whether demands for this type of guarantee increased since the Directive applied and its impacts. Insurance policies seem to have risen in Austria up to 100% since the law transposing the Directive was passed. In Germany, however, the number of demands introduced for product liability policies did not increase considerably. The reason was that the majority of companies already had taken appropriate cover, prior to the Directive and following the case law of German courts which developed stricter liability standards for producers. The same situation prevailed in most of the other Member States.

The Directive's impact on costs is difficult to assess because many other factors and developments influenced the level of compensation paid, the amounts of cover sought and the premiums collected. At European level no statistics exist which break down the type of liability (negligence or no fault-based liability) or the type of defect. This is due to the fact that product liability statistics are neither systematically collected at this level nor collected in such detail by all individual insurers. They are collected at national level by a few of the smaller markets. On the basis of this data approximately 60 to 70% of settled claims are based on manufacturing defects and 1 to 11% concern design defects.

3. ASSESSMENT OF ISSUES DISCUSSED WITH A VIEW OF POSSIBLY AMENDING DIRECTIVE 85/374

3.1 Maintaining the balance

Political discussions on earlier occasions and again the contributions to the Green Paper show that the policy of product liability provokes conflicting views on the part of producers and consumers. Victims want the highest level of protection at the lowest cost, while producers ask in particular for ceilings and for the shortest possible liability period.

Directive 85/374 represents a compromise reconciling the interests at stake. The Member States' political determination, set out in the provisions of the directive, to have a balanced framework of liability governing relations between firms and consumers must not be underestimated. The Commission expressed its wish in the Green Paper to see this conciliatory approach retained. Accordingly, any proposal to revise the directive should take into account the balance which at present is rooted in the following principles:

- the producer's civil liability is

(1) **objective** (no need to prove the fault),

(2) **relative** (the producer is exempt from liability when he proves the existence of certain facts, these facts being subject to re-examination (see below, for example, "development risks"),

(3) **limited in time** (the producer is not liable for an indefinite period, even though the practical arrangements for this principle deserve to be re-examined, especially the period of cessation of liability) and

(4) **liability that cannot be waived** at the wish of the parties;

- the victim's rights and obligations are:

(5) **he has to prove** that damage has occurred, that the product was defective and that there is a causal relationship between the defect and the damage suffered (the conditions of proof are subject to re-examination (see below "burden of proof") and

(6) **joint and several** liability (allowing the victim to approach any of those liable without prejudicing his right of complaint).

The Green Paper asked whether the said six principles constitute the basis that needs to be maintained in order not to upset the internal balance of the Directive. Some of the comments agree that the six principles constitute a fair balance of the interests involved and should be maintained, whereas others would wish to see some modifications introduced.

3.2 Issues for a possible future reform

Earlier political discussions, stakeholders and experts have highlighted several aspects of the directive as deserving special analysis with a view to possible reform. The Green Paper explained the issues at stake for each point and, when possible, indicated "options" which should be considered as guidelines for open discussion, without prejudice to any future Commission initiative.

3.2.1 Burden of proof

According to the Directive, the injured party is required to prove the damage, the defectiveness of the product and the causal link between the defect and the damage suffered. In practice it may be difficult to prove that a product was defective and/or that a causal link exists. This can be due to the technical complexity of the product concerned, the high costs for the necessary expert opinions or the disappearance of the product concerned (e.g. foodstuffs, pharmaceutical products).

Without prejudice to the general principle whereby the burden of proof lies with the victim, the Green Paper asked whether its application should be facilitated. It indicated four "options":
- to infer a causal relationship when the victim proves the damage or defect, or the defect when the victim proves the existence of damage resulting from a product;

- to establish the degree or standard of necessary proof of the three elements required;
- to impose on the producer the obligation to provide all useful documentation and information so that the victim can avail himself of concrete facts to prove his case;
- to make the producer bear the costs of the expert opinion under certain circumstances.

Replies are divided on this issue. One group believes that the current system is adequate, since problems had not been cited. If the producer had to provide proof that the product was safe, there was a risk that a large number of actions would be brought by consumers without due reason. This group rejects the idea of introducing a liability based on presumption. Since each product liability case needs to be decided on its merits, presumption would not be a suitable instrument.

Another group considers that the use of presumptions is a useful means in law to put the onus on the more informed person with the relevant insight in order to prove to the Court why the product should not be considered to be defective. A similar argument could be made for causation. It would be unfair to oblige the victim to cover evidential costs when it is clear that the defective product was the only possible cause of the victim's injury.

The situation in Member States in this area differs to some respect. It indicates, however, that national Courts have already developed ways to facilitate the burden of proof.

- In **Sweden** it is for the judge to assess the causal relation, particularly in technically complex cases. The burden of proof had been reduced by the courts in certain situations ("probability").

- In **Finland**, under the principle of the free assessment of evidence, the judge can take into account the difficulty of establishing the defect in a product or a causal relation.

- In **Germany**, according to the law on civil procedure, the Court is free to assess and judge evidence in the individual case. Causality was established in several cases on the basis of *prima facie* proof, when damage arose in the normal course of events.

- When the product disappeared (e.g. an exploding bottle) and when it was difficult to find the origin of the defect, in **Spain** judges based their decisions on assumptions.

- Judges in the **Netherlands** used the power to overthrow the burden of proof in exceptional cases, e.g. in the case of the defect in the product.

- In **Denmark**, the requirements of proof depend on each case and are decided by the judge. There are several judgements where consumers had been unable to furnish proof and where the court had asked the producer to provide rebuttal evidence.

- According to legal practice in **France** and **Belgium**, the defect of a product can be proven in any way, by evidence and by probability. The judge can infer the causal link ("the equivalence of conditions").

- In the **United Kingdom** the simple balance of probabilities test (this means at least 51%) is applied to issues of damage, defect and causation.

There is limited experience with regard to relieving the victim's financial burden of advancing the costs for expert opinions. Under UK Civil Procedure Rules 1999 the Court is obliged to ensure that parties are as far as practicable put on an equal footing; it also has the power to give directions about the payment of a jointly instructed expert's fees and expenses. According to existing German law, the producer is obliged to pay the expenses insofar as the damage is regulated out of court or if the producer is ordered to pay damages. In case of financial difficulties, the victim can apply for legal aid. The Italian transposing decree allows the judge to order the producer to advance the costs of expert opinion if it is likely that the damage has been caused by a defect in the product.

Finally, the national rules on discovery vary widely between Member States. Where such rules provide for excessively limited disclosure of documentation or information prior to or in the course of litigation, a denial of access to justice could be the possible result. The English Civil Procedure Rules 1999 are cited as a balanced approach with regard to the disclosure of information by both claimants and defendants at an early stage of a dispute. Other liability rules under German law oblige the producer to provide documentation and information if specific conditions are met. This obligation applies when sufficient indications for the causation of damage exist and factual circumstances falling within the ambit of the producer are necessary for the victim to establish the proof. In cases where the producer does not provide this information, the burden of proof can be reversed.[13]

In general, national administrations know of no practical problems due to the rules on burden of proof. This conclusion concerns also the situation of foodstuffs or pharmaceuticals which is recognised as being specific.[14] In Germany, it is presently being discussed how to overcome some difficulties with regard to pharmaceutical products. In this case, consideration might be given to introducing the right of the user to have certain facts mentioned on the product or on the packaging leaflet concerning the side-effects of pharmaceutical products, since this was necessary for bringing legal action.

The Green Paper then addressed the special problem of determining the identity of the producer when the same product is made by several producers and asked whether "market share liability" were feasible in Europe for this type of cases.

The concept of "market share liability" is rejected by nearly all the contributions. Product liability is based on the individual responsibility of the person who causes

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13 § 35 of the Law on biotechnology (Gesetz zur Regelung von Fragen der Gentechnik), BGBl I 1999, 1080: Liegen Tatsachen vor, die die Annnahme begründen, daß ein Personen- oder Sachschaden auf gentechnische Arbeiten eines Betreibers beruht, so ist dieser verpflichtet, auf Verlangen des Geschädigten über Art und den Ablauf der in der gentechnischen Anlage durchgeführten oder einer Freisetzung zugrundeliegenden gentechnischen Arbeit Auskunft zu erteilen, soweit dies zur Feststellung, ob ein Anspruch nach § 32 besteht, erforderlich ist. Die §§ 259 bis 261 BGB sind entsprechend anzuwenden.

14 In Germany nearly all cases concerning pharmaceuticals could be solved on the basis of the *prima facie* rule.

damage. The said concept would make persons liable although they are not involved in the damage and thus deviate from a fundamental principle of liability. In this situation it would be extremely difficult to ensure risk as underwriters would not be able to assess or quantify their exposure until after the case has been concluded. The Directive introduces the liability of the supplier under Article 3(3) in case the producer cannot be identified. This guarantees that the victim has a defendant against whom he can introduce a claim.

Furthermore, Article 3 of the Directive gives a wide definition of a producer. This can lead to joint and several liability of producers (Article 5). The Dutch Supreme Court developed the following rule for the DES case:[15] if it is established that the victims' damage is the result of a particular product, each of the producers who had placed that product on the market during the period in which the damage occurred can be liable for the full amount of the damage.

It seems that no other similar cases exist and that there is no need for introducing this concept. Also in the United States, where this concept originated, the application is limited and the courts have refused its application due to practical difficulties of definitions.

3.2.2 Development risks

Under Directive 85/374 a producer is exempt from liability when he proves the existence of certain facts. One of the exemptions concerns the so-called "development risks". The European Court of Justice interpreted the relevant provision in the following way: the producer of a defective product is absolved of liability if he can establish that the objective state of technical and scientific knowledge, at its most advanced level, at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered. If it is to be a valid argument against the producer, the relevant knowledge must have been available when the product was put into circulation[16].

Given the controversial debate, the Community legislator in 1985 did not settle this issue definitely, but provisionally: exemption was possible for a period of ten years, and the Member States had the option of abolishing it unilaterally. Under Article 15(3) of the Directive, it had been agreed that the Commission would assess the effect that rulings by the courts as to the application of Article 7(e) and of Article 15(1)(b) have on consumer protection and the functioning of the internal market. In the light of this assessment it was to be decided whether producers should be liable for "development risks" after the transition period.

After implementation, in some Member States the producer is liable also in case of development risks. In Luxembourg and Finland the scope of liability concerns all types of products. Other countries limited this liability to specific product sectors: Spain in the case of food and pharmaceutical products and France for products derived from the human body and for those marketed before May 1998. In Germany

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15 See Green Paper, p. 23, footnote 41.

16 *Commission v the United Kingdom*, C-300/95, judgement of 30.5.1997, ECR [1997], p. I-2649, point 29.

the producer's liability in cases of development risks existed since 1978 in the area of pharmaceutical products.[17]

In this context, the Green Paper asked whether and how liability for development risks involves insurmountable consequences for producers at the European level, by discouraging them from innovation, especially in the sector of pharmaceuticals, and whether it would be feasible to insure this kind of risk in the insurance market.

Industry's replies put forward a number of arguments in favour of maintaining the exemption based on development risks. In their view this kind of liability would prevent scientific progress, the development and innovation of new products. Linked to the specific features of the pharmaceutical sector, the product launch of innovative bio-tech products could be delayed or prohibited. The degree of unforeseeable risk in so-called "orphan drugs", i.e. those designed to treat rare diseases, would be comparatively higher than with other medicines because the clinical testing is limited to a small number of patients. Introducing such a liability could lower the standard of care to which the pharmaceutical industry works since producers could be made liable notwithstanding the fact that they have applied the highest existing level of scientific knowledge.

Insurers stress the difficulties which will result in pricing a product liability insurance that covers development risks. Given the unforeseeable and unknown risk, it would be very difficult to cover it and insurers might exclude it in their policies.

Other replies, namely those from consumer organisations, stress the fact that strict liability is based on the recognised principle under which the person taking benefits from a dangerous activity should compensate the disadvantage of other persons. Consequently, the producer should be held liable also in case of damages due to any undetectable risk.

Some information is available with regard to the five Member States where, partially or in general, the producer is liable for development risks.

Finland: The Government regarded cases of development risks as very rare and introduced producer liability in this case since there was no justification for consumers having to bear these risks. In practice, the level of insurance premiums increased, the additional costs being negligible. At a public hearing organised by the Ministry of Justice in November 1999, it had been noted that there had been no cases of development risks.

Luxembourg: Case law existing before the Directive was adopted made producers also responsible for development risks. The option had been used to maintain this situation. Specific problems due to this system are not known.

Spain: Introducing liability for development risk for foodstuffs and pharmaceuticals is explained by the fact that these sectors are of greatest public sensitivity and the occurrence of these risks is likely in this area. The financial impact on industry (insurance premiums) is not known.

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[17] The Directive recognised the existence of this specific liability system and authorised the co-existence with the Directive, see Article 13 and the 13th recital.

France: Under the traditional liability system, an undetectable defect was not grounds for exonerating the producer. Owing to ethical considerations, the transposing law made the producer liable for development risks with regard to the elements and products of the human body. Although it is known that insurance companies had difficulties with this provision, no specific data is available.

Germany: Strict liability including development and production risks with regard to pharmaceutical products had already existed before the adoption of the Directive. Given the direct impact on the human body medicines have, the Law on Pharmaceuticals provided for this solution. The inclusion of liability for development risks is combined with financial ceilings (liability is limited to 500 000 DM in any individual case and 200 million DM for each pharmaceutical or 12 million DM for each product per year in the case of annuities). No data on the practical impact is available and very little case law exists.

Very little data is available on what practical impact the introduction of producer liability in case of development risks would have for industry and insurers. No detailed research on the rulings of national courts with regard to the application of the exemption clause related to development risks exists. The few cases known seem to indicate that in practice it is not so easy for the producer to prove that the defect could not be detected on the basis of the knowledge that was available when the product was marketed and, thus, waive his liability. The occurrence of damages due to a development risk seems to be most likely in the following sectors: pharmaceutical products, chemical substances, genetically modified organism and foodstuffs.

The Green Paper asked whether damage caused by development risks should be borne by society as a whole, by means of a compensation fund using government revenue, and/or by the manufacturing sector in question, by means of a fund to which those in the sector contribute.

Replies are divided on this point. Some contributions are in favour of introducing a compensation fund in the most sensible sectors. Past experience has shown that, with damage on a large scale, public intervention was inevitable and public funds were set up to assist those suffering damage (see the cases mentioned above under point 2.2 - HIV etc). It is questionable whether this intervention should not constitute the exception. Therefore, the idea of establishing a fund by companies of the manufacturing sector concerned should be first envisaged. Other comments suggest that the question of compensation funds should be left to the individual Member States.

Compensation funds set up by industry exist in few countries. In Germany, due to the liability limit of 200 million DM per product, manufacturers of pharmaceuticals and insurers agreed to establish the “Pharmapool”. Manufacturers pay a percentage of turnover based on three risk categories into a pool comprising all of the German insurers of pharmaceutical companies. In return, the insurers collectively guarantee the cover. Since its existence, this pool made one payment of 55 million DM in the case compensating haemophiliacs with HIV alleged to be caused by blood products. Premiums were reduced in 1981 since no claims were introduced against the pool.

A voluntary scheme for injuries caused by pharmaceuticals was established in Sweden in 1978. The scheme is financed by a percentage of the manufacturers’ sales

and administered by insurance companies. This scheme was established on the basis that manufacturers would not be expected to reimburse the National Social Security Scheme of any payments it had made to injured persons.

A voluntary Pharmaceutical Insurance Scheme exists also in Finland since 1990. An aggregate upper limit of 100 million Mk per year is set for epidemic injuries.

Danish legislation provides for compensation of personal injury caused to individuals by pharmaceuticals, regardless of any proof of fault or liability, if the products were obtained after 31 December 1995. A compensation fund is managed by the patient insurance association and financed by reducing State reimbursement of medicinal products individuals have bought. Two claims were introduced during the period of 1998 and 2000.

On the basis of information available it seems that the said compensation funds intervened very rarely and, if so, for minor damages.

3.2.3 Financial limits

The Green Paper addressed two issues under this heading: First, according to Article 9 of the Directive, the producer does not have to compensate the victim for damage to property which is lower than ECU 500. This threshold or deductible was introduced in 1985 in order to avoid litigation in an excessive number of cases.[18] Stakeholders were asked to provide any information on the percentage of cases involving material damage of less than € 500.

One group of replies proposes to abolish the € 500 limit. Consumers would often suffer damages to property which are below this threshold and therefore lack compensation in these cases. Contributions contain limited data: in Finland 71 cases were brought before the Consumer Complaint Board between 1.1.1993 and 22.11.1999; 13 out of these cases involved damage to property of less than € 500.

Another group argues that the current regime should be maintained. The limit would be reasonably modest and would not unduly disadvantage consumers. Judicial costs related to this category of claims would be disproportionately high. In most cases, the damage would be covered by the consumer's home insurance policy.

The limited data available seems to indicate that a removal of the deductible might result in a higher number of cases against producers, also small and medium size enterprises. This could be prevented by encouraging out-of-court solutions for small claims.

The second issue concerns the possibility left to Member States under Article 16 (1) of the Directive to fix a maximum ceiling for product liability in the case of damage to persons caused by identical items with the same defect. This ceiling is set at € 70 million. In 1985 lawmakers considered this limit as transitional and agreed that the Commission should assess the effect of using this option on consumer protection and the functioning of the internal market after a period of ten years (Article 16(2)). In the

[18] See 9th recital of the Directive.

light of this assessment it should be decided whether this financial ceiling should be removed.

Three Member States (Germany, Spain and Portugal) have adopted financial ceilings.

In **Germany**, the setting-up of a financial ceiling of DM 160 million was explained by the fact that liability without fault needed to be limited. Under the specific regime for pharmaceutical products the financial ceiling is DM 200 million. There are no known cases in which the financial ceiling would not have been enough.

In **Spain**, the ceiling is PTS 10 500 million. So far, no cases are known were this limitation left injured persons without compensation.

In **Portugal**, legislation set a financial limit at ESC 10 000 million. No data on the application is available.

The little information seems to indicate that the financial ceilings which exist in three Member States are high enough in order to cover any claims for compensation. No data exists which would show that the use of the option under Article 16 (1) of the Directive by these Member States has any major impact on the functioning of the internal market.

3.2.4 Prescription and liability periods

The liability of a producer extincts ten years from the date on which the product was put into circulation, unless there are any claims or proceedings pending (liability period). A person who wants to bring a claim against a producer for damages due to a defective product must bring his claim within three years after the date on which he became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer (prescription period). This limitation of liability is mainly justified by the fact that strict liability puts a higher burden on producers than liability under the traditional systems of contractual or extra-contractual liability. Therefore, the liability period is limited in order not to discourage technological innovation and to allow insurance cover.

The Green Paper asked whether the time limit of ten years needed to be changed, either generally of specifically for certain products or sectors and whether the costs resulting from such a change should and could be borne by industry and the insurance market.

One group of replies thinks that the ten-year limit should be maintained. Their arguments relate to the need for legal security, problems to get insurance cover in case of longer periods or at least an increase in insurance premiums. Another point is that, since it is easier for the victim to get compensation under strict liability, the time limit is justified and the victim has the possibility to take redress against the producer for longer periods (up to 30 years) under other liability systems.

Another group of comments suggest to extend the limit, at least with regard to particular product sectors (such as foodstuffs, pharmaceuticals, agricultural products or products intended for especially long-use). These sectors are identified to bear latent injury where the damage might result a long time after the product was put on

the market.[19] Other proposals consist in beginning the ten-year period by the date on which the product was first supplied to the consumer or extending the limit to the foreseeable period of the product's use.

The Directive 92/59 on general product safety[20] requires that only safe products are put on the market. In this context, the notion of a safe product refers to the foreseeable period of a product's use. It is to be noted, however, that Directive 92/59 and Directive 85/374 have a complementary function: the first instrument ensures that only safe products are put on the market (prevention); the second instrument establishes the rules under which personal injury and damage to property caused by a defective product are compensated (compensation). Therefore, it is justified to deal with the issue of time-limit in relation to the producer's liability in a different way than in relation to the general safety of products.

There is no information on practical cases in relation to the effect of the ten-years time-limit, nor concrete data on the financial impact on industry and the insurance sector if the time-limit was extended.

3.2.5 Insurance requirement

Producers are currently not required to have any kind of financial cover; they are not required to take out liability insurance for an amount that is adequate to cover any damage caused by a defective product.

The Green Paper asked about the experience in this regard, in particular whether any cases are known where lack of insurance cover left victims without compensation and whether there is a need for further action in this relation.

A group of contributions considers that the producers themselves should decide on the question of insurance. The arguments are twofold: there are no known cases where compensation could not be provided due to the lack of insurance cover and obligatory insurance for all product sectors would make the manufacturers of products with low risk pay a part of the financial burden of more dangerous products. Some comments favour the introduction of a mandatory insurance in those sectors which insurance companies have recognised as risk sectors.

On the basis of the information available, it seems that the absence of a specific provision on insurance cover did not lead to any practical problem. It should be further assessed whether in practice manufacturers of those sectors where the liability risk is high already seek on their own insurance cover or whether there is a need for further action.

3.2.6 Transparency

The Directive currently does not foresee any means of making its implementation more transparent by instituting a mechanism covering information with regard to

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19 A case occurred in France where a pharmaceutical was taken by pregnant women and which caused physical damage to their children which appeared, however, at the age of sexual maturity.

20 OJ No L 228 of 11.8.1992, p. 24.

product liability cases. Producers are not obliged to keep records of claims against them, nor are the national authorities obliged to collect the cases reported.

The Green Paper asked whether the Directive should provide for means of increasing transparency of the way in which operators apply the rules, in particular by identifying the cases involving defective products that are still on the market.

With regard to the question of ways to identify defective products that are still on the market, some replies propose to set up a system requiring producers of defective products to provide a central body with all the relevant information. Another group of comments refer to Directive 92/59 on general product safety. This Directive and the national implementing measures are considered to be the means of guaranteeing that only safe products are placed on the market and that, should unsafe products be found on the market, they are withdrawn or recalled.

A number of contributions disagree with the idea of publishing the details of product liability cases. Two main arguments are raised: detailed information on specific cases could in some instances weaken the consumer's position when negotiating the amount of compensation; increased information about product liability cases could lead to a number of ungenuine claims.

It needs to be further analysed whether the obligation of the producer under the Directive 92/59 with regard to post-marketing, in particular recall and withdrawal of unsafe products, is correctly implemented.

3.2.7 Supplier's liability[21]

The Green Paper addressed under this title two points: the notification procedure in relation to the supplier and the supplier's liability.

Formal notification of supplier: Article 3(3) of the Directive states that where the producer of a defective product cannot be identified, the 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 applies in the case of a product imported into the Community, if this product does not indicate the identity of the importer, even if the name of the producer is indicated. The victim is therefore obliged to notify the supplier formally, so that he can within a reasonable time provide details of the producer or previous supplier.

The Green Paper asked whether the supplier should inform the victim of the producer's identity within a maximum time limit.

Many contributions consider that a fixed time limit could be justified because the indication of "reasonable time", as currently stated, could be interpreted in different ways in the Member States. While some propose a limit of one month, it is three months for others.

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[21] The Directive uses in Article 3 (3) the term "supplier" within the meaning of a person distributing a product put on the market to the consumer. The present report follows this definition.

It seems that Member States apply the indication of “reasonable time” with small variations. No data is available on the practical effects of these differences. At this stage, there is no clear evidence for a need for harmonisation.

Extent of supplier's liability: The Directive is based on the principle that it is the producer who is liable for the damage caused by a defect in his product. Article 3(1) of the Directive defines a producer as "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".

By way of exception, a professional acting as simple supplier is liable in only three cases: when he is the importer of the product into the Community - within the meaning of Article 3(2) of the Directive - and, in certain circumstances, when the producer of the product cannot be identified by the victim of the damage caused by the product or when the identity of the aforementioned importer is not indicated on the product (Article 3(3)).

The Green Paper asked whether the Directive should be applicable to any professional in the product supply chain when his activities have affected the safety properties in question of a product placed on the market.

A group of replies refer to Directive 92/59 whereby the definition of producers includes other professionals in the supply chain, insofar as their activities may affect the safety properties of a product placed on the market. This means that professionals in the supply chain are also obliged to ensure that only safe products are marketed and to participate in post-marketing measures. The liability rules under Directive 85/374 should be extended in this sense. The contributions do not always clearly indicate whether the supplier’s liability should be unlimited (i.e. the supplier would be liable also if it concerns a manufacturing defect) or only limited to specific activities of the supplier involving e.g. repackaging, transport or storage.

Another series of comments rejects the idea of introducing supplier’s liability. The main argument is that it is difficult to see how the principle of no-fault based liability can be applied to the supplier. If the supplier was liable for any defect due to storage or transport, such a liability would come close to the concept of fault-based liability. Other problems would consist in identifying the liable person (the producer or the supplier) and proving the defect if it is a defect falling within the supplier’s sphere. The approach adopted in the Directive 85/374, based on the production and marketing of defective products, does not justify full liability of the supplier, i.e. also in the case of a defect existing at the moment of commercialisation.

As already mentioned above, Directive 92/59 has the objective of prevention and Directive 85/374 has the role of compensation. Although these functions are complementary, it does not mean that in all respects the rules applicable need to be the same. This is true for the question whether the obligations suppliers bear under the Directive on general product safety can be transposed *ipso facto* to the area of product liability. The objective underlying Directive 85/374 is that the producers shall be liable for defective products independently of any fault. Suppliers are liable only in case that the producer cannot be identified. Thus, the Directive recognises the exceptional situation of the supplier’s liability.

The number of cases where a product defect results from the activity of a supplier seem to be relatively limited (mainly in the area of foodstuffs and agricultural products); no concrete data is available in this regard. No information is available whether consumers were left without compensation in this specific situation or whether they could turn themselves against the producer. A fundamental change in shifting the liability to the supplier in other situations than the ones foreseen by Article 3(3) of the Directive does not seem justified at this stage.

3.2.8 Products covered

The Directive applies only to products[22] and covers all material movables, whether for private use or not, including electricity.

The Green Paper asked whether real estate property should be included in the scope of the Directive.

Comments are in general negative on this point. Specific legislation on liability for buildings exists in several Member States. In other Member States rules of contractual law ensure that a person can seek compensation in case that there is a problem with a building. The Directive envisages the producer's liability for defects in products which are industrially mass-produced. Accordingly, the Directive covers construction products which are incorporated into an immovable. However, real estate property constitutes an individual service and requires different rules.

On the basis of data available it does not seem appropriate to make the Directive apply to real estate property.

3.2.9 Damage covered

The Directive currently refers in Article 9 to damage caused by death or personal injury, as well as damage to property, provided that it is intended for non-professional use. The defective product itself[23] is not covered.

The Green Paper addressed three issues in this respect:

Non-material damage (any damage not affecting property, moral damage, mental suffering, etc) is not at present covered by the Directive, even though most national legislation takes it into account. Stakeholders were asked whether the Directive should cover also non-material damage.

Contributions are divided on this point. It is confirmed that national laws on strict liability in most Member States already cover non-material damage. However, differences exist with regard to the definitions and the practical application (e.g.

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22 For defective services the Commission is considering a possible specific initiative, see Communication from the Commission - "Consumer policy action plan 1999-2001" (COM(98) 696 of 1.12.1998).

23 Product compensation is covered by the legislation on sales guarantees (see Directive 99/44/EC on after-sales guarantees, OJ No L 171 of 7.7.1999, p. 12).

amount of compensation awarded in this respect). In Germany, discussions have started in order to extend damage which is compensated according to the national law on strict liability to non-material damage resulting from suffering.

The replies do not give sufficient detail in order to be able to assess what practical impact national rules providing for compensation of non-material damage and the fact that they have a different scope and are applied in different ways have on the functioning of the internal market as well as on the protection of the consumer. This issue needs to be further examined before any conclusions can be made.

The Green Paper also asked whether damage caused to products intended normally for professional or commercial use should be covered by the Directive and, thus, professionals should be protected in case of damage.

The position of comments in this regard is in general negative. The main argument is that one of the Directive's objective is the protection of the consumer and products other than consumer goods should not be covered. In practice professional users had either a means of redress under contractual law or any damage would be covered by a business insurance policy.

On the basis of data available it does not seem appropriate to amend the Directive on this point.

Only few contributions address the issue whether damage to the defective product itself should be covered. Damage to the defective product itself was said to be covered by contractual arrangements.

On the basis of data available it does not at this stage seem appropriate to include this type of damage.

3.2.10 Access to justice

The Directive contains no special provisions on the victims' access to justice in its current version. The injured person has to use national remedies.

The Green Paper put the question whether special measures to improve victims' access to justice should be introduced by providing for injunctions, special mechanisms for out-of-court proceedings and/or class actions.

A number of contributions consider the power given to the national authorities under Directive 92/59 to withdraw any dangerous product sufficient for the protection of consumers. They think that there is no need for an individual's right on injunction.

While some replies are in favour of giving further thought to alternative dispute mechanisms, others consider that the out-of-court proceedings currently in existence are functioning well since the majority of claims are solved in this way. There are objections on formal grounds (lack of Community competence under Article 95 EC with regard to the harmonisation of rules on civil procedure) against group actions. Another negative argument in this respect relates to the fact that rules on legal proceedings should not be created for a specific sector, as this same problem arises in all consumer-related areas.

There is some information on the situation in most of the Member States with regard to group actions. It can be summed up as follows:

In **Portugal**, popular legal action exists whereby the Public Prosecutor's Office and consumers' organisations can intervene in cases of injury to private individuals.

In **Austria**, civil procedural rules allow the victim to pass on his/her liability claim to a consumers' association.

In **Belgium**, plaintiffs with similar but separate claims can institute proceedings before the same court and then ask the court to handle their claims at the same hearing, without joining them.

In **Greece,** legal action by consumer groups is possible.

In **Denmark**, the rules on legal proceedings allow popular legal actions to be brought in all consumer-related areas.

In **France**, legislation exists which enables consumer associations to defend the civil interests of consumers. This does, however, not include actions for compensation for a group of injured persons. Consequently, there are no actions similar to the "class actions" in the United States.

In **Germany**, in the event of a series of accidents, there is a "trial action" which will subsequently form the basis of compensation between industry and the injured persons.

In **Ireland**, the rules of court provide a procedure whereby one or more of persons having the same interest in a single claim may bring or defend the claim on the behalf of all those interested.

In **Italy**, consumers' associations can defend consumers' interests, but cannot act on behalf of injured persons.

In **Finland**, a few years previously, the question of popular legal action had been examined. The consumer ombudsman can assist individuals before the court; the trial costs can be entirely covered by a special budgetary fund.

In the **Netherlands**, multi-party action is possible under the Group Actions Act from May 1994.

In **Spain**, consumers' associations can bring a legal action on behalf of one of its members. An amendment of the rules on court proceedings will make it possible to bring joint actions, as from January 2001.

In **Sweden**, rules concerning popular legal action are being considered, and a proposal might be put forward in the future.

In the **United Kingdom**, multi-party action can be brought in the courts in England and Wales[24] under a rule of civil procedure on group litigation. Under this procedure one or more individuals can act in a representative capacity and bring proceedings on behalf of others where they have the same interest.

At this stage, there is no indication that action concerning access to justice specifically with regard to product liability cases would be appropriate.

3.2.11 Other

Some contributions advance additional points which should be reflected further. The issues concern some points where the Directive leaves Member States to define certain legal concepts (such as "putting into circulation"[25]) or where, due to an apparent lack of clarity in the Directive, Member States seem to have taken diverging national transposition laws. Another point relates to the use of a defective product in the supply of a service. Finally, the question is raised whether the Directive should contain provisions concerning conflicts of law (defining the jurisdiction and the applicable law).

These issues need further consideration. They would not require in principle a modification and might be dealt with either in relation to the transposition control of the Directive or in the context of an exchange of information between Member States on the practical application of certain provisions.

4. CONCLUSIONS

The Commission concluded in its First Application Report in 1995 that experience was still limited and was only likely to develop slowly. The impact study[26] on which the report based its conclusions and to which it referred, explained the different reasons why experience would be little.

In view of this situation, the Commission thought it appropriate to issue a Green Paper on product liability for the following reasons: this document would address the various points on which factual information is needed and would trigger a large and substantial debate in this respect. The Commission received a large number of contributions which shows the great interest in the subject matter.

The Green Paper had invited the stakeholders to provide the Commission with factual information on the practical application, rather than mere positions of principle, in order to enable it to justify its conclusions, in particular if they were to lead to a substantial amendment of the Directive.

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24 The Scottish Law Commission rejected the idea of introducing such a rule.

25 A preliminary ruling request, currently pending with the Court of Justice, addresses inter alia this point (case C-203/99, Veedfald).

26 See footnote 2.

On the basis of the information available at present which results from the contributions to the Green Paper as well as other documents received, one can summarise the situation prevailing in the Member States as follows:

- there is still limited experience with regard to the application of the Directive. This is mainly due to two factors: the Directive was lately transposed in some Member States and, according to the possibility given to Member States under Article 13 of the Directive, national contractual or extra-contractual law or a specific liability regime is applied in parallel;

- the scarce information available has not permitted to identify any major problems with the application of the Directive;

- a cost-effective framework should be maintained preserving the balance between the interests of both consumers and producers.

Globally, the factual situation is not different compared to the situation prevailing in 1995 when the Commission presented the first report. The Commission is of the opinion that any modifications to the Directive should be grounded on objective factual bases. The information available at the present stage is not sufficient to draw firm conclusions. Therefore, the Commission considers that it would be premature to envisage any changes to the current liability system under Directive 85/374.

The Commission intends, however, to take a number of follow-up actions which are twofold: on the one hand, it envisages measures which are directly linked to the issue of product liability, with short and medium-term objectives; on the other hand, measures in other fields which are complementary to product liability are either already under way or will be taken up in the near future.

4.1 Follow-up measures which are directly linked to product liability

The Green Paper purported to collect as much factual information on the functioning of the Directive as possible. Despite the active participation of a large number of the interested parties in this exercise, difficulties in gaining a full picture of the situation in the Member States still remain. In view of the continuous process of assessing the application of the Directive in the Community, means need to be explored by which the present information gaps can be filled in the short-term. A reflection on ways for greater harmonisation of product liability at Community level in the medium-term should also be initiated.

4.1.1 Short-term actions

The Commission is of the opinion that a pragmatic and efficient tool of data-collection could be the setting-up of a expert group on product liability, similar to the idea of an “observatory” the Social and Economic Committee had put forward in its opinion on the Green Paper. This expert group would involve all the interested parties such as experts from national administrations, specialised lawyers and academics, representatives from different industry sectors and the insurance area as well as consumers’ associations.

The expert group would gather information in relation to all the Member States in particular on the legal application of the Directive, on recent case law and changes in national legislation having an impact on product liability (such as issues concerning the access to justice). In addition, the data exchanged could be published on the Internet in order to increase transparency.

The Commission considers that the establishment of such a expert group would not only be a practical way of filling information gaps, but also a forum to continuously discuss issues related to product liability. The specific details of the expert group and its functioning will be defined in the beginning of the year 2001.

Another question concerns the collection of information related to the availability of safe products on the market. A Community injury data-collection and information system has already existed since 1993 under the former EHLASS (European Home and Leisure Accident Surveillance System) system. In the past, this system did not identify the number of injuries caused by a defective product because all types of accidents involving a product were collected. Under the programme of Community action on injury prevention,[27] a new Community system for compiling information on injuries has been set up. Product and services safety indicators will be developed. The feasibility of integrating additional information in particular dealing with accidents caused by defective products will also be approached.

Furthermore, the information received from the interested parties during the discussion on the Green Paper needs to be completed by other expert opinions. The Commission intends to launch a study on the assessment of the economic impact of strengthening the current liability system under Directive 85/374.

The Directive in its current version attributes a specific role to the Commission when assessing the impact of the Directive with regard to the options left to the Member States regarding the exemption to liability for development risks and the financial limit (see Article 15(3) and 16(2) of the Directive). Given that the impact of these two options on the functioning of the internal market and the protection of consumers at present cannot be measured sufficiently, the envisaged study should focus on these issues.

The objective of the study would be to assess the economic impact for industry, insurance companies, consumers and society as a whole (in particular via social security schemes) of introducing producer liability also in case of development risk and of eliminating maximum financial limit for serial incidents. This analysis should be as fact-based as possible.

The results of the study should enable the Commission to have a realistic evaluation of the costs and benefits of strengthening the current liability system.

4.1.2 Medium-term actions

The lawmakers in 1985 thought that the Directive was only an initial step towards establishing a genuine producer liability policy at Community level. They introduced

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[27] OJ No L 46 of 20.2.1999, p. 1

a review of it at regular intervals (five years) in order to proceed towards greater harmonisation with a view to establishing a regulatory framework which is as comprehensive, coherent, balanced and effective as possible for protecting victims and guaranteeing legal certainty for producers.

At this moment, reflection could start with whether greater harmonisation between the different liability systems currently existing would be advisable and, if this was the case, what means would be feasible.

Indeed, for the time being, the Directive does not affect any rights the injured person may have according to contractual or non-contractual (negligence/tort) liability or a special liability system existing in July 1985 (Article 13). This means that the Directive sets common rules on strict liability which Member States have to implement and from which they cannot deviate by adopting stricter provisions. The injured person can, however, base an action against the manufacturer of a defective product under other product liability systems which may exist in the different Member States, provided the specific conditions necessary for their application are met.

This possibility of allowing the co-existence of different liability systems might be one factor which could explain the limited number of practical cases brought before national courts on the basis of national rules implementing the Product Liability Directive.

In principle it would seem that the injured party could more easily bring actions based on strict liability provisions rather than under other provisions; in particular, he/she does not have to show the fault or negligence of the producer as is the case under contract or tort law. An absence of fault would seem to exclude the liability of the producer under another system. Contributions to the Green Paper, however, indicate that in practice, at least in some Member States, actions are based in parallel on different systems, and not only on the strict liability provisions.

Moreover, case-law in several Member States tends to interpret the producer's liability under fault-based liability systems in an extensive way with the result that in practice the difference between fault-based and strict liability systems is getting blurred. In this situation and given that fault-based liability systems generally provide for a larger scope of consumer protection parallel applications are a practical consequence.

In some Member States, strict liability rules used to be only exceptionally applied and the principle introduced by the Directive therefore constituted a novelty for these legal systems. In this situation one would assume that the position of the injured person suing the producer of a defective product has improved.

At present no assessment is possible as to the real impact of the co-existence of national laws transposing the Directive with other liability systems. Therefore, the Commission will launch a study which should analyse and compare the practical effects of the different systems applicable in all the Member States on the bringing of claims for defective products (i.e. the national laws implementing the Product Liability Directive, the national laws on contractual obligations, the national laws on extra-contractual obligations and specific liability laws). One important aspect of the study would be to analyse on what points the different systems diverge from each

other (in particular with regard to conditions and scope of application, rules on burden of proof, products and damages covered, exemptions of the producer, prescription and liability periods, financial limits, levels of damages awarded, access to justice).

A second part of the study would look into the future of product liability legislation. It would address the question of whether a uniform product liability system could be introduced in the Community on the basis of the present situation in the Member States. In this context, the study should look at the different initiatives existing with regard to the law of obligations, such as the Lando Commission, the European Group on Tort Law and the European Centre on Tort and Insurance Law (Europäisches Zentrum für Schadenersatz- und Versicherungsrecht) in Vienna.

This study would enable the Commission to have a complete overview of all the applicable product liability laws and their practical application in all the Member States. On the basis of the results of this study, the Commission could assess the practical effect of the strict product liability provisions under Directive 85/374 and the need and feasibility of introducing - at medium-term - a common and sole liability system for defective products.

4.2 Follow-up measures in other areas which are complementary to product liability

The Commission is committed to achieving a high level of consumer protection against product-related risks. In this context, the provisions of Directive 85/374 on product liability are one major element. Two other areas play a complementary role: Directive 92/59 on General Product Safety and specific Community legislation governing the safety of products are of paramount importance since their correct application ensures that only safe products are put on the market and, therefore, minimises the risk that any liability claims due to a defective product occur. Access to justice issues are another important element in providing compensation to consumers in general and, more particularly, to the victim of an injury caused by a defective product. Any actions taken in the past addressed these questions in general and did not envisage specific actions for product liability matters. The present situation confirms the soundness of this approach.

Another area important in relation to product liability is environmental liability which concerns the allocation of responsibility for damage caused to the environment.

The Commission already took and intends to take further actions in these areas, as described below, and considers that these measures will help to foster product safety, guarantee consumers fair access to justice as well as a well-conserved environment.

4.2.1 Amendment to Directive 92/59 and enforcement of other Directives related to product safety

The General Product Safety Directive 92/59 and other Directives related to product safety have established an elevated level of consumer protection in the Community.

The past experience has shown some weaknesses in the provisions of the Directive 92/59 and the review of its application identified additional needs of consumer

protection. Therefore, the Commission adopted on 29 February 2000 a Proposal for revision of Directive 92/59.[28]

Several of the proposed amendments to Directive 92/59 enhance the preventive aspect of product safety by reinforcing the effectiveness of market surveillance. In this respect, the obligations for producers and distributors needed to be completed:

- producers and distributors, the latter within the limits of their respective activities, have to pass on information on product risk, safeguard and provide documentation necessary for tracing the origin of products, inform national authorities immediately if a product put on the market is dangerous and they have to inform these authorities of the action taken to prevent risks to consumers. This information will help market surveillance authorities to trace the products concerned, verify whether other products present the same risk, take any necessary measures and inform the authorities of the other member States as appropriate.

- producers and distributors have to collaborate with the national authorities on action taken to avoid the risks posed by products they supply or have supplied. This will enable swift tracing of dangerous products during emergency situations and organising their withdrawal.

- in addition to the withdrawal of dangerous products from the market when this is necessary to prevent risks to consumers, producers have to recall products already supplied to the consumers when other means would not suffice to prevent the risks involved.

- producers have to adequately and effectively warn consumers of the risks posed by the products that have already been sold to them.

Another set of amendments are proposed with a view of strengthening market surveillance and enforcement powers of the Member States. These measures aim to:

- ensure that effective, proportional and dissuasive sanctions are applied as necessary;

- ensure that systematic and co-ordinated market surveillance approaches are put into place by all Member States;

- ensure that the market surveillance systems work in a transparent manner and are open to consumers and other stakeholders;

- provide for a periodic assessment by the Commission of the results achieved by the market surveillance systems of the Member States;

- set-up a framework for systematic collaboration between the enforcement authorities of the Member States;

- reinforce the enforcement powers of competent authorities, namely in relation to:

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[28] COM(2000) 139 final/2 of 15.6.2000

- recall of dangerous products already supplied to consumers, and adequate consumer information on the risks posed to them;

- temporary prohibition of the placing on the market of certain products, pending verification and assessment of their risks;

- rapid action, in case of serious risks requiring immediate or rapid intervention, and removal of limitations on the circulation of information on such risks.

Market surveillance is an essential tool for the enforcement of Community legislation on product safety (with regard to, inter alia, pharmaceuticals, chemicals, cosmetic products, medical devices, machinery and electrical equipment). It is worth recalling the fact that market surveillance must allow to verify that the provisions of applicable Directives have been complied with in each Member State on the same basis. This guarantees both a high level of protection for consumers and users, and supports the free movement of goods in the internal market by eliminating unfair competition and non-compliant products. Member States' authorities have an obligation to organise and carry out market surveillance in an effective way (i.e. adequate infrastructures and resources). In order to ensure that market surveillance is as effective as possible, the Commission encourages administrative co-operation between national authorities.

4.2.2 Initiatives with regard to access to justice

Since the eighties, with the continuing development of the internal market, the Commission has faced a new challenge: to promote more effective and efficient access to justice in view of the cross border dimension of the problem. In its Green Paper on "Access of consumers to justice and the settlement of consumer disputes in the Single Market", the Commission set out a number of proposals aimed at resolving individual and collective cross border disputes. This led to the adoption of Directive 98/27 on injunctions for the protection of consumers' interests[29] to allow qualified entities (e.g. consumer associations) to seek injunctions where there has been an infringement of one of the Directives related to consumer protection enumerated in the annex and which harms the collective interests of consumers. In addition, the Commission published a "Consumer Guide in the Single Market" and a "Guide to Legal Aid in the European Union".

The Commission has also been supporting for several years, a network of Consumer "Euroguichets" which aim to support and give advice to consumers on access to justice in cross border cases. Finally, the Commission adopted, in 1996, an "Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market" which highlighted the need for Community action in regard to the settlement of consumer disputes.

In the light of the consultations surrounding these initiatives the Commission adopted in 1998 a "Communication on the out-of-court settlement of consumer disputes". This Communication contains two features designed to improve access to justice for

[29] OJ No L 166 of 11.6.1998, p. 51

individual consumers: a consumer complaint form and Recommendation 98/257/EC[30] laying down the principles applicable to out-of-court procedures for the settlement of consumer disputes.

These two initiatives were aimed at addressing this issue through promoting access to simple, swift, effective and inexpensive legal channels for resolving disputes. Member States were requested to notify the Commission of all out-of-court bodies which applied the principles of the Recommendation and these where placed on the Commission website. As the follow up the Commission adopted on 17 March 2000 a "Working Paper on the creation of the EEF-Net" to provide a background and framework to create a network of European out-of-court consumer dispute resolution schemes: the European Extra-Judicial Network (EEJ-Net).

The EEJ-Net will utilise all existing alternative dispute resolution (ADR) schemes notified to the Commission by Member States as complying with the principles within Recommendation 98/257/EC. Member States have undertaken to establish national contact points (or 'Clearing Houses').[31] If a consumer has a dispute with an enterprise he can then contact his Clearing House for advice and support to assist him in filing a complaint with an out-of-court body where that enterprise is located. In cross-border disputes the Clearing House will address existing barriers to seeking extra-judicial redress such as language differences and lack of information and then pass the complaint through the network to the appropriate out-of-court body.

The Commission further announced in its consumer policy action plan 1999-2001 a number of initiatives concerning consumers' access to justice.[32] In line with this action plan, it published in February 2000 a Green Paper on Legal Aid in Civil Matters[33] in cross-border litigation. The Commission will adopt at the beginning of the year 2001 a Communication on widening access to justice for consumers, which will build on existing Community initiatives and provide criteria to promote greater choice and flexibility for using out-of-court resolution schemes.

Since Article 65 EC came into force in May 2000 the competence of the Community has been extended to cover judicial co-operation generally. Therefore, these initiatives should be seen in the wider framework of co-operation in ensuring citizens better access to justice.

By the year 2001, the Commission will issue a Green Paper on alternative dispute resolution (ADR) and a Working Paper on recovery of legal expenses and lawyers fees. Other areas where the Commission intends to launch initiatives concern measures to make it easier for consumers to take legal action collectively and the definition of the applicable law to non-contractual obligations.

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30 OJ No L 115 of 17.4.1998, p. 31

31 See Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ No C 155 of 6.6.2000, p. 1.

32 COM(98) 696 of 1.12.1998, p. 21

33 COM(2000) 51 of 9.2.2000

4.2.3 Initiatives with regard to environmental liability

The Commission adopted in February 2000 a White Paper on environmental liability[34] with a view to introducing a framework directive on environmental liability. This future liability regime will provide for liability for damage to the environment as such, next to covering traditional damage (damage to persons and goods) which is caused by dangerous or potentially dangerous activities. It will have to ensure coherence and consistency with Directive 85/374. In this regard, it is necessary to determine the applicable regime in cases where there could be an overlap between Directive 85/374 and the future environmental liability regime. This question needs particular reflection as far as genetically modified organisms (GMOs) are concerned. Directive 85/374, as amended by Directive 99/34, establishes already liability for damage caused by GMOs to persons and property. The future environmental liability regime should in any event supplement this by covering damage to the environment caused by GMOs.

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The Commission will continue to monitor the implementation and effects of the Directive 85/374 in view of its requirement in Article 21 to submit periodic reports to the Council and Parliament. Based on the findings of this report, it intends to set up a forum for a continuous dialogue and exchange of information between the interested parties with regard to product liability issues. The results of two studies will complete the information available at present and allow the Commission to assess the need and the feasibility of developing a strengthened Community liability system for defective products. In parallel, the Commission will propose supporting actions in the area of general product safety, access to justice for consumers and environmental liability.

[34] COM(2000) 66 of 9 February 2000

FINANCIAL STATEMENT

1. TITLE OF OPERATION

Report on the application of Directive 85/374 on Liability for Defective Products

2. BUDGET HEADINGS INVOLVED

B5-3001

3. LEGAL BASIS

Article 21 of Directive 85/374 on Liability for Defective Products foresees that the Commission reports every five years to the Council on the application of the Directive.

4. DESCRIPTION OF OPERATION

4.1 General objective

At the present stage only limited information is available on the actual impact the Community legislation on product liability has on the internal market and the consumer protection. The present report identifies information gaps with regard to the application of product liability legislation in all the Member States which need to be filled.

4.2 Period covered and arrangements for renewal

The duration of the action is limited to five years.

According to Article 21 of Directive 85/374, the Commission will present in 2005 a report to the Council on the application of the Directive and, if necessary, submit appropriate proposals to it.

5. CLASSIFICATION OF EXPENDITURE OR REVENUE

5.1 Non-compulsory expenditure

5.2 Differentiated appropriations

6. TYPE OF EXPENDITURE OR REVENUE

Purchases of studies.

7. FINANCIAL IMPACT

7.1 Method of calculating total cost of operation (relation between individual and total costs)

Operational expenditure (cost of studies) will amount to EUR 0,5 million.

All expenditure on incidental activities mentioned in the report in other areas than those being directly linked with product liability have been or will be the subject of separate financial statements.

7.3 Operational expenditure for studies, experts etc. included in Part B of the budget

Commitment appropriations EUR 0,5 million (at current prices)

	2001	2002	2003	2004	2005	2006	Total
Studies	0,5	0	0	0	0	0	0,5
Total	0,5	0	0	0	0	0	0,5

7.4 Schedule of commitment and payment appropriations

EUR million

	2001	2002	2003	2004	2005	2006	Total
Commitment appropriations	0,5	0	0	0	0	0	0,5
Payment appropriations							
Studies	0,21	0,29	0	0	0	0	0,5
Total	0,21	0,29	0	0	0	0	0,5

8. FRAUD PREVENTION MEASURES

The rules and procedure governing procurement of goods and services for the Communities will be strictly complied with, in accordance with the financial regulation applicable to the general budget of the European Communities, the regulation on modalities for the implementation of the financial regulation and internal rules.

9. ELEMENTS OF COST-EFFECTIVENESS ANALYSIS

9.1 Specific objectives; target population

Product liability legislation has a major impact on manufacturers and suppliers of products as well as important consequences for consumers, therefore even small modifications to the existing product liability framework, although limited, can have an important effect. Studies appear to be the most efficient way of achieving a consistent analysis of the situation across all the 15 Member States.

9.2 Grounds for the operation

The Commission is assessing the functioning of the internal market throughout the Community. Only limited information is at the present stage available on the actual impact the Community legislation on product liability has on the internal market and the consumer protection. The aim of the present actions is to gather lacking information by having recourse to the help of external expert knowledge. These actions form part of the on-going assessment of the functioning of the internal market legislation. They will highlight whether the legislation is achieving its objectives and functions correctly and whether any changes are needed.

9.3 Monitoring and evaluation of the operation

This forms part of the ongoing monitoring of the Internal Market and more particularly of the functioning of Directive 85/374 on which the Commission is obliged to report every five years.

10. ADMINISTRATIVE EXPENDITURE (SECTION III, PART A OF THE BUDGET)

The mobilisation of required administrative and human resources is covered by the existing resources of the managing service.

10.1 Effect on the number of posts

Type of post		Staff to be assigned to managing the operation		Source		Duration
		Permanent posts	Temporary posts	Existing resources in the DG or department concerned	Additional resources	
Officials or temporary staff	A B C	0.54 0.16		0.54 0.16		
Other resources						
Total		0.7		0.7		

10.2 Overall financial impact of additional human resources

EUR

	Amounts	Method of calculation
Officials Temporary staff Other resources (indicate budget heading)	378.000	0,7 (two-third official per year) x EUR 108.000 x 5 years
Total	378.000	

10.3 Increase in other administrative expenditure as a result of the operation

EUR

Budget heading	Amounts	Method of calculation
A 7030 General meetings	111.500	(10 private experts x EUR 790 + 5 experts from national administrations x EUR 650 = 11.150) x 2 meetings x 5 years
Total	111.500	

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.6.2003
COM(2003) 313 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the safety of services for consumers

[SEC(2003) 625]

EXECUTIVE SUMMARY

I. General

This report responds to the invitation addressed to the Commission by the European Parliament and the Council in Article 20 of Directive 2001/95/EC (General Product Safety) to "identify the needs, possibilities and priorities for Community action on the safety of services". It has been prepared in the light of wide consultations with the Member States and stakeholders and is based on a preliminary identification and qualitative assessment of the most relevant policy options. The main finding of the report is that there is a substantial lack of data and information on the factual aspects of risks and safety aspects of services. The conclusion of the present report is thus that the priority for Community action is the improvement of the knowledge base in this area.

This report focuses on the health and physical safety aspects of services provided to consumers and on services that are relevant in this respect. Protection of economic and financial interests of consumers is already considered within the framework of initiatives related to the EU consumer policy and the internal market and is not dealt with in this report.

II. Regulatory situation on service safety at EU level

At EU level there is no horizontal legislation on service safety. However, a number of existing instruments in various policy areas contribute indirectly to the safety of certain services. In particular, Community legislation harmonising the technical rules for certain professional products is very relevant for the safety of the service in which those products are used. On the specific important issue of fire safety in hotels, a Council Recommendation was adopted in 1986. Comprehensive specific Community legislation has been established for transport safety (air, sea and terrestrial), within the framework of the Treaty provisions on transport policy.

III. Policy and regulatory situation in the Member States

All Member States have adopted policies, legislation and administrative measures concerning service safety, but the approaches vary significantly. Certain Member States (Finland, France, Portugal, Spain and Sweden) have introduced general legislation specifically on the safety of consumer services, which supplements sectoral policies and legislation. A few Member States (United Kingdom and Ireland) cover the horizontal aspects of consumer, user and public safety of services via their occupational health and safety legislation. All Member States have sector-specific approaches, with a variety of provisions directly or indirectly relevant for the safety of various categories of services. Codes of practice and voluntary measures have also been established in some Member States, but on an ad-hoc basis and just for a few specific service sectors. In addition to the specific direct measures, regulation in other areas like safety of buildings and occupational safety is of significant indirect importance.

Due to the complexity and variety of the relevant measures, it is very difficult to make a comparative assessment of the regulatory situation in the Member States and

to identify specific gaps and weaknesses in the approaches in place or in their practical application and enforcement.

IV. Issues emerging from the assessment of the situation in the Member States

So far, no factual evidence has been found of specific barriers to intra-EU cross-border supply of services due to different safety requirements. No indication or complaint in that respect has resulted from the consultations. A Eurobarometer survey has indicated that European consumers may perceive that the safety level of products and services is less well protected abroad. That could depend, among other things, on their perception of a lower level of safety of services provided in countries other than their own. Improving consumer confidence in the safety of services through the EU is an important objective for the internal market, particularly in areas like tourism, leisure and sports activities.

Very substantial gaps have appeared in the available knowledge base on service safety and risks. Systematic monitoring and data collection on accidents and injuries is limited to a few sectors like transport and health. Data for other sectors are scarce. Moreover, the available information is in general not reliable and detailed enough and not comparable. Therefore, it cannot be used for conducting a systematic and comparative assessment of risks. Extrapolations at Community level from the few data available lead to meaningless or contradictory results.

V. Indications and expectations emerging from the consultations

In preparation of this report the Commission consulted national consumer associations on the functioning of national legislation as well as a broader European audience (public authorities, business, industry, trade and professional organisations, European consumer associations and standardisation bodies) on possible options for Community actions. The consultation indicated that consumer associations perceive a safety risk in some services sectors, such as sports and leisure, tourism and health care services. Consulted parties generally see a role for the Commission in developing actions to support national policies for consumer protection, such as enhancing the knowledge on safety risks and promoting various kinds of non-regulatory instruments. Expectations of consulted parties on the need for legally binding safety requirements at EU level diverged. The consumer side sees such legal requirements as essential in order to guarantee an adequate level of consumer protection in all Member States, whereas businesses and most public authorities do not see an added value for such requirements at this stage.

VI. Action at EU level

In line with the outcome of the consultation the Commission is of the opinion that the aim of Community action on service safety could be:

- To support the national policies and measures in order to contribute to their effectiveness and efficiency.

- To ensure that consumers can rely upon a consistent, high level of safety protection throughout the EU ;

- To facilitate the information on the cross-border provision of services or the establishment of subsidiaries of service providers.

A number of options for substantive action on safety of services have, therefore, been considered in order to assess the extent to which they might be justified in the light of these objectives.

However, the inadequacy of (a) the available data and (b) the lack of evidence of specific internal market difficulties make it difficult to justify any specific option for substantive Community action at this stage. The importance of services in the EU economy, the cross-border relevance of safety aspects of services related to tourism and sports and leisure activities as well as the expectations often expressed by EU citizens for a high level of safety throughout the EU, lead to the conclusion that initiatives at Community level should be considered in order to support the policies and measures of the Member States.

It therefore seems that the immediate priority should be to improve the present knowledge base and to monitor systematically the policies and measures of the Member States. European standards for specific service sectors or risks may also be necessary in order to support national measures.

In order to improve the knowledge base and to be in a position to set up, if necessary, European standards supporting national policies, a suitable framework should be put in place.

Such a legislative framework would aim at monitoring and supporting national policies and measures by:

(1) Establishing *a procedure for exchange of information on policy and regulatory developments* and the results achieved and administrative co-operation between the authorities, taking into account the scope of relevant existing and forthcoming Community legislation on the provision of information in the field of technical standards and regulations related to services,

(2) Setting provisions for the *systematic collection and assessment of data on risks* of services and the establishment of an EU database,

(3) Aiming at the establishment of *procedures for setting European standards,* if and when the evidence indicates a need, to work in conjunction with broadly defined objectives related to the safety of services.

The framework will be designed in the light of careful assessment of potential benefits and burdens, with particular focus on the situation of small and medium-sized enterprises, and in close co-operation with the Member States. The objective will be to define the optimal scope and methods for monitoring and data collection, in order to ensure a genuine added value in a cost-effective manner.

It would be appropriate to focus on the sectors most relevant for consumers in a cross-border perspective, for example mass-accommodation services like hotels, camping or other tourist facilities as well as related sports and leisure activities.

REPORT

1. INTRODUCTION AND SCOPE

1. As economies develop, the relative share of the agricultural sector and the manufacturing industry tends to decrease rapidly whilst the services sector becomes increasingly important. Therefore, a post-industrial economy is commonly qualified as a "service" economy. This is not different for the EU economy, which is dominated by the services sector both in terms of wealth created and employment. This sector covers branches such as trade, transport, travel, communication, financial services, business activities, health and social work, public services. In order to work towards the progressive removal of barriers to trade in services, the Commission presented its two-stage internal market strategy for services in December 2000.[1] The first stage of this strategy was completed in July 2002 with a Commission report[2], which draws up an inventory of the internal market barriers that continue to inhibit services. In the context of this strategy the Commission recognised that, in addition to a horizontal harmonisation instrument to tackle barriers of a horizontal nature, specific harmonisation measures might be appropriate in areas with significant health and consumer protection considerations.

2. According to EUROSTAT data for 2000 the services sector in the EU accounted for 69.6%[3] of Gross Value Added and for 68.6%[4] of those employed. For the same year intra-EU trade in commercial services (i.e. services excluding government services) was estimated at 710.8 billion €. In terms of private household, consumer expenditure services accounted in 1999 for 59.4%[5] (including housing, water, electricity, gas) of total expenditure.

3. These macro-economic figures clearly demonstrate the importance of services for the European economy, the internal market and consumer expenditure. Given the significant share of consumer income spent on services, there is a legitimate interest for the consumer that services put on the market, in the same way as products, do not represent a physical safety or health hazard. Transport, health and leisure services are examples of consumer services with potential risks to the health and physical safety of private individuals.

4. A large body of Community legislation regarding *product* safety has been established over the last decades. This legislation includes both sector directives, applicable to particular categories of products and/or risks, and general measures, in particular the recently revised Directive 2001/95/EC of the European Parliament and of the Council on General Product Safety [6] and Council Directive 85/374/EEC on Liability

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1 COM(2000)888final of 29 December 2000

2 COM(2002)441final of 30 July 2002

3 Of which 27.2% for financial services, business activities; 21.0% for trade, transport and communication; 21.4% for public services. Since the available statistical data do not allow for a distinction between products and services, there is a risk of over-estimating the services related expenditure.

4 Of which 13.9% for financial services, business activities, 25.4% for trade, transport and communication; 29.3% for public services.

5 Of which 3.2% for health, 14.1% for transport, 2.3% for communication, 1% for education and 8.1% for restaurants and hotels and 21.3% for housing, water and electricity.

6 European Parliament and Council Directive 2001/95/EC, OJ No L 11 of 15.01.2002 p. 4

for Defective Products[7]. The objective of this legislation was to harmonise national rules on safety and liability with a view to facilitating free movement of goods in the EEA area, whilst ensuring a high level of consumer health and safety protection.

5. With regard to the safety of *services*, there is currently neither a general Community regulatory framework, nor sector-specific legislation, except for transport services. However, some elements of Community legislation in other areas may be relevant for the safety of certain services. For example, Community requirements for specific products may have an influence on the safety of services where these products are used. With a view to establishing a more global approach to the safety of services, the European Parliament and the Council called upon the Commission in Article 20 of Directive 2001/95/EC to "*identify the needs, possibilities and priorities for Community action on the safety of services and to submit to the European Parliament and the Council, before 1 January 2003, a report, accompanied by proposals on the subject as appropriate"*.

6. This report is limited to *consumer services*, i.e. services provided to physical persons acting in their personal capacity. Professionals are usually better equipped to assess risks and have different needs compared to consumers.

   The safety of food offered by service providers to consumers, e.g. in restaurants, is covered by the initiatives related to the revision of the Community food safety hygiene rules adopted in the framework of the "from farm to table" approach to food safety.

   Non-food products supplied to or used by consumers as part of a service are covered by Directive 2001/95/EC. However, the safety of the equipment used by service providers themselves in order to supply a service to consumers is excluded from the scope of Directive 2001/95/EC and should, therefore, be considered within the scope of Community action on the safety of *services*. This is in particular relevant for equipment on which consumers travel or ride, but which is operated by a service provider.

   Services of public interest related to public security and protection, such as defence, police or civil protection are left outside the scope of this report given their particular objectives, the nature of the "service provider" and the conditions under which the relevant activities are operated.

7. For the purpose of this report *safety* relates to health and physical integrity of consumers. In line with this definition consumer services, such as financial or electronic communication services that do not represent a health or physical safety risk are excluded from the scope of this report. It does not consider risks for damages to property and financial risks. They are more directly related to commercial practices, which are governed by contract law. Moreover, these risks are already addressed within the framework of Community initiatives related to the internal market and the EU consumer protection policy[8].

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[7] OJ L 210, 07.08.1985, p. 29

[8] See, for example, Green paper on European Union Consumer Protection, COM(2001)531 final of 2 October 2001 and Follow-up Communication to the Green Paper on EU Consumer Protection, COM(2002)289 final of 11 June 2002.

The safety of consumer services is mainly influenced by preventive "command and control" type of measures on the one hand and liability systems on the other hand. Rules establishing a framework for the safe provision of services have a direct beneficial impact on safety levels by preventing damage. Liability schemes, although very important for repairing the negative impact caused by defective services on consumers, have mainly an ex-post compensating function and a more indirect, preventive function with regard to service safety.

8. In 1990 the Commission addressed the liability for defective services in a proposal for a Directive[9] on the liability of suppliers of services. The main purpose of this legislative initiative was

- to provide better protection for consumers suffering damage from services which injure the physical integrity of their person or their private property; this was achieved through the establishment of the principle of subjective liability of the supplier with reversal of the burden of proof in favour of the injured person, and

- to eliminate discrepancies between national legal systems which could prejudice the efficient operation of the internal market for services.

After extensive discussions in the European Parliament and the Council the Commission decided to withdraw its proposal in June 1994. In the light of the discussions the Commission took the view that the approach to the liability issue should be reviewed following, amongst others, an in-depth examination of the functioning of civil liability systems for remedying damage caused by defective services currently applicable in the Member States and a careful consideration of the specificity of the different categories of services.

The Commission is currently analysing Member States' legal systems governing liability for defective services. It will assess again the need and possibility for Community action in this area once the outcome of this analysis is available.

9. The actual safety level of a service is basically determined by the aggregate effects of the following main components:

- The safety of the premises, structures and equipment used for providing the service;

- The qualifications of the service provider;

- The availability and quality of the information on the safety aspects of the service provided to the user/consumer of the service;

- The way in which the service is carried out by the service provider;

- The general abilities and behaviour of the consumer;

- The availability of emergency procedures and equipment to reduce damage in case of accidents.

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9 COM(90)482final – SYN 308 of 20 December 1990, OJ C 12, 18/01/1991, p. 8

10. When looking into Community measures to address the safety risks of specific sectors of consumer services, transport and health constitute particular categories. Measures to improve the safety of the different modes of transport are an integral part of the common transport policy as enshrined in Article 71 of the Treaty. As set out below, a wide range of measures have been enacted under this Article to regulate the safety of the various modes of transport. In relation to health, Article 152 of the Treaty aims at a high level of human health protection and foresees that the Council shall contribute to the achievement of the objectives referred to in this Article through adopting incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States concerning health services. In the light of such specific provisions and the nature and organisation of the relevant activities, Community measures to contribute to the safety of health services are best examined within the framework of the Community programmes and activities in that specific area. This report does not seek to identify and assess priorities for Community action on the safety of transport and health services.

11. In preparation of this report the Commission has carried out a wide consultation of Member States and stakeholders, including extensive discussions with Member States' experts in the Consumer Safety Working Party. In May 2002 a questionnaire was submitted to national consumer associations in Member States and EEA countries. The replies to this questionnaire provided a useful indication on how consumers perceive the functioning of existing national legislation on safety of services. In order to collect further input for this report, a large-scale consultation of stakeholders with a legitimate interest in the safety of consumer services and of public authorities was carried out in August – October 2002. Interested parties were invited to comment on the potential contribution to enhanced safety of consumer services of a number of policy options, taking into account existing policies and legislation in Member States and the Community. This consultation process delivered more than 70, often very detailed and relevant reactions, from various societal groups representing consumers, service providers, industry and commerce, standardisation bodies and public authorities.

12. The purpose of the present report is to assess the needs and possibilities for Community action related to the safety of certain categories of services. Due consideration has been given to the input received during the consultation process for the prioritisation of the different options for Community action.

2. THE SAFETY OF SERVICES IN THE EUROPEAN UNION

Existing Community policies and legislation impacting on the safety of services

13. At Community level the safety of services is at present directly regulated only in the area of transport. In addition, various Community legislative provisions and initiatives take into consideration, more or less directly, safety aspects of certain services. In most cases the main objective of such provisions is to ensure the proper functioning of the internal market. Four principal areas are particularly important: recognition of diplomas, certificates and other qualifications for the objective of the internal market, environment, energy and tourism.

14. The transnational character of *the transport sector* and the fact that Article 71 c) of the Treaty explicitly opens up the possibility for adopting measures aimed at enhancing transport safety, has made the sector a priority area for Community action.

15. Transport safety is mainly regulated through technical harmonisation with a view to maintaining a high level of safety or by harmonisation in the social and vocational training spheres aimed at ensuring sufficient safety at the level of the carrier providing the transport service. These provisions have a direct impact on the safety of the service. Road and maritime passenger transport offer numerous examples of provisions with a direct impact on safety; such as Council Directives 92/6/EEC[10] and 92/24/EEC[11] on speed limitation devices on heavy goods and passenger vehicles, Council Regulation (EC) No 3820/85[12] on equipment installed on vehicles transporting passengers or goods to record the distances travelled, speeds, driving and rest periods, Council Regulation (EC) N° 3051/95[13] on the safety management of roll-on/roll-off passenger ferries. For railways essential requirements on safety of the various subsystems (infrastructure, rolling stock, signalling, etc.) are laid down in Council Directive 96/48/EC[14] on the interoperability of the trans-European high-speed rail system and in Directive 2001/16/EC[15] of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system. For aviation, an obligation to investigate accidents and incidents with a view to improving safety follows directly from the provisions of Annex 13 to the Convention on International Civil Aviation and Council Directive 94/56/EC[16]. This Directive is to be complemented by a Directive[17] on the reporting of occurrence. Harmonisation of civil aviation safety is dealt with through Council Regulation (EC) N° 3922/91[18] and Regulation (EC) N° 1592/2002[19] of the European Parliament and the Council.

16. Improving transport safety remains a key objective in the reflections on the future of the common transport policy[20], together with efficiency, quality and reduced pressure on the environment.

17. The implementation of the principles established by the Treaty related to the freedom of establishment and the freedom to provide services has indirectly addressed the issue of safety of services in setting provisions on the *mutual recognition of professional qualifications* as well as on the harmonisation or mutual recognition of national rules on access to regulated professions. The impact is particularly important for certain professions in the medical sector such as nurses[21] and doctors[22].

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10 OJ L 57, 02.03.1992, p. 27
11 OJ L 129, 14.05.1992, p. 154
12 OJ L 370, 31.12.1985, p. 1
13 OJ L 320, 30.12.1995, p. 14
14 OJ L 235, 17.09.1996, p. 6
15 OJ L 110, 20.04.2001, p. 1
16 OJ L 319, 12.12.1994, p. 14
17 Proposal dor a Directive of the European Parliament and of the Council on occurrence reporting in civil aviation, OJ C 120, 24.04.2001, p. 148
18 OJ L 373, 31.12.1991, p.4
19 OJ L 240, 07.09.2002, p. 1
20 White paper on European transport policy for 2010: time to decide, COM(2001)370 final of 12 September 2001
21 Council Directives 77/452/EEC, OJ L 176, 15.07.1977, p. 1 and 77/453/EEC, ibid. p. 8
22 Council Directive 93/16/EEC, OJ L 165, 07.07.1993, p. 1

18. Also, *other internal market measures* influence the safety of consumer services. For instance, the provisions concerning medical devices[23] and legislation on foodstuffs have a positive indirect impact on safety levels of the services associated with them.

19. The protection of human health is one of the objectives of the *Community environmental policy*. The close link between the environment and human health provides the basis for various provisions which, although they do not have consumer safety as their direct objective, in practice lead to improved health and safety for consumers, also with regard to consumer services. For example, Community legislation on waste management, such as incineration, landfill and transport, contributes to improved safety of the service, by limiting the different types of pollution that might endanger human health. In other cases the link between environmental protection and safety of consumer services is of a more direct nature, for example in the case of Council Directive 98/83/EC[24] on the quality of water for human consumption.

20. The *common provisions on energy* have a limited and indirect impact on the safety of services. Energy policy contributes to the general objectives of Community economic policy, focusing on the integration and opening up of markets and the prevention of obstacles. Going beyond these general objectives, energy policy pursues specific objectives with a view to reconciling competitiveness, security of supply and protection of the environment. The European Parliament and Council Directive 94/63/EC[25] on the control of volatile organic compound (VOC) emissions resulting from the storage and distribution of petrol has a more direct impact on safety levels.

21. The Treaty does not provide for a specific legal basis for common actions in the *tourism sector*. The role of the Commission is mainly one of co-ordinator and catalyst. Consequently, there are few Community provisions with a direct and principal impact on the safety of services in the tourism sector. Where they do exist, they are dependent on other policy areas, and their primary objective is often the proper functioning of the internal market. This is the case, for example, with Council Directive 90/314/EEC[26] on package travel based on the former Article 100a (now Article 95) of the Treaty, which makes the organiser and/or retailer liable for damage suffered by the consumer as a result of non-performance or improper performance of the contract and with Council Recommendation 86/666/EEC[27] on a minimum level of fire safety in Community hotels. The Community's current policy on tourism is primarily concerned with the development and competitiveness of businesses. The safety of consumer services is not referred to in this context as a goal in itself, but rather as an indirect consequence of promoting the quality of the services offered with a view to the development of tourist activities.

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23 Council Directives 93/42/EEC, OJ L 169, 12.07.1993, p. 1 and 90/385/EEC, OJ L 189, 20.07.199O, p. 17

24 OJ L 330, 05.12.1998, p. 32

25 OJ L 365, 31.12.1994, p. 24

26 OJ L 158, 23.06.1990, p. 59

27 OJ L 384, 31.12.1986, p. 60

Member States' approaches, policies and legislation related to the safety of services[28]

22. Several policies and regulatory measures in Member States *indirectly* contribute significantly to the safety of services. Examples include requirements related to the construction and operation of buildings and sites where services are provided, technical measures related to equipment and products, rules on qualification and authorisation of service providers and provisions regarding health and safety at work. A further analysis of these policies and areas of legislation would be extremely far reaching and falls outside the scope of this report. The focus in the following is on national policies and legislation where the measure directly addresses the *performance of the service* and where the *main objective* is the protection of the health and physical safety of the consumer.

23. There is no coherent or typical *overall approach* in this area in the Member States. Half of the Member States have established "safety of services" as a specific policy area, whilst the others deal with safety of services on an ad hoc basis or in connection with other policies. Three different national approaches can be identified. There are Member States with horizontal legislation on the safety of services supplementing sector-specific measures. This group includes Finland, France, Portugal, Spain and Sweden. Ireland and the United Kingdom have an extended scope for their horizontal legislation on safety at work with a view to covering also safety of consumers as a supplement to their sectoral policies and legislation. The remaining Member States have sector policies and legislation in place but no overarching, general structure.

24. The Member States that have adopted *general legislation* have chosen different legal frameworks and different legislative techniques. Finland and Sweden have integrated safety of services in their legislation on product safety. Hence, the general requirements for consumer services are more or less parallel to those for products. Authorities have the necessary competencies to monitor, control and take action against unsafe services. France, Portugal and Spain have chosen to include provisions regarding services in their general consumer legislation. As an example, Spain has a provision in its general Law for the Protection of Consumers and Users, which states that service providers shall only put safe services on the market. In the United Kingdom, the Health and Safety at Work Act makes it clear that the objective is to protect also the general public, including consumers, against the risks to health and safety arising from the activities of persons at work. The legislation includes provisions on the obligation to secure safety at premises made available to the general public, including premises where consumer services are offered. Ireland has a similar concept in place.

25. All Member States have adopted significant *sectoral legislation*. In addition to legislation on transport services, which to a large extent implements international and Community law, the legislation relates mainly to four sectors: health, accommodation largely related to tourism, sports and leisure and services of general interest such as installation of gas and electricity. Some Member States have also specifically targeted repair services, installation of products as well as personal services like hairdressers, suncentres etc.

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[28] This part of the report is supported by a Commission Staff working paper {SEC(2003)625} providing for a factual summary of Member States' policies and legislation on safety of services

26. In the *health sector* all Member States have focused on legislation regarding qualifications of medical staff. In addition, there are significant regulations on the performance of health services and on the physical premises, including design, construction, maintenance and operation. In general terms, the health area is an area with significant legal obligations for the service providers with the main purpose to protect patients. It is noted that the clinical part of health services, in particular medical misadventure, is followed up by different institutions and authorities than those in charge of non-clinical issues, including safety of premises, design of floors to avoid slipping and falling etc.

27. *Accommodation services* are regulated in all Member States, mainly in connection with design and construction of buildings and mandatory safety equipment typically in relation to fire. The regulations vary significantly, not only nationally, but also regionally and locally according to local needs and specificity.

28. *Sports and leisure services* include a wide variety of activities ranging from pop concerts and discotheques to playgrounds, diving courses and skiing centres. The sector is increasingly being regulated by Member States, mainly on an ad-hoc basis according to concrete incidents or indications of higher than acceptable risks. A significant part of the legislation focuses on premises and buildings used for such services. In Sweden, for example, the legislation on technical requirements for buildings also covers development of ski centres and sport grounds. In addition, some Member States have introduced requirements for the service providers with regard to qualifications of staff or the performance of the service itself. In Denmark, for example, pyrotechnic operators must obtain an authorisation, whilst the legislation on public entertainment facilities provides for rules on training of staff and supervision of services, such as shooting ranges and slides.

29. *Certain services of general interest*, such as installation of gas and electricity have a significant risk potential, and are heavily regulated in all Member States. The regulation focuses on the qualification of the service provider, but also to some extent on the actual performance of the service. Waste services, waste water and the supply of water is also regulated, but mainly with the aim of reducing risks to public health and environmental risks, not primarily protecting the physical safety of consumers. For example, national regulation on incineration of waste, based on Community legislation, is aimed at reducing emissions of hazardous substances.

30. *Repair services, rental services and services relating to the installation of products* are services that are closely linked with product safety, but still the safety of the service is regulated specifically by certain Member States. In addition, *personal services* such as hairdressing and solariums have also been subject to specific regulation in a few Member States.

31. When looking into the concrete requirements of Member States for the various consumer services, some *key provisions* of a general nature can be identified both in horizontal and in sector-specific legislation.

32. First, there are examples of an *obligation to provide "safe services"*. In Finnish, French, Portuguese, Spanish and Swedish legislation there are general legal provisions that require service providers to market only "safe services". Different definitions and criteria on what is considered to be a "safe" service support this obligation. Moreover, in areas of particular interest regulations are adopted in order

to specify this general requirement. Other safety obligations exist in sectoral legislation. The direct application of such general safety obligations seems to be very limited in practice in cases where there is no standard or clear point of reference.

33. Second, there are provisions, which oblige the service provider to introduce *safety management procedures* within business operations. Usually such provisions include obligations to identify and assess risks, to take reasonable measures in order to prevent damages to health and safety, to establish internal control systems to ensure systematic and safe organisation of the activities and to establish emergency procedures. In order to avoid disproportionate obligations for SMEs it is usually foreseen that internal control be adapted to the nature, activities, risks and size of the enterprise to the extent required to comply with requirements set out in safety legislation. In France, for example, in the regulations regarding public playgrounds, the responsible person is obliged to keep up-to-date the maintenance plan of the playground and records of the work carried out. The documents must be available to the authorities upon request. In the United Kingdom a general regulation obliges all service providers to conduct a risk assessment. Businesses with less than five employees are subject to less formal requirements than larger operators. Norway has a similar concept called "internal control" regulations.

34. Third, it is a common feature, at least in sectoral legislation, that service providers are obliged to *inform consumers* about serious risks connected with the service provided or to request information about consumers' abilities and experiences. One example is the regional legislation in Austria on mountain guides, which stipulates that the guide must inform and be informed about possible risk factors. In the Finnish general legislation, the obligation follows somewhat indirectly from paragraph 4 of the Act, where it is stipulated that a service is deemed to be unsafe and therefore prohibited if "…any untrue, misleading or inadequate information supplied in respect of the service can produce an injury, poisoning, illness or any other hazard to health". Thus there is an indirect obligation to provide adequate and sufficient information on risks. In addition, the Finnish Supervisory Authority *may* require the operator to inform the consumer of particular risks associated with a service. This option has never been used in practice, because the Finnish Consumer Authorities in concrete cases have chosen to inform consumers directly through the media etc.

35. Fourth, provisions on competencies for public authorities to *conduct market surveillance and control service providers* is an essential part of general as well as sectoral legislation. Competencies for the monitoring of consumer services is usually carried out in close connection with the monitoring of product safety and/or safety at work, either by consumer authorities or authorities responsible for safety at work. Finland, for example, has placed the competence in the Finnish Consumer Agency, whilst the United Kingdom has competencies within the Health and Safety Commission (HSC) and the Health and Safety Executive (HSE). The general competencies are to a large degree delegated to regional and local levels, and they are subsidiary to the competencies of sectoral authorities. In the United Kingdom, the HSE seeks to agree demarcation lines based on an assessment of expertise, economy, efficiency and suitability. On this basis fire safety is left to the fire safety authorities, most transport issues to the relevant transport authorities etc. The competent authorities usually have a wide range of measures available to them based on results of monitoring and inspections. In France and in Finland for example the competent authorities may order the service-provider to take measures to address the risk posed or they can prohibit the provision of the service temporarily or permanently. Fines

and criminal proceedings are considered in serious cases. In some instances the competent authorities also have the possibility of introducing pre-licensing requirements for certain services that involve significant risks. Member States with no general legislation or policy rely exclusively on sectoral authorities to control service providers.

36. Fifth, some key sectors such as transport and health services have a sophisticated system for *notification* of accidents and incidents with the aim of informing public authorities, limiting the damage of unsafe services and monitoring risk. Finland has introduced general notification requirements for service providers where a non-acceptable hazard is discovered and measures have been taken by the service provider.

37. In addition to the legislative measures taken in all Member States, in some cases *voluntary or non-regulatory measures* have been introduced, typically in the form of codes of conduct, guidelines, best practices and voluntary standards. In general with the exception of Finland, the development of such measures is done on an ad-hoc basis, although it seems that the sports and leisure sector is the main target area. Examples include standards for ski-rental services in France, pop-concerts and sport arenas in Ireland, equestrian centres in the Netherlands and diving courses in Sweden. In most instances service providers develop the codes of practice in co-operation with public authorities and/or consumer organisations. In Ireland and the United Kingdom some sectors with a significant risk potential, like the health sector and installation of gas are covered by non-regulatory measures, but this approach is being re-assessed at present.

Finland has a more systematic scheme for development of guidelines under its mandatory horizontal legislation. Guidelines are developed for key services by public authorities in close co-operation with service providers based on results from market surveillance, complaints etc.

38. From the above description it can be *concluded* that consumer services with a significant risk potential, such as passenger transport, health services and installation of gas and electricity have been extensively regulated and are monitored according to local, regional and national priorities and resources in all Member States. For other consumer services, typically in the sports and leisure sector, the approach varies more. Some countries have focused on sectoral initiatives with a different mix of regulatory and non-regulatory measures, whilst others have included additional horizontal provisions in their legislation as a "safety net" and a basis for responses to new emerging risks. However, there is no evidence at this stage that the differences in the policy and regulatory approaches of the Member States must necessarily imply significant differences in the level of consumer protection, even though many consumers seem to have a lack of confidence about the safety of products and services in Member States other than their own[29]. Administrative capacity and priorities with regard to resources used for market surveillance and follow up of service providers seem to be more crucial for the actual safety levels. There is also a general problem of lack of knowledge and transparency as regards applicable regulation in other Member States. Both consumers and service providers have highlighted the lack of information about existing rules and their application in

[29] Gallup Europe, "study on consumers", January 2002 and Eurobarometer survey EB 57.2/175

different Member States[30] as one of the obstacles to the creation of the internal market for services.

Factual situation of service safety in the Community

39. The tragic canyoning adventure tour in Interlaken, Switzerland in July 1999, where 19 people drowned in a heavy flooded river, the fire at a discotheque in Gothenburg, Sweden on 29 October 1998 where 90 people died and the tragedy at the Roskilde Rock festival in Denmark, 29 June 2000, where nine people died after panic at a crowded rock concert scene are among the well documented examples of recent cases where safety of services has been an issue. Several passenger transport accidents could be added. However, more *systematic* information and statistics regarding the factual situation on safety of services in the Community is hardly available, apart from the transport sector. Accident data that have been collected through the European Home and Leisure Accident Surveillance System (EHLASS), and through projects under the Injury Prevention Programme (IPP) are accessible in the database called Injury Surveillance System (ISS)). However, in the same way as data from EUROSTAT, national public authorities, European consumer organisations, European Insurance companies, academic institutions and some business organisations they are not capable of providing data for a systematic assessment of the safety of the most relevant service sectors.

40. The EHLASS data in the ISS database do not identify accidents caused by consumer services as a separate category. The limited description of the cause of the accident provided does not allow the identification of the precise cause of the accident. Of the approximately 26 million accidents reported in 1998, excluding road transport and occupational safety, a significant part are home accidents. Many of the remaining number occur when the injured persons are acting on their own initiative. Finally, many accidents are related to consumer products. There are no means available for estimating the share of accidents related to consumer services, although one might expect the share to be significant.

41. At national level, the United Kingdom, through the Health and Safety Executive, has one of the most advanced systems for collection of accident data in the European Union[31]. However, the statistics do not distinguish between accidents occurring to consumers and accidents occurring to bystanders. Of the total of 19,591 non-fatal injuries registered in 2000/2001 in the services industry a significant number would be injuries to bystanders. Again, a number of these accidents could have occurred when the consumer was acting on her/his own initiative and not as a recipient of a service provided by a third party or when a product rather than the service itself were the cause of injuries. Thus this data cannot be used as a basis of an extrapolation to European level.

42. The United Kingdom statistics also contain information on *fatalities*. In 2000/2001 the total number of fatal injuries to members of the public, both bystanders and consumers, caused by work in the United Kingdom was 445. However, 333 of these were related to transport, of which 298 were trespassers and suicides on transport systems, mainly rail. Of the remaining 112 fatalities 92 occurred in « the service

30 COM(2002)441 final, op. cit.

31 Health and safety statistics 2000/01, Health and Safety Commission

industries »[32] This group includes the categories « hotels and restaurants », « education », « health and social work » (42 fatalities) and « other community, social and personal service activities » (26 fatalities). It is difficult to estimate the "consumer" share of this, and impossible to analyse the share of injuries caused by consumer products. In addition, several of the fatalities are likely to have been caused by persons acting on their own initiative or where the connection with a service is remote.

43. Turning to sector-specific statistics, for the *transport* sector[33], the rate of fatalities per billion passenger kilometer (pkm) was 0.3 for buses and coaches, compared to 6.7 for passenger cars in 1999, mainly non-service related, except for taxis etc. The total number of road *fatalities* was 42,122, of which 24,599 were related to passenger cars. The total railway passenger fatalities was 16 in 1998 whilst the number of airline passenger fatalities in the EU territory was 52 in 1999, leading to a rate of fatalities per billion pkm of 0.7 and 0.1 respectively. 74 lives were lost in 1999 on passenger ships world-wide. Some of these figures vary significantly from year to year following single, large accidents. The number of accidents with *personal injury* in road traffic in 1999 was 1.3 million. Again it must be noted that a significant part of this is not connected to services, but to people driving their own car. In conclusion, statistics in the transport sector are well developed and sufficiently detailed to indicate risk rates and to make policy decisions in the context of the common transport policy.

44. In the *health* sector specific aggregate European statistics are not available, but in the ISS database there is an entry on non-fatal accidental injuries in "medical/socio-medical/health institutions". It indicates approximately 100,000 accidents per year in the EU. Few of these accidents are likely to be linked to consumer products, to involve bystanders or to be linked to people acting on their own initiative. The statistics are, nevertheless, not sufficiently detailed to determine the risk level in terms of accidents per patient hour, for example. In addition to ISS/EHLASS, several countries register all incidents in health institutions according to national legal obligations, so that the statistical basis is solid in this area.

45. Similarly, there is no specific aggregated information at Community or at national level in the *sports and leisure* sector. In the ISS database, entries include accidents in "sports area", "leisure area" and "natural area". In total they indicate 6 million accidents per year, of which a significant part must be assumed to occur outside of a "service" situation, i.e. where the consumer himself initiates the activity. There is no simple means to draw a clear line between situations where the service is the major cause of the accident and where the consumer himself causes the accident. Normally accidents are caused by a mix of factors. For example, an accident to a child at a fairground could be caused partly by lack of parental supervision, flaws to the equipment and lack of training of staff.

46. Accidents in connection with some specific sports and leisure services with particular risks have been investigated at national level in the context of studies or ad hoc initiatives. In 1999 the French authorities[34] made an assessment of risks and

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32 ibid, p. 47

33 EU energy and transport in figures 2001, Directorate-General for Energy and Transport in co-operation with Eurostat

34 Commission de la sécurité des consommateurs (CEC); opinion dated 11 April 2001

accidents in *equestrian centres*. They noted that "it has not been possible to obtain precise and exhaustive accident figures". However, based on emergency room statistics, data from voluntary organisations and insurance businesses they estimated that between 500 and 2,000 horse riding accidents with non-fatal injuries happened per year in France[35]. More than half of these were in equestrian centres, whilst the rest were connected with riding in natural surroundings, where the service element is less obvious. At least one or two fatal accidents were registered per year. No risk rate in terms of risk of accident per hour riding was estimated. Dutch, Austrian and US figures seem to indicate up to 100,000 accidents per year for a population the size of the EU. Thus it does not seem possible to extrapolate the French figures with any accuracy at Community level.

47. Accidents and fatalities in *skiing* areas are well documented in Austria, Sweden, France and other countries. In Austria[36] an average of 90 000 injuries and 30 fatalities were recorded per season. For France 45,000 injuries and 41 deaths were recorded on the slopes during the skiing season from 1 December 2000 to 31 May 2001[37]. Again the connection with the provision of a consumer service cannot be firmly established due to the lack of precise information. Although the skiing centres with their lifts, marked trails etc are to be seen as services, accidents are often caused by skiers themselves overestimating their own abilities, not by lack of warnings, signs etc. No risk rate in terms of risk of accident per hour skiing has been produced from the statistics.

48. Attempts have been made to analyse accidents in "new" high risk *adventure sports* offered to consumers, such as diving, climbing, bungee-jumping, hang-gliding, kayaking, canoeing and white-water rafting. Although the number of fatalities and non-fatal incidents is quite limited in absolute terms, a British study conducted by the University of Lancaster[38] found that the risk of a fatality when climbing, canoeing and hang-gliding was much higher than the risk of a traffic fatality. The risk level seems mainly influenced by the behaviour of people pursuing these activities on their own, not necessarily in connection with a service. National statistics indicate that most diving accidents happen in connection with private diving. No overall risk rate has been estimated for diving courses.

49. In the Netherlands statistics exist for accidents in *swimming pools and waterslides*[39]. Between 1987 to 1996 there were about 9000 accidents per year in swimming pools, including slides. Approximately seven drowning fatalities occur per year. The overall number of accidents has been reduced to 7,100 in 1998, whilst the number of accidents in water slides has been stable around 1,000 per year. No risk rate has been established.

50. Other examples of ad-hoc statistical data include Belgian and Danish authorities' statistics on accidents and fatalities at playgrounds and in fun parks, Irish authorities' information on accidents in connection with gas installations, United Kingdom

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35 ibid, p. 3-6

36 Presentation by Dr. Rupert Kisser, Austrian Alpine Forum, 15 April 1999 and at Montreal Safety Seminar, May 2002

37 Campagne national de prévention des accidents de ski et de snowboard, 2001-2002

38 Quoted by Mr van Woudenberg at 3rd European Convention on Promotion of Safety and Injury Prevention, Vienna, 15-16 March 2001

39 Consumer Safety Institute, CISE, N° 4, December 1999

authorities' statistics on fire safety in hotels, and French and Swedish statistics on accidents in sun-centres. In the same way as for the other sources mentioned, these data are not directly applicable for assessing risks in connection with consumer services.

51. The investigations and consultations carried out by the Commission as well as the outcome of a recent study[40] suggests that the perceived overall higher risk to non-nationals than to nationals in the service sector is largely unfound.

52. It results from the above that there is little systematic factual information on service safety, apart from transport and health services. The reporting structures in place are poor and few attempts have been made to streamline and utilise statistics on service-related consumer risks in national policy making. Structural problems in existing data collection schemes prevent any substantial improvement of the situation. For example, it is difficult to define the exact borderline between product and service related risks and accidents. In addition, many of the incidents registered do not distinguish between situations where the consumer is operating on his/her own initiative and where there is a service provider involved. Finally, many accident statistics do not distinguish between consumers and other members of the general public. All these problems make it impossible to interpret such data as does exist with any certainty. It is, therefore, not possible to assess risks associated with the various services, to compare risk levels in different countries, to monitor risk over time or to identify in a documented way possible weaknesses and gaps in the risk prevention and management systems in place in Member States. Moreover, any risk assessment should also include a qualitative and quantitative characterisation of the probability, frequency and severity of the known health and safety effects. Here too, figures on the frequency of use of services or the numbers of consumers are also missing. The few data available can, thus, only give a very general, imprecise idea of the level of the risk.

Possible options for Community action

53. On the basis of a preliminary identification of the gaps and weaknesses in the existing situation, a number of possible options for Community action on safety of services were identified. These were submitted for consultation to stakeholders and public authorities. Interested parties showed great interest in the issue of service safety and provided detailed comments, which are summarised below.

54. Taking account of the existing knowledge gap a first, obvious option concerned Community action to collect data on services related accidents and injuries. In addition, such action would be fully in line with the Commission's strategy for consumer policy[41], which highlights the need to back consumer policy by relevant information and data in order to adjust policies and prioritise in the most appropriate ways. The consultation showed broad support for action aimed at improving the knowledge base, provided that it would be organised in a cost-effective manner and that the important methodological problems could be solved. Stakeholders felt that it

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40 Planistat in association with Consumer Risk Limited and Middlesex University, December 2000, Study of the needs and scope for Community action in the field of services safety and liability

41 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on Consumer Policy Strategy, COM(2002) 208 final; OJ C 137, 08.06.2002, p. 137

should focus on a limited number of priority sectors and build upon existing experiences and instruments for data collection. In particular, it would be necessary to ensure co-ordination with the New Public Health Programme that will incorporate experiences and information gathered under EHLASS and IPP.

55. A second option related to the development and promotion of non-regulatory measures, such as best practices for service providers or professional categories and European voluntary standards would contribute to enhanced service safety for consumers through better information on the safety levels that they can expect and improved practices by service providers. The investigations undertaken have shown that there are such measures in place in the service area that are not well co-ordinated. The consultation showed broad support for the development and promotion of non-regulatory measures, either as a stand-alone self-regulatory instrument or as a flexible supplement to a legally binding framework. However, there is concern, in particular on the consumer-side, about the lack of enforcement powers for this type of soft law and the absence of sanctions in case of non-compliance.

56. A third option concerned the establishment at EU level of a scheme for certification of safety management systems, which would require common criteria against which compliance can be certified by an accredited certification organism. The consultation showed some support for such a scheme. It was stressed that the scheme should build upon existing national or international standards rather than introducing new criteria. There was, however, a general feeling that the attractiveness of the scheme for businesses would be limited, since safety issues seem more difficult to be used as a competitive tool than, for example, environmental ones.

57. Possible more far-reaching *harmonisation* measures were also part of the consultation process, in particular the introduction of legally binding safety requirements for service providers as well as the obligatory establishment of monitoring and market surveillance activities to be carried out by public authorities. The exact improvement of legally binding safety requirements would largely depend on the existence of European standards or other more precise common safety specifications for specific services.

The consultation showed a clear divergence of opinion on such requirements. Consumers preferred this type of legally binding measure as it offers legal certainty by providing the generic framework for preventive action. However, consumer associations highlighted a general problem of effective enforcement of legally binding safety provisions and a need for adequate sanctions in case of non-compliance with legal requirements. Businesses expressed doubts about the added value of such a measure. Member States expressed different preliminary observations, but the majority did not at this stage see a need or possibility to adopt such measures. On the obligatory establishment of market surveillance activities only a few consulted parties took position. Some interest was expressed in exchange of good practices. Most considered this action as a question of resources at national and local level and not as a matter for legislation.

From a legal point of view harmonisation measures would have to rely on Article 95 of the Treaty, which provides a legal basis for harmonisation measures related to the establishment of the internal market. In line with the relevant case law, the use of this Article would require an assessment of the actual or potential barriers to trade and

distortions of competition motivating Community action. This would again require knowledge about the cross border demand and supply of the most relevant consumer services and about the potential impact of proposed legislation both with regard to safety levels and with regard to harmonised safety requirements. However, there is currently no evidence about distortions of competition or barriers to trade caused by different national legislation. In addition, at this stage evidence is also missing to justify harmonisation measures related to safety of services under the general principles of Community law, in particular subsidiarity and proportionality. Therefore, it is impossible to draw conclusions on the need for legislative action aimed at *harmonising* safety requirements applied at national level in specific service sectors at this stage.

Priority sectors

58. Although transport and health services as well as services with limited or no risk to consumer health and physical safety like financial or electronic communication services are excluded from this report, a significant number of different types of consumer services are relevant. When designing Community policy it will be essential to *concentrate on some priority consumer services* in order to gain experience and to ensure that action is focused. Ideally, the focus should be on services with a documented significant risk for consumers and with a significant cross border dimension. However, the current knowledge gap both in terms of risk assessment and cross-border impact makes it impossible to establish a prioritisation based on firm evidence. Thus, instead of a quantitative approach, more *qualitative criteria* were used to tentatively identify priority sectors and services at this stage. These criteria included for instance the type and seriousness of potential risk, the cross border dimension, and the relevance for consumers with particular needs. Priorities of the Member States and stakeholders were also taken into account.

59. Based on these criteria, *services related to tourism*, especially those related to mass accommodation, in particular hotels, camping and caravaning, and *sports and leisure services*, in particular playgrounds, fairgrounds and amusement parks, swimming pools and other water sport services, riding schools, skiing an "new" adventure sports like bungee jumping and white water rafting, could be identified as priority sectors. Both sectors and the related services involve risks of fatalities and severe injuries, there is a clear cross border dimension, they often involve children and sometimes elderly, they are provided throughout the Community and they are considered to be a priority by Member States, consumer organisations and service providers. It is noted that the two sectors are often inter-linked as tourism increasingly involves organised sports and leisure activities.

3. POLICY CONCLUSIONS TO BE DRAWN FROM THE REGULATORY AND FACTUAL SITUATION ON THE SAFETY OF SERVICES IN THE EU

Conclusions to be drawn from the regulatory situation

60. At Community level there is currently no specific legislation to address the safety of services, except for Community measures directly regulating the safety of the various modes of transport as part of the common transport policy enshrined in Article 71 of the Treaty. However, Community legislation in other policy areas can have a beneficial side-effect on the safety of services. Measures on the mutual recognition

of certain professional qualifications aimed at facilitating provision of professional services throughout the Community, or those on the quality of bathing waters taken under the Community environmental policy, which contribute to the safety of tourism, are good examples. Moreover, Community legislation harmonising the technical rules for certain professional products and equipment is very relevant for the safety of the services in which such products are used. In the specific case of fire safety in hotels, Council Recommendation 86/666/EEC on a minimum level of fire safety in Community hotels was adopted in 1986. The safety of services will continue to benefit indirectly from the provisions in other areas of common policies.

61. All the Member States have legal, administrative and technical measures in place in the area of service safety. The approaches are different and involve a wide variety of measures, with no single model prevailing. Consumer associations have drawn attention to a general problem of enforcement of consumer safety provisions and a lack of adequate sanctions in case of non-compliance by service-providers with legal requirements. Nevertheless, due to the variety of sectors involved and the differences in the national approaches it is not possible at this stage to identify specific gaps in the regulatory, control and enforcement systems. It is equally impossible to determine whether the actual level of protection in the various Member States differs in any significant way. Consumer associations and service providers have highlighted the lack of information about existing rules and their application in different Member States as an obstacle to increased consumer confidence in the internal market for services. However, it has so far not been possible to identify evidence of barriers to trade or distortions deriving from the different requirements in the Member states. This would make it difficult to justify at this stage substantive Community action that would aim at harmonising Member States' service related safety rules.

Conclusions to be drawn from the factual situation

62. The analysis of the factual situation has shown that there is little systematic information on service safety. This can be partly explained by poor reporting structures and by the low priority given to the use of accidents and incidents statistics as a basis for policy-making in the area of service safety.

Therefore, improving the knowledge base on service safety is identified as a clear priority for Community action. The consultation itself confirmed that there is broad support for this, provided that it can be organised in a cost-effective manner and that the methodological challenges can be overcome. Focusing on a limited number of priority sectors or services, in particular services related to tourism and sports and leisure services, and building upon existing experiences and instruments for data collection can help to meet these conditions.

63. The improvement of the knowledge base is in itself a substantial objective since it requires all Member States to adopt a more systematic approach towards monitoring service safety in the most important sectors. The collection and assessment of the relevant data involves methodological and organisational issues that require careful examination in order to identify practical and cost-effective solutions. Clearly, this is an area where action at Community level might bring substantial benefits, provided that an appropriate approach is developed. When developing this approach due consideration should be given to the difficulties for small and medium sized enterprises to undertake additional administrative or cost burdens. This is particularly

relevant for individual tourism enterprises, 95% of which are small or micro sized entities.

64. Therefore, Community action on the safety of consumer services should, at this stage, focus on (a) improving available knowledge about risks and accident data and (b) on monitoring systematically the policies and measures of the Member States.

65. Experience to date shows that the work of data collection and of monitoring will not be conducted systematically and uniformly across the EU without a formal framework for the exercise. The enlargement of the EU can only reinforce this need.

Aims and contents of the proposed legislative framework

66. In the light of the above it is proposed to introduce a legislative framework which would establish procedures aimed at ensuring a systematic and consistent collection and assessment of data and information on service related accidents and injuries. The type of information expected from the data collection system would be determined by policy-making objectives that would be set out in the legislative framework. For reasons of cost effectiveness it would be appropriate to focus on the priority sectors and related services identified in this report, namely services related to tourism and sports and leisure services

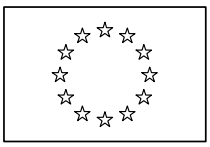
67. Given the wide variety of measures currently applied by Member States to enhance safety of services, it would be mutually beneficial to be better informed about relevant service safety legislation and policies. Therefore, the legislative framework would also establish procedures for administrative co-operation between Member States authorities in order to systematically exchange information on policy and regulatory developments and the results achieved. This would be important for the identification of specific gaps in the regulatory, control and enforcement systems. This is particularly relevant since consumers and service providers have highlighted the lack of information about existing rules and their application in different Member States as one of the obstacles to the creation of the internal market for services. It is obvious that the procedures for the exchange of information should be conceived in such a way as to avoid any overlapping of relevant existing or forthcoming Community legislation laying down procedures for the provision of information in the field of technical standards and regulations related to services.

68. The framework could also provide for procedures aimed at setting and using European standards. The better knowledge base on service safety would indeed allow for the identification of specific sectors and risks where community standards may be necessary for supporting national policies and measures on safety of services for consumers.

69. The precise contents of the legislative framework will be designed in the light of careful cost-benefit analysis, pilot projects, surveys and further work to be carried out in close co-operation with Member States. The objective will be to define the optimal scope and methods for the monitoring and data collection, to ensure the added value of Community action in a cost-effective manner. It is obvious that the legislative initiatives envisaged in the context of the internal market for services should also be given due consideration when designing the legislative framework.

70. In the longer term the Commission would be in a better position to assess the possible need for more far-reaching Community legislation in the light of the evidence that has become available as a result of the implementation of the legislative framework. These longer-term legislative initiatives will require an analysis of the appropriate legal basis and of the economic impact. Recourse to Article 95 of the Treaty will, in particular, require an assessment of the actual and potential barriers to trade and distortions of competition resulting from diverging national regulation governing safety of services. Possible Community harmonisation measures related to safety of services would have to remain in line with initiatives developed within the framework of the internal market strategy for services.

71. In the meantime the Commission will also continue its assessment of the liability systems in the Member States. The outcome of this assessment will contribute to the identification of possible gaps in the national liability systems. It should make it possible to determine whether a new Community initiative in this area would be useful and justified.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.10.2004
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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

European Contract Law and the revision of the *acquis*: the way forward

1. INTRODUCTION

This Communication sets out the Commission's follow-up to the 2003 Action Plan[1], in the light of the reactions from EU institutions, Member States and stakeholders. It outlines how the Common Frame of Reference (CFR) will be developed to improve the coherence of the existing and future *acquis*, and sets out specific plans for the parts of the *acquis* relevant to consumer protection, in line with the Consumer Policy Strategy 2002-2006. It also describes planned activities concerning the promotion of EU-wide standard contract terms and intends to continue the reflection on the opportuneness of an optional instrument.

The European Parliament (EP)[2] and the Council[3] adopted resolutions welcoming the Action Plan in which they underlined the need to involve all interested parties, in particular in the elaboration of the CFR. The EP called for the CFR to be completed by the end of 2006 and speedily introduced. The Council also recognised the usefulness of EU-wide general contract terms developed by contractual parties within the respect of Community and national provisions. Finally, these institutions called on the Commission to pursue further reflection on an optional instrument.

To date, 122 contributions to the consultation were received. The Commission, with the consent of the authors, published their contributions and a summary thereof [4].In order to ensure stakeholders involvement, two workshops on contract law were organised in June 2003[5]. Another workshop on standard terms and conditions was organised in January 2004[6]. In addition a joint Commission and EP conference took place in April 2004[7].

2. THE WAY FORWARD

2.1 Improving the present and future *acquis* (Measure I of the Action Plan)

Contributors to the Action Plan supported the need to improve the quality and consistency of the *acquis* in the area of contract law and emphasised that the CFR could contribute to that goal. In the light of this significant support the Commission will pursue the elaboration of the CFR.

2.1.1 The main role of the CFR

The Action Plan identified different categories of problems of the *acquis.* The main ones were:

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1 All the documents concerning European contract law are available on the Commission's website: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.
2 See footnote 1.
3 See footnote 1.
4 See footnote 1.
5 See footnote 1.
6 http://europa.eu.int/comm/internal_market/contractlaw/2004workshop_en.htm.
7 See footnote 1.

- Use of abstract legal terms in directives which are either not defined or too broadly defined

- Areas where the application of directives does not solve the problems in practice

- Differences between national implementing laws deriving from the use of minimum harmonisation in consumer protection directives

- Inconsistencies in EC contract law legislation

First a policy choice must be made on the need to modify the existing directives in order to address these problems. If so, the Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law. At the same time, it will serve the purpose of simplifying the acquis[8]. The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States' legal orders.

Example: Review of the consumer *acquis*

The Commission's key goals remain to enhance consumer and business confidence in the internal market through a high common level of consumer protection and the elimination of internal market barriers and regulatory simplification[9]. Eight consumer directives[10] will be reviewed to identify whether they achieve these goals, in particular in the light of the 'minimum harmonisation' clauses they contain.

The review will evaluate to what extent the current directives, as a whole and individually, have in practice met the Commission's consumer protection and internal market goals. That implies looking not only at the directives themselves but the way they are applied and the markets within which they operate (i.e. national transposing laws; jurisprudence; self-regulation; enforcement; levels of compliance in practice; and developments in business practice, technology and consumer expectations).

In particular the review will examine the following questions:

- Is the level of consumer protection required by the directives high enough to ensure consumer confidence?

[8] This initiative is included in the scope of the Commission Communication on "Updating and simplifying the Community *acquis*" (COM(2003) 71) and aims at achieving legislative simplification.

[9] OJ C 137, 8.6.2002, p. 2.

[10] Directives 85/577, 90/314, 93/13, 94/47, 97/7, 98/6; 98/27, 99/44.

- Is the level of harmonisation sufficient to eliminate internal market barriers and distortions of competition for business and consumers?
- Does the level of regulation keep burdens on business to a minimum and facilitate competition?
- Are the directives applied effectively?
- As a whole, are there any significant gaps, inconsistencies or overlaps between the eight directives?
- Which of the directives should be given the highest priority for reform?

Certain specific questions also arise:

- Is the scope of the directives correct? Are the pre-contractual information requirements appropriate?
- Should the duration and modalities of the withdrawal periods in the directives on doorstep selling, timeshare and distance selling be both fully harmonised and standardised between the directives?
- Does consumer contract law need to be further harmonised?
- Is there scope for merging some of the directives to reduce inconsistencies between them?

In order to review the consumer *acquis*, a number of actions are planned:

- Development of a public database of the *acquis*, including national legislation and jurisprudence. This project will also provide a comparative analysis of the implementation of the directives in practice.
- Establishment of a standing working group of Member States' experts to act as a forum for information exchange and debate on the implementation of the *acquis*.
- Implementation reports on the directives on price indication, distance selling, sales of consumer goods and injunctions. The reports will also consult stakeholders and be followed up with appropriate seminars.

In the light of the completion of the project and the reports, the Commission will consider the necessity for proposals to amend the existing directives. This diagnostic phase is expected to be completed by end 2006. Any proposals will take into account work on the draft CFR, as appropriate, and will be accompanied by the appropriate regulatory impact assessments.

It would also be desirable that the Council and the EP could use the CFR when tabling amendments to Commission proposals. Such use of the CFR would be consistent with the shared goal of achieving high quality EU legislation[11] and the commitment of the European institutions to promote simplicity, clarity and consistency of the EU legislation[12].

2.1.2 Other possible roles of the CFR

National legislators could use the CFR when transposing EU directives in the area of contract law into national legislation. They could also draw on the CFR when enacting legislation on areas of contract law which are not regulated at Community level.

Another role, suggested by the EP, is the possible use of the CFR in arbitration. Arbitrators would have the possibility to refer to the CFR to find unbiased and balanced solutions to resolve conflicts arising between contractual parties.

The CFR can also play a role in developing the other measures identified in the Action Plan. The EP, for example, indicated that the CFR could be developed into a body of standard contract terms to be made available to legal practitioners. The Commission agrees that it would be desirable to use the CFR as extensively as possible in the realisation of Measure II of the Action Plan. Moreover, the CFR would be likely to serve as the basis for the development of a possible optional instrument.

The Commission is also considering the suggestion that it could integrate the CFR in the contracts concluded with its contractors. The CFR could still be used in addition to the applicable national law. The Commission would also encourage other institutions and bodies to use the CFR when concluding contracts with third parties.

Finally the CFR, based on the EC *acquis* and on best solutions identified as common to Member States contract laws, could inspire the European Court of Justice when interpreting the *acquis* on contract law.

2.1.3 Legal nature of the CFR

Several contributors to the Action Plan raised the question of the legal nature of the CFR. The proposed ideas range from a binding legal act adopted by the Council and the EP, to a non-binding instrument adopted by the Commission.

The Commission considers at this stage that the CFR would be a non-binding instrument. However, the Commission will consult extensively all interested parties when elaborating the CFR. In that context this question might be raised again.

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11 Action Plan "Simplifying and improving the regulatory environment" (COM(2002) 278).

12 Interinstitutional Agreement on Better Lawmaking, (OJ 2003/C 321/01).

2.2 Promoting the use of EU-wide standard terms and conditions (Measure II of the Action Plan)

2.2.1 The Commission's suggestions in the Action Plan

The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU-wide use rather than just in a single legal order. Currently parties often think they have to use different sets of STC, due to the existence of differing mandatory requirements in Member states' laws, either in contract laws or in other areas of the law (e.g. tort law differences may appear to require different contract terms on liability issues). However, there are a number of examples of EU-wide STC being used successfully, which cover issues which typically need to be dealt with in other contracts as well.

Acceptable EU-wide solutions are therefore likely to be also available in other cases where single-country STC are currently being used. There appears to be a lack of awareness of the availability of such EU-wide solutions, so the Action Plan suggested a comprehensive initiative to increase awareness of the existing possibilities.

2.2.2 The reactions from stakeholders and others

Some respondents welcomed the suggested approach, but others were sceptical of the Commission's involvement in this area as they thought that the Commission planned to draw up STC itself. This is certainly not the Commission's intention: the content of STC is for market participants to determine and the decision whether to use STC is also one for economic operators. The Commission only intends to act as a facilitator and an "honest broker", i.e. bringing interested parties together without interfering with the substance.

The issues were further explored at a work-shop on 19 January 2004[13] where the focus was on the use of STC in business to business (B2B) transactions as well as in contracts between the business sector and the government (B2G). Two principal conclusions were reached:

First, there was general agreement that EU-wide STC could be successfully used in a significant number of cases, in spite of the fact that some legal and administrative obstacles remain in certain areas. An inventory of the most egregious obstacles would be drawn up by the Commission with the help of stakeholders.

Second, it was agreed that raising awareness of existing possibilities, in particular by providing structured information about successful examples of EU-wide STC on a Commission-hosted website would be useful.

[13] See footnote 6.

2.2.3 Actions: a website to promote the development and use of EU-wide STC

In the light of all these contributions, the Commission has concluded that there would be benefits from raising awareness of existing possibilities. The Commission will focus on STC regarding B2B and B2G transactions.

In the light of an assessment of these actions, further measures may be proposed and further consideration may be given to extending this work.

2.2.3.1 A platform for the exchange of information on existing and planned EU-wide STC

The Commission will host a website, on which market participants can exchange information about EU-wide STC which they are currently using or plan to develop. The information will be published at the sole responsibility of the parties posting it. Such publication will not constitute any recognition of the legal or commercial validity of those STC. Before proceeding, the Commission will consult interested stakeholders to obtain information about precisely what information users need and what information organisations will be prepared to post on the website.

The information should allow parties to avoid the mistakes and repeat the positive experiences of those who went before. The Commission does not, therefore, intend to define itself a set of "best practices".

2.2.3.2 Guidelines on the relationship between the competition rules and EU-wide STC

The Commission does not intend at this stage to publish separate guidelines relating to the development and use of STC. It has already pointed out that it generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions[14]. Although agreements on the development or use of EU-wide STC will therefore generally be looked upon positively, in certain cases agreements or concerted practices to use STC may be incompatible with the competition rules.

In this regard the Commission draws attention to its "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements"[15], particularly section 6 which lays down guidelines on standardisation agreements. Although they do not specifically apply to agreements on STC, parties may use them to find guidance for avoiding problems when agreeing to use STC.

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14 Commission Notice Nr. 2001/C 3/02, (OJ C3/2 of 6 January 2001) point 169.

15 Ibid.

2.2.3.3 Identifying legislative obstacles to the use of EU-wide STC

The Commission will examine, together with interested parties, whether and if so what legislative obstacles to EU-wide STC exist in the Member states, with a view to eliminating them where needed and appropriate. This could be done through voluntary action by the Member State concerned, infringement procedures by the Commission where the obstacles violate EU law, or other EU action, such as legislative measures, where they do not.

In the first instance the Commission will organise a survey on this following consultation with stakeholders on its content and structure, to ensure that the survey focuses on aspects relevant to market participants.

2.3 A non-sector specific measure - An optional instrument in European contract law (Measure III of the Action Plan)

The Action Plan concluded, *inter alia*, that at this stage there were no indications that the sectoral approach followed thus far leads to problems or that it should be abandoned. It was nevertheless considered appropriate to examine whether non-sector-specific-measures such as an optional instrument may be required to solve problems in the area of European contract law.

The Commission intends to continue this process in parallel with the work on developing the CFR and taking into account the comments received so far from stakeholders about their preferences for the parameters of any such instrument, if the need for it were to arise. The process of developing the CFR and in particular the stakeholder consultation may well provide relevant information in this regard.

The Commission will establish specific opportunities for exchange of information on the opportuneness of such an instrument. Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission's intention to propose a "European civil code" which would harmonise contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions.

A number of parameters for the reflections on the need for an instrument have been determined based on the contributions to the Action Plan and the Commission's own considerations. These include the need to take into account differences between transactions with consumers and those between businesses or with public authorities, the degree to which other solutions, including EU-wide STC already offer satisfactory solutions and the need to respect different legal and administrative cultures in the member states. These parameters will need to be taken into account during the future discussion on the opportuneness of this instrument. Some of these parameters are explained in Annex II.

Moreover, if problems are identified that require solutions at EU level, the Commission would proceed to an extended impact assessment in order to determine the nature and contents of those solutions.

3. PREPARATION AND ELABORATION OF THE COMMON FRAME OF REFERENCE

3.1 Preparation: research and participation of EU institutions, Member States and other stakeholders

3.1.1 Overview

In order to ensure that the CFR is of high quality the Commission will finance three years of research under the Sixth Framework Programme for research and technological development[16]. Proposals for research were evaluated and work is expected to begin soon.

By 2007, the researchers are expected to deliver a final report which will provide all the elements needed for the elaboration of a CFR by the Commission. It shall therefore include a draft CFR which the researchers believe to be fit for the purposes set out in the Action Plan.

3.1.2 Stakeholder participation

Stakeholder participation to the process is essential, as was emphasised by all respondents to the Action Plan.

At the joint EP/Commission conference in April 2004, four key criteria for successful participation were proposed and supported:

- Diversity of legal traditions: account needs to be taken of the range of different legal traditions in the EU;
- Balance of economic interests: account needs to be taken of the interests of a wide range of businesses in diverse economic sectors from SMEs to multi-nationals, as well as consumers and legal practitioners;
- Commitment: stakeholders need to devote real resources to provide ongoing, substantive input;
- Technical expertise: to provide detailed feedback and challenge to the academic researchers.

[16] Decision No 1513/2002/EC (OJ L 232, 29.8.2002, p. 1).

These criteria will be taken into account in establishing the structures outlined below. The structures in the first strand will form part of the agreement between the Commission and the researchers:

First strand: technical input

- The Commission will establish a network of stakeholder experts to make an ongoing, detailed contribution to the researchers' preparatory work.

- Regular workshops on all themes of the research will be organised to enable stakeholders to identify practical issues to be taken into account and give feedback. On each topic, there will be workshops so that stakeholders and the Commission can follow the evolution of the works. Workshops' subjects will be specific and the number of participants to each workshop will be limited in order to ensure efficiency.

- This process will be supported by a dedicated internet site, accessible to researchers, stakeholder experts, the Commission, Member State experts and the EP. Drafts will be updated on this website as the research evolves and in the light of stakeholder comments.

- Once decisions are taken on how to divide the different aspects, it may be helpful to establish guidelines for the operation of the technical strand, to ensure that researchers and stakeholders have a clear and shared understanding of the process. These could include a structure for ensuring overall co-ordination of stakeholder input, such as a steering group involving both members of the academic research and stakeholder experts.

Second strand: political consideration and review

The Commission will:

- Provide regular updates to the EP and to the Council on progress, as they have requested

- Organise regular high level events involving the EP and Member States

- Establish a working group of experts from Member States to ensure that they are informed about progress and have an opportunity for feedback

In addition, the two strands could be brought together periodically into a discussion forum, to allow discussion in a broader context.

3.1.3 Possible structure and content of the CFR

The research preparing the CFR will aim to identify best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments, particularly the UN Convention on Contracts for the International Sale of Goods of 1980. Other existing material will also be relevant and will be taken into account, while ensuring that the CFR fits the EU's specific requirements.

The structure envisaged for the CFR (an example for a possible structure is provided in Annex I) is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles could be required. Secondly, those fundamental principles would be supported by definitions of key concepts. Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR. A distinction between model rules applicable to contracts concluded between businesses or private persons and model rules applicable to contracts concluded between a business and a consumer could be envisaged.

Some respondents identified areas which they argued could be included in the CFR. Many of these relate to general concepts, which are not specific to particular types of contract or contracting parties. The primary criterion for determining which areas are covered should be the usefulness in terms of increasing the coherence of the *acquis.*

However, two types of contracts which were mentioned specifically were consumer and insurance contracts. The Commission expects the preparation of the CFR to pay specific attention to these two areas. Other areas mentioned specifically which the CFR could cover were contracts of sale and services and clauses relating to the retention of title and the transfer of title of goods.

The Commission also took into account a study launched, following the requests from the EP and the Council, to examine whether problems arose from differences in the interaction between contract laws and tort laws, and between contract laws and property laws[17]. In the light of this study, the Commission concluded that there are no appreciable problems arising from differences in the interaction between contract law and tort law in the different Member States. More significant problems appear to arise from the different interactions between contract and property law in Member States. The preparation of the CFR will need to consider how to resolve these problems, as far as necessary for improving the present and future *acquis*.

[17] See footnote 1.

3.2 Elaboration by the Commission of the Common Frame of Reference

3.2.1 Suitability for the objectives of the Action Plan

The Commission is not bound by the researchers' final report and will amend it where necessary to achieve the Action Plan's objectives.

3.2.2 Practicability test

In its evaluation of the researchers' final report the Commission will ensure that the draft CFR is subjected to a practicability test on the basis of concrete examples for the anticipated uses of the CFR.

Firstly this will involve checking that the draft CFR is fit for use in improving the *acquis* and preparing legislation. This could mean using the draft CFR in a proposal to modify an existing directive.

This could be done, for instance, within the context of the Commission plans to review the consumer law *acquis* and in any actions arising from the review of Directive 2000/35/EC on combating late payment in commercial transactions[18]

Any lessons learned will be incorporated before adoption of the Commission's final CFR.

Secondly, the draft CFR could be used by other institutions on a trial basis. This phase could also involve asking Member States to examine the transposition of a sample of existing legislation and consider to what extent the draft would have contributed to it. The suitability of the draft CFR for use in Measures II and III, again using practical examples, would also need to be tested. Ways to check the suitability of the draft CFR as a tool in international arbitration or in the Commission's own contractual relationships will also be sought.

3.2.3 Consultation on the Commission's CFR

This elaboration process will result in a Commission CFR that will be submitted for final consultation. The EP, the Council and the Member States will be invited to examine the researchers' final report and the Commission's evaluation. An inter-institutional working group could also be used to discuss the CFR's use throughout the legislative process. Consultation of Member States could be continued through the same working group of national experts which will track the preparatory work.

. Next step will be an open consultation in the form of White Paper, giving stakeholders the opportunity to contribute. For that purpose, the Commission's CFR will be translated into all official EU languages. Stakeholders will have at least six months to comment on the Commission draft. The consultation will allow for detailed consideration

[18] OJ L 200, 8.8.2000, p. 35.

of the CFR's content and provide an opportunity to address differences between the language versions, to ensure that the final version is fully compatible and clearly intelligible in all languages.

3.2.4 Adoption of the CFR by the Commission

The adoption of the CFR by the Commission is foreseen for 2009. The CFR will be widely published, including in the Official Journal of the European Union and reviewed as necessary. Mechanisms for updating the CFR will be identified.

ANNEX I

Possible structure of the CFR

The main goal of the CFR is to serve as a tool box for the Commission when preparing proposals, both for reviewing the existing *acquis* and for new instruments. To that aim, the CFR could be divided into three parts: fundamental principles of contract law; definitions of the main relevant abstract legal terms and model rules of contract law.

CHAPTER I – Principles

The first part of the CFR could provide some common fundamental principles of European contract law and exceptions for some of these principles, applicable in limited circumstances, in particular where a contract is concluded with a weaker party.

Example: Principle of contractual freedom; exception: application of mandatory rules; Principle of the binding force of contract*;* exception: e.g. right of withdrawal; principle of good faith

CHAPTER II – Definitions

The second part of the CFR could provide some definitions of abstract legal terms of European contract law in particular where relevant for the EC *acquis*.

Examples: definition of contract, damages. Concerning the definition of a contract, the definition could for example also explain when a contract should be considered as concluded.

CHAPTER III – Model rules

SECTION I – Contract

1. Conclusion of a contract: i.e. notion of offer, acceptance, counteroffer, revocation of an offer, time of conclusion of a contract.

2. Form of a contract: i.e. written contract, oral contract, electronic contract and electronic signature.

3. Authority of agents: direct and indirect representation.

4. Validity: i.e. initial impossibility, incorrect information, fraud, threats.

5. Interpretation: i.e. general rules of interpretation, reference to all relevant circumstances.

6. Contents and effects: i.e. statements giving rise to contractual obligation, implied terms, quality of performance, obligation to deliver the goods / provide the services, conformity of the performance with the contract.

SECTION II – Pre-contractual obligations

1. Nature of pre-contractual obligations (mandatory or not)

2. Pre-contractual information obligations:

   a. General/Form: i.e. written information, by any clear and comprehensible way.

   b. Information to be given before the conclusion of the contract: i.e. information regarding the main characteristics of goods or services, price and additional costs, regarding the rights of the consumer, specific information for e-contracts.

   c. Information to be given at the conclusion of the contract: i.e. information regarding the right to ask for arbitration.

   d. Information to be given after the conclusion of the contract: i.e. obligation to notify any modification of the information.

SECTION III – Performance / Non-Performance:

1. General rules: i.e. place and time of performance, performance by a third party, time of delivery, place of delivery, costs of performance.

2. Non-performance and remedies in general:

   a. Non-performance : notion of breach of contract

   b. Remedies in general: i.e. remedies available, cumulation of remedies, clause excluding or restricting remedies.

3. Particular remedies for non-performance: i.e. right to performance, to terminate the contract (right of rescission), right of cancellation, right for a price reduction, repair, replacement, right to damages and interest.

SECTION IV – Plurality of parties

1. Plurality of debtors

2. Plurality of creditors

SECTION V – Assignment of claims

1. General principles: i.e. contractual claims generally assignable, partial assignment, form of assignment.

2. Effects of assignment as between Assignor and Assignee: i.e. rights transferred to assignee, when assignment takes effects.

3. Effects of assignment as between Assignee and Debtor: i.e. effect on debtor's obligation, protection of debtor.

SECTION VI – Substitution of new debtor - Transfer of contract

1. Substitution of new debtor: i.e. effects of substitution on defences and securities

2. Transfer of contract

SECTION VII – Prescription

1. Periods of prescription and their commencement

2. Extension of period

3. Renewal of periods

4. Effects of prescription

SECTION VIII – Specific rules for contract of sales

SECTION IX – Specific rules for insurance contracts

ANNEX II

Parameters concerning the optional instrument – For further discussion on the opportuneness of this instrument

This annex presents some parameters concerning an optional instrument which should be taken into account during the further discussion on its opportuneness.

1. Concerning the general context of an optional instrument:

The existing legal framework, in particular existing European legislation relating to contract law and the ongoing work regarding the future Regulation on the law applicable to contractual obligations should be taken into account within this reflection process. The results of measure I regarding the improvement of the *acquis* as well as those of measure II will have to be considered.

Moreover, an extended impact assessment will have to be carried out regarding this measure. Such an exercise implies that, among others, the following questions are considered before any decision on the adoption of an optional instrument:

- What problem(s) are being addressed?
- What is the overall policy objective, in terms of the desired impacts?
- What would happen under a 'no change' scenario?
- What other options are available to meet the objectives? (eg different types of action, more or less ambitious options)
- How are subsidiarity and proportionality taken into account?
- What are types and the scale of positive and negative impacts associated with each option – whether economic, social, environmental – and are there tensions/trade offs between them?
- How can the positive impacts be maximised and negative impacts minimised? Are any associated measures needed to achieve this?
- Who is affected? Are any specific groups particularly affected?
- Are there impacts outside the EU?
- How will the instrument be implemented and the impact in practice monitored and evaluated?
- What were the views of stakeholders?

2. Concerning the binding nature of an optional instrument

In the Action Plan, the Commission presented different possible approaches concerning the binding nature of an optional instrument. This instrument could either be a set of rules on contract law which would apply unless its application is excluded

by the contract of the parties ("*opt out*") or a purely optional model which would have to be chosen by the parties through a choice of law clause ("*opt in*"). The latter would give parties the greatest degree of contractual freedom.

Respondents' positions on this issue were clear, with most favouring an "*opt in*" model. The governments which expressed an opinion on this point, supported the "*opt in*" model which they consider being of great importance in preserving the principle of contractual freedom. Businesses also supported such a voluntary scheme and again stressed the importance of the general principle of contractual freedom. Further, almost all legal practitioners called for an "*opt in*" solution. Finally, a majority of academics seemed also to prefer this solution.

The Commission shares stakeholders' view of the importance of the principle of contractual freedom and had already underlined in the Action Plan that the principle of "*contractual freedom should be one of the guiding principles of such a contract law instrument"* and that consequently *" it should be possible for the specific rules of such a new instrument, once it has been chosen by the contracting parties as the applicable law to their contract, to be adapted by the parties according to their needs*". A limit to contractual freedom would only be acceptable in relation to some mandatory provisions contained in the optional instrument, particularly provisions aiming to protect consumers (see point 4 below).

In that context, and as suggested by contributors, the Commission considers that future consultations and debates should follow this direction and should take into account the coherence of such an optional instrument with the Rome Convention of 1980 on the law applicable to the contractual obligations and the subsequent Green Paper of January 2003 on the conversion of the Rome Convention into a Community instrument and its modernisation. This latter point was underlined by all respondents.

Contributors to the Action Plan mentioned different approaches which could be used as a basis for further reflection on the question of the articulation of an optional instrument and the successor of the Rome Convention ("Rome I"). The first suggestion, as put forward by some contributors, would be to adopt the optional instrument as international uniform law. The main example of an instrument adopted as international uniform law is the Vienna Convention on the International Sale of Goods (CISG). Within that approach, the optional instrument would contain a provision relating to its scope[19] and Rome I would not then apply to matters regulated by the optional instrument. Moreover, for all the aspects of contract law not provided by the optional instrument, the parties would use the national law applicable according to the provisions of Rome I. The second approach presented by respondents to ensure such coherence would be through Article 20 of the Rome Convention[20]. In this case, the optional instrument would again contain a clause relating to its scope and Rome I would not then apply to matters regulated by the optional instrument. An adaptation of Article 20 could be envisaged. Finally, the

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19 The scope clause could provide that the optional instrument is applicable to contracts where at least one of the parties is established in a Member State.

20 Article 20 of the Rome Convention: "This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts".

third possibility suggested by stakeholders would be to adopt the optional instrument as a Community instrument, which would not benefit from any priority over Rome I and that the parties could choose as applicable law to their contract on the base of Article 3[21] of the Rome Convention. In this case, the optional instrument would not contain any scope clause but only provisions of substantive law. As suggested by stakeholders, Article 3, paragraph 1 could be interpreted in a way to leave the possibility for the parties to choose the optional instrument as applicable law to their contract. The possibility of such interpretation could be clarified in Rome I.

It is clear from the approaches suggested by respondents that the works undertaken on the conversion of the Rome Convention into a Community instrument and its modernisation and those on European Contract Law need to be coherent. Even if it is too premature to take any decision on the opportuneness and adoption of the optional instrument, it is important to ensure that the future Community instrument "Rome I" takes into account the possibility of a coherent articulation of its provisions with a possible future optional instrument.

3. Concerning the legal form of an optional instrument

In the Action Plan, the Commission suggested that an optional instrument could take the legal form of a regulation or a recommendation which would exist in parallel with, rather than instead of, national contract laws.

As we have seen above, a great majority of respondents expressed its preference for an "*opt in*" instrument. If this approach is followed, there is significant support for a regulation. However, among the academics' contributions, some are in favour of a non-binding instrument, for example a recommendation.

For an "opt-out" instrument a regulation would be more appropriate as, unlike a recommendation, it is directly applicable. For an "opt-in" instrument, the choice of its legal form will depend on the approach chosen for the articulation of this instrument with the successor of the Rome Convention (see point 1 above). In this context, in the light of the three approaches suggested by stakeholders, the form of a Regulation may seem more appropriate.

4. Concerning the content of an optional instrument

In its Action Plan, the Commission made clear that in reflecting on the content of a non-sector-specific instrument, the future CFR should be taken into account. The content of this CFR would be likely to serve as a basis for the discussions on the optional instrument. On that point, most of the stakeholders agreed with the Commission view even if the question of whether the new instrument should cover the whole scope of the CFR or only parts of it was left open.

The question of whether this optional instrument should contain only some general contract law components or also components for specific contracts which are of a

[21] Article 3.1 of the Rome Convention: "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

great economic importance in the internal market, i.e. contract of sale or services, was also left open in the Action Plan. Many stakeholders agreed on the fact that an optional instrument should contain some provisions of general contract law as well as provisions relating to specific contracts which have significant importance for cross-border transactions. Concerning provisions of general contract law, stakeholders suggested that the optional instrument could contain, for instance, provisions relating to the conclusion, validity and interpretation of contracts as well as performance, non-performance and remedies. Concerning specific contracts, several suggestions were made: the optional instrument should contain rules relating to contract of sale, exchange, donation, lease, cross-border financial transactions and contracts of insurance. Some stakeholders also expressed the view that the optional instrument should cover areas of law linked to contract law, i.e. security law, unjust enrichment as well as rules on credit securities on movable goods.

Thus, according to these contributions, an optional instrument could have different components, i.e. parts relating to general contract law and/or certain specific contracts. However, the exact content of an optional instrument and which sectors should receive special attention will need to be further discussed. An optional instrument should only contain those areas of contract law, whether general or specific to certain contracts, which clearly contribute to addressing identified problems, such as barriers to the smooth functioning of the internal market.

5. Concerning the scope of an optional instrument

Concerning the scope of an optional instrument, two main issues can be identified which would need to be addressed through further reflection.

Firstly, in the Action Plan, the Commission raised the question of whether an optional instrument should cover solely business-to-business transactions or also business-to-consumer contracts. In the latter case, the new instrument would contain mandatory provisions concerning consumer protection. The Commission underlined the importance of the principle of contractual freedom that allows parties, once they have decided to apply the optional instrument to their contract, to adapt this instrument according to their needs. However, it also noted that this freedom could be restricted by the mandatory character of some limited provisions of the new instrument, e.g. those relating to consumer protection.

In answering this question, it is important to remember the main goal of the optional instrument, namely the smoother functioning of the internal market. It is clear that including business-to-business transactions would facilitate that goal. However, business-to-consumer transactions are also of great economic importance for the internal market and, to that extent, their inclusion would be justified. In this case, consumers would need to be afforded a sufficiently high level of protection to ensure benefits for the demand-side of the market (consumers) as well as the supply-side (businesses). In that context, most stakeholders considered that a new instrument should apply to business-to-consumer transactions as well and so include mandatory rules to ensure a high level of consumer protection.

Here it should be noted that national mandatory rules, applicable on the basis of Articles 5 and 7 of the Rome Convention, can increase transaction costs and constitute obstacles to cross-border contracts. In that context, the introduction in the

optional instrument of mandatory provisions in the meaning of in Articles 5 and 7 of the Rome Convention could represent a great advantage: the parties, by choosing the optional instrument as applicable law to their contract, would know from the moment of the conclusion of the contract which mandatory rules are applicable to their contractual relationship. That would provide legal certainty in cross border transactions and the relevant providers of services and goods could market their services or products throughout the whole European Union using one single contract. The optional instrument would then become a very useful tool for the parties. However, in such a situation, it would need to be certain that, where the parties have chosen the optional instrument as applicable law, other national mandatory rules would no longer be applicable. That would depend on the solution chosen for the articulation of the optional instrument with Rome I (see point 1 above).

Secondly, the introduction of the business-to-business transactions within the scope of the optional instrument raises another issue. It concerns the articulation of the optional instrument and the Vienna Convention on the International Sale of Goods (CISG). In its Action Plan, the Commission asked for some comments on the scope of the optional instrument in relation to the CISG. Many stakeholders presented their view on this issue. All of them agreed on the necessity to ensure coherence between an optional instrument and the CISG. However, there was less consensus on how to ensure such coherence: while some considered that the optional instrument should only provide for complementary rules to the CISG, others proposed that the CISG should become part of the optional instrument.

The question of the relationship between the optional instrument and the CISG would depend, on the one hand, on the scope of the optional instrument[22], and, on the other hand, on the binding nature of this new instrument, i.e. "*opt in*" or "*opt out*". As noted in point 1, the majority of respondents favoured an "*opt in*" instrument. In a scenario where the optional instrument was an "*opt in*" instrument applicable to business-to-business international sales of goods, by choosing the optional instrument as applicable law to their contract, the parties would have tacitly excluded the application of the CISG on the base of Article 6 of the CISG[23]. However, in the alternative scenario of an "*opt out*" instrument applicable to business-to-business international sales of goods, the problem of determining the appropriate application of the two instruments could be more difficult to solve. That would be an argument in favour of an "*opt in*" instrument, an approach preferred so far by stakeholders.

6. Concerning the legal base of an optional instrument

In its Action Plan, the Commission launched the reflection on the legal base of a new instrument and welcomed comments from stakeholders. However, very few contributors expressed their view on that issue. While one Member State proposed Article 308 of the TEC for an "*opt in*" instrument and Article 95 TEC for an "*opt out*" scheme, a group of academic lawyers preferred Article 65 TEC.

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22 If the optional instrument is not applicable to international sales of goods, there is no problem of competition between this optional instrument and the CISG.

23 Article 6 of the CISG: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

The question of the legal base is closely linked with the questions of the legal form of the optional instrument (see point 2 above), of its content (see point 3 above) and its scope (see point 4 above). More reflections on the important issue of the legal base will be necessary within a larger debate on the parameters of an optional instrument.

ANNEX I

Possible structure of the CFR

The main goal of the CFR is to serve as a tool box for the Commission when preparing proposals, both for reviewing the existing *acquis* and for new instruments. To that aim, the CFR could be divided into three parts: fundamental principles of contract law; definitions of the main relevant abstract legal terms and model rules of contract law.

CHAPTER I – Principles

The first part of the CFR could provide some common fundamental principles of European contract law and exceptions for some of these principles, applicable in limited circumstances, in particular where a contract is concluded with a weaker party.

Example: Principle of contractual freedom; exception: application of mandatory rules; Principle of the binding force of contract*;* exception: e.g. right of withdrawal; principle of good faith

CHAPTER II – Definitions

The second part of the CFR could provide some definitions of abstract legal terms of European contract law in particular where relevant for the EC *acquis*.

Examples: definition of contract, damages. Concerning the definition of a contract, the definition could for example also explain when a contract should be considered as concluded.

CHAPTER III – Model rules

SECTION I – Contract

1. Conclusion of a contract: i.e. notion of offer, acceptance, counteroffer, revocation of an offer, time of conclusion of a contract.

2. Form of a contract: i.e. written contract, oral contract, electronic contract and electronic signature.

3. Authority of agents: direct and indirect representation.

4. Validity: i.e. initial impossibility, incorrect information, fraud, threats.

5. Interpretation: i.e. general rules of interpretation, reference to all relevant circumstances.

6. Contents and effects: i.e. statements giving rise to contractual obligation, implied terms, quality of performance, obligation to deliver the goods / provide the services, conformity of the performance with the contract.

SECTION II – Pre-contractual obligations

1. Nature of pre-contractual obligations (mandatory or not)

2. Pre-contractual information obligations:

    a. General/Form: i.e. written information, by any clear and comprehensible way.

    b. Information to be given before the conclusion of the contract: i.e. information regarding the main characteristics of goods or services, price and additional costs, regarding the rights of the consumer, specific information for e-contracts.

    c. Information to be given at the conclusion of the contract: i.e. information regarding the right to ask for arbitration.

    d. Information to be given after the conclusion of the contract: i.e. obligation to notify any modification of the information.

SECTION III – Performance / Non-Performance:

1. General rules: i.e. place and time of performance, performance by a third party, time of delivery, place of delivery, costs of performance.

2. Non-performance and remedies in general:

    a. Non-performance : notion of breach of contract

    b. Remedies in general: i.e. remedies available, cumulation of remedies, clause excluding or restricting remedies.

3. Particular remedies for non-performance: i.e. right to performance, to terminate the contract (right of rescission), right of cancellation, right for a price reduction, repair, replacement, right to damages and interest.

SECTION IV – Plurality of parties

1. Plurality of debtors

2. Plurality of creditors

SECTION V – Assignment of claims

1. General principles: i.e. contractual claims generally assignable, partial assignment, form of assignment.

2. Effects of assignment as between Assignor and Assignee: i.e. rights transferred to assignee, when assignment takes effects.

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SECTION VI – Substitution of new debtor - Transfer of contract

1. Substitution of new debtor: i.e. effects of substitution on defences and securities

2. Transfer of contract

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1. Periods of prescription and their commencement

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4. Effects of prescription

SECTION VIII – Specific rules for contract of sales

SECTION IX – Specific rules for insurance contracts

ANNEX II

Parameters concerning the optional instrument – For further discussion on the opportuneness of this instrument

This annex presents some parameters concerning an optional instrument which should be taken into account during the further discussion on its opportuneness.

1. Concerning the general context of an optional instrument:

The existing legal framework, in particular existing European legislation relating to contract law and the ongoing work regarding the future Regulation on the law applicable to contractual obligations should be taken into account within this reflection process. The results of measure I regarding the improvement of the *acquis* as well as those of measure II will have to be considered.

Moreover, an extended impact assessment will have to be carried out regarding this measure. Such an exercise implies that, among others, the following questions are considered before any decision on the adoption of an optional instrument:

- What problem(s) are being addressed?
- What is the overall policy objective, in terms of the desired impacts?
- What would happen under a 'no change' scenario?
- What other options are available to meet the objectives? (eg different types of action, more or less ambitious options)
- How are subsidiarity and proportionality taken into account?
- What are types and the scale of positive and negative impacts associated with each option – whether economic, social, environmental – and are there tensions/trade offs between them?
- How can the positive impacts be maximised and negative impacts minimised? Are any associated measures needed to achieve this?
- Who is affected? Are any specific groups particularly affected?
- Are there impacts outside the EU?
- How will the instrument be implemented and the impact in practice monitored and evaluated?
- What were the views of stakeholders?

2. Concerning the binding nature of an optional instrument

In the Action Plan, the Commission presented different possible approaches concerning the binding nature of an optional instrument. This instrument could either be a set of rules on contract law which would apply unless its application is excluded by the contract of the parties ("*opt out*") or a purely optional model which would have to be chosen by the parties through a choice of law clause ("*opt in*"). The latter would give parties the greatest degree of contractual freedom.

Respondents' positions on this issue were clear, with most favouring an "*opt in*" model. The governments which expressed an opinion on this point, supported the "*opt in*" model which they consider being of great importance in preserving the principle of contractual freedom. Businesses also supported such a voluntary scheme and again stressed the importance of the general principle of contractual freedom. Further, almost all legal practitioners called for an "*opt in*" solution. Finally, a majority of academics seemed also to prefer this solution.

The Commission shares stakeholders' view of the importance of the principle of contractual freedom and had already underlined in the Action Plan that the principle of "*contractual freedom should be one of the guiding principles of such a contract law instrument"* and that consequently *" it should be possible for the specific rules of such a new instrument, once it has been chosen by the contracting parties as the applicable law to their contract, to be adapted by the parties according to their needs*". A limit to contractual freedom would only be acceptable in relation to some mandatory provisions contained in the optional instrument, particularly provisions aiming to protect consumers (see point 4 below).

In that context, and as suggested by contributors, the Commission considers that future consultations and debates should follow this direction and should take into account the coherence of such an optional instrument with the Rome Convention of 1980 on the law applicable to the contractual obligations and the subsequent Green Paper of January 2003 on the conversion of the Rome Convention into a Community instrument and its modernisation. This latter point was underlined by all respondents.

Contributors to the Action Plan mentioned different approaches which could be used as a basis for further reflection on the question of the articulation of an optional instrument and the successor of the Rome Convention ("Rome I"). The first suggestion, as put forward by some contributors, would be to adopt the optional instrument as international uniform law. The main example of an instrument adopted as international uniform law is the Vienna Convention on the International Sale of Goods (CISG). Within that approach, the optional instrument would contain a provision relating to its scope[1] and Rome I would not then apply to matters regulated by the optional instrument. Moreover, for all the aspects of contract law not provided by the optional instrument, the parties would use the national law applicable according to the provisions of Rome I. The second approach presented by respondents to ensure such coherence would be through Article 20 of the Rome Convention[2]. In this case, the optional instrument would again contain a clause relating to its scope and Rome I would not then apply to matters regulated by the optional instrument. An adaptation of Article 20 could be envisaged. Finally, the third possibility suggested by stakeholders would be to adopt the optional instrument as a Community instrument, which would not benefit from any priority over Rome I and that the parties could choose as applicable law to their contract on the base of Article 3[3] of the Rome Convention. In this case, the optional instrument would not contain any scope clause but only provisions of substantive law. As suggested by stakeholders, Article 3, paragraph 1 could be interpreted in a way to leave the possibility for the parties to choose the optional instrument as applicable law to their contract. The possibility of such interpretation could be clarified in Rome I.

It is clear from the approaches suggested by respondents that the works undertaken on the conversion of the Rome Convention into a Community instrument and its modernisation and those on European Contract Law need to be coherent. Even if it is too premature to take any decision on the opportuneness and adoption of the optional instrument, it is important to ensure that the future Community instrument "Rome I" takes into account the possibility of a coherent articulation of its provisions with a possible future optional instrument.

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1 The scope clause could provide that the optional instrument is applicable to contracts where at least one of the parties is established in a Member State.

2 Article 20 of the Rome Convention: "This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts".

3 Article 3.1 of the Rome Convention: "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

3. Concerning the legal form of an optional instrument

In the Action Plan, the Commission suggested that an optional instrument could take the legal form of a regulation or a recommendation which would exist in parallel with, rather than instead of, national contract laws.

As we have seen above, a great majority of respondents expressed its preference for an "*opt in*" instrument. If this approach is followed, there is significant support for a regulation. However, among the academics' contributions, some are in favour of a non-binding instrument, for example a recommendation.

For an "opt-out" instrument a regulation would be more appropriate as, unlike a recommendation, it is directly applicable. For an "opt-in" instrument, the choice of its legal form will depend on the approach chosen for the articulation of this instrument with the successor of the Rome Convention (see point 1 above). In this context, in the light of the three approaches suggested by stakeholders, the form of a Regulation may seem more appropriate.

4. Concerning the content of an optional instrument

In its Action Plan, the Commission made clear that in reflecting on the content of a non-sector-specific instrument, the future CFR should be taken into account. The content of this CFR would be likely to serve as a basis for the discussions on the optional instrument. On that point, most of the stakeholders agreed with the Commission view even if the question of whether the new instrument should cover the whole scope of the CFR or only parts of it was left open.

The question of whether this optional instrument should contain only some general contract law components or also components for specific contracts which are of a great economic importance in the internal market, i.e. contract of sale or services, was also left open in the Action Plan. Many stakeholders agreed on the fact that an optional instrument should contain some provisions of general contract law as well as provisions relating to specific contracts which have significant importance for cross-border transactions. Concerning provisions of general contract law, stakeholders suggested that the optional instrument could contain, for instance, provisions relating to the conclusion, validity and interpretation of contracts as well as performance, non-performance and remedies. Concerning specific contracts, several suggestions were made: the optional instrument should contain rules relating to contract of sale, exchange, donation, lease, cross-border financial transactions and contracts of insurance. Some stakeholders also expressed the view that the optional instrument should cover areas of law linked to contract law, i.e. security law, unjust enrichment as well as rules on credit securities on movable goods.

Thus, according to these contributions, an optional instrument could have different components, i.e. parts relating to general contract law and/or certain specific contracts. However, the exact content of an optional instrument and which sectors should receive special attention will need to be further discussed. An optional instrument should only contain those areas of contract law, whether general or specific to certain contracts, which clearly contribute to addressing identified problems, such as barriers to the smooth functioning of the internal market.

5. Concerning the scope of an optional instrument

Concerning the scope of an optional instrument, two main issues can be identified which would need to be addressed through further reflection.

Firstly, in the Action Plan, the Commission raised the question of whether an optional instrument should cover solely business-to-business transactions or also business-to-consumer contracts. In the latter case, the new instrument would contain mandatory provisions concerning consumer protection. The Commission underlined the importance of the principle of contractual freedom that allows parties, once they have decided to apply the optional instrument to their contract, to adapt this instrument according to their needs. However, it also noted that this freedom could be restricted by the mandatory character of some limited provisions of the new instrument, e.g. those relating to consumer protection.

In answering this question, it is important to remember the main goal of the optional instrument, namely the smoother functioning of the internal market. It is clear that including business-to-business transactions would facilitate that goal. However, business-to-consumer transactions are also of great economic importance for the internal market and, to that extent, their inclusion would be justified. In this case, consumers would need to be afforded a sufficiently high level of protection to ensure benefits for the demand-side of the market (consumers) as well as the supply-side (businesses). In that context, most stakeholders considered that a new instrument should apply to business-to-consumer transactions as well and so include mandatory rules to ensure a high level of consumer protection.

Here it should be noted that national mandatory rules, applicable on the basis of Articles 5 and 7 of the Rome Convention, can increase transaction costs and constitute obstacles to cross-border contracts. In that context, the introduction in the optional instrument of mandatory provisions in the meaning of in Articles 5 and 7 of the Rome Convention could represent a great advantage: the parties, by choosing the optional instrument as applicable law to their contract, would know from the moment of the conclusion of the contract which mandatory rules are applicable to their contractual relationship. That would provide legal certainty in cross border transactions and the relevant providers of services and goods could market their services or products throughout the whole European Union using one single contract. The optional instrument would then become a very useful tool for the parties. However, in such a situation, it would need to be certain that, where the parties have chosen the optional instrument as applicable law, other national mandatory rules would no longer be applicable. That would depend on the solution chosen for the articulation of the optional instrument with Rome I (see point 1 above).

Secondly, the introduction of the business-to-business transactions within the scope of the optional instrument raises another issue. It concerns the articulation of the optional instrument and the Vienna Convention on the International Sale of Goods (CISG). In its Action Plan, the Commission asked for some comments on the scope of the optional instrument in relation to the CISG. Many stakeholders presented their view on this issue. All of them agreed on the necessity to ensure coherence between an optional instrument and the CISG. However, there was less consensus on how to ensure such coherence: while some considered that the optional instrument should only provide for complementary rules to the CISG, others proposed that the CISG should become part of the optional instrument.

The question of the relationship between the optional instrument and the CISG would depend, on the one hand, on the scope of the optional instrument[4], and, on the other hand, on the binding nature of this new instrument, i.e. "*opt in*" or "*opt out*". As noted in point 1, the majority of respondents favoured an "*opt in*" instrument. In a scenario where the optional instrument was an "*opt in*" instrument applicable to business-to-business international sales of goods, by choosing the optional instrument as applicable law to their contract, the parties would have tacitly excluded the application of the CISG on the base of Article 6 of the CISG[5]. However, in the alternative scenario of an "*opt out*" instrument applicable to business-to-business international sales of goods, the problem of determining the appropriate application of the two instruments could be more difficult to solve. That would be an argument in favour of an "*opt in*" instrument, an approach preferred so far by stakeholders.

6. Concerning the legal base of an optional instrument

In its Action Plan, the Commission launched the reflection on the legal base of a new instrument and welcomed comments from stakeholders. However, very few contributors expressed their view on that issue. While one Member State proposed Article 308 of the TEC for an "*opt in*" instrument and Article 95 TEC for an "*opt out*" scheme, a group of academic lawyers preferred Article 65 TEC.

The question of the legal base is closely linked with the questions of the legal form of the optional instrument (see point 2 above), of its content (see point 3 above) and its scope (see point 4 above). More reflections on the important issue of the legal base will be necessary within a larger debate on the parameters of an optional instrument.

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4 If the optional instrument is not applicable to international sales of goods, there is no problem of competition between this optional instrument and the CISG.

5 Article 6 of the CISG: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.10.2001
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GREEN PAPER

on European Union Consumer Protection

(presented by the Commission)

GREEN PAPER

on European Union Consumer Protection

1. CONSULTATION ON EU CONSUMER PROTECTION

The purpose of this green paper is to launch an extensive public consultation on the future direction of EU consumer protection. To stimulate a well-informed debate, it sets out an analysis of the current situation and possible options for the future.

The Commission invites interested parties to comment by 15 January 2002. Comments are invited on all aspects of the document but in particular on the following questions:

- *What are the main barriers faced by consumers and business resulting from differences in national regulations on fair/good commercial practices in respect to advertising and practices related to the pre-contractual, contractual and after sales aspects of business-consumer relations?*

- *Do you agree that there is a need to reform consumer protection as regards this aspect of the internal market?*

- *Should reform be pursued on the basis of the existing specific approach or the mixed approach outlined below?*

- *What is the likely impact of the two approaches in terms of costs and benefits for consumers and business?*

If the specific approach were to be pursued:

- *What are the priorities for harmonisation?*

If the mixed approach were to be pursued:

- *What would be the key elements of a general clause, the general tests and core rules for regulating commercial practices?*

- *Which would be better: a framework directive with a general clause based on fair commercial practices or based only on misleading and deceptive practices? Which approach is more feasible? Which is more likely to address the problem of fragmentation in the internal market in the interests of consumers?*

- *Would it be useful to include a basis for self-regulation in a framework directive? If so, what are the key elements of such options and criteria for their inclusion?*

- *Would it be useful for non-binding practical guidance to be developed? Would this guidance be preferable in the form of Commission recommendations or through an indicative list of permitted and illicit examples annexed to the directive?*

- *Should there be a role for stakeholder participation in the development of the non-binding legal guidance?*

- *Is a legal framework for improving co-operation between consumer protection enforcement authorities needed?*

- *What would be the key elements of such a legal framework?*

Please send your comments (marked "Green Paper on EU Consumer Protection") to:

The European Commission
Health and Consumer Protection Directorate General
F101 06/52
Rue de la Loi 200
B-1049 Brussels

Or by email to: consultsanco@cec.eu.int

In addition, the Commission intends to organise a hearing for interested parties and a consultation of national authorities.

2. CONSUMER PROTECTION IN THE INTERNAL MARKET

2.1 Introduction

For the internal market to yield its benefits to consumers, they must be able to have easy access to goods and services promoted, offered and sold across the borders. It is the cross-border movement of goods and services that allows consumers to search out bargains and innovative products and services and thus ensures that they optimise their consumption decisions. This cross-border demand increases competitive pressure within the internal market and allows for a more efficient and competitively priced supply of goods and services. This virtuous circle can only be achieved if the regulatory framework in place encourages consumers and businesses to engage in cross-border trade. Different national laws on commercial practices relating to business–consumer relations can hinder this evolution.

The EU dimension to consumer protection (here understood as the regulation of consumer economic interests and excluding health and safety matters and other connected concerns) has existed for over twenty-five years. Article 153 of the EC Treaty enshrines a number of consumer rights - to information, education and representation. EU consumer protection directives, usually based on the internal market provisions of Article 95 (ex Article 100a) of the EC Treaty, have fleshed out the detail of certain of these rights. Further EU directives, whose primary purpose is not consumer protection, also have a direct effect on consumer protection. National regulations and jurisprudence in turn have an impact on consumer protection in the internal market.

However, consumer protection in the internal market is faced with a fragmented set of regulations and a fragmented system of enforcement. The prospect of enlargement brings the risk of further fragmentation of the internal market and additional enforcement problems. The circulation of Euro notes and coins beginning in January 2002 gives a huge opportunity to develop the consumer internal market. If it is not taken, citizens will be left with the impression that the EU's core project - the internal market - is an irrelevance to their daily

lives and simply a project designed to serve the interests of business. The goals of consumer protection are to deliver a system of regulation that:

- achieves as high as possible a level of consumer protection whilst also keeping costs to business to a minimum;

- is as simple as possible and is sufficiently flexible to respond quickly to the market, and which involves stakeholders as much as possible ;

- provides legal certainty and ensures its efficient and effective enforcement, especially in cross-border cases.

Three studies have been produced for the Commission[1] to provide a comprehensive survey of consumer protection regulations at national and EU level. The following paragraphs provide an overall analysis of their impact.

2.2 EU-level regulation and jurisprudence

EU consumer protection directives fall into two broad categories: generally applicable directives and directives containing rules regarding specific sectors or selling methods. An enforcement mechanism is provided by the Directive on injunctions. The box below summarises the existing directives.

EU Consumer Protection Directives

General rules - Directive on Misleading Advertising[2], as amended by Directive on comparative advertising[3]. Directive on price indications. Directive on unfair terms in consumer contracts[4]. Directive on the sale of consumer goods and associated guarantees[5].

Rules on sectors and selling methods – Directives on foodstuffs[6], cosmetics[7], textile names[8] medicinal products for human use[9], package travel,[10] contracts negotiated away from business premises[11], consumer credit[12], distance selling contracts[13], measuring instruments[14] and timeshare[15].

Enforcement - Directive on injunctions[16].

In addition, further EU legislation, which does not have consumer protection as its primary purpose, provides for some consumer protection or regulates the power of national authorities to introduce consumer protection regulations. For example the e-commerce directive[17] covers advertising and marketing to consumers by information society service providers. The television without frontiers directive[18] also coordinates certain aspects of commercial communications through broadcasting means. It provides for a uniform high level of protection, application of the country of origin principle, precisely defined common definitions and clear enforcement requirements.

Furthermore, the Brussels Convention (now enshrined in an EU regulation[19]) and the Rome Convention[20] establish rules, in cases of a cross-border contractual dispute within the EU, to determine which Member State Court should hear the case (jurisdiction) and which Member State's law will apply to the contract (applicable law). Finally, there is a body of ECJ jurisprudence covering the compatibility of certain national consumer protection rules with the internal market[21].

The main characteristics of EU consumer protection are as follows:

- Existing EU consumer protection directives, when compared to national regulation, do not constitute a comprehensive regulatory framework for business-consumer commercial practices, the central aim of consumer protection. While some areas have been effectively targeted, other key areas are not covered by EU rules, notably marketing practices, practices linked to the contract, payment and after-sales services. The development of new commercial practices and technology has also tended to blur traditional distinctions made in EU rules between the different stages of the transaction, thereby adding an element of uncertainty.

- Some of the directives, notably the sector-specific ones, have developed as a very detailed response to specific identifiable problems at a particular moment in time. This approach, combined with the long period between the proposal and implementation of EU measures (the distance selling directive was proposed in June 1992 but was not due to be implemented until June 2000), has guaranteed a certain level of obsolescence as market practices have moved on. This could make EU rules irrelevant, unnecessarily restrict innovation or allow rogue traders to keep one step ahead of the law. The time involved in modifying these directives to adapt them to technological development while maintaining the same level of consumer protection compounds such inflexibility.

Case study: the distance selling directive and the timeshare directive

The distance selling Directive provides a number of contractual rights for consumers when they buy goods or services from a supplier who they do not meet face to face. In particular, a number of information requirements are stipulated which are required to be provided in a 'durable medium' in order to allow the consumer to permanently retain essential contractual information. This creates no problems if the medium used for the transaction is either the post or e-mail. However, the development of distance selling via new mobile telephone technology could be restricted by such requirements and the limits of current technology. This may stifle innovation and undermine consumer protection.

New marketing techniques for timeshare have been designed to ensure that in some circumstances they are excluded from the scope of the directive and its key obligations. For example, some sellers are offering contracts for a period less than three years or stipulating an annual period of use of less than 7 days. In addition, timeshare-type contracts are being offered through insurance or membership of a club or through point schemes with the purpose of excluding such arrangements from the scope of the directive.

- The interaction between the EU consumer protection rules and the other measures cited has created a regulatory framework which is complicated and difficult to understand for business and consumers.

- The jurisprudence of the European Court of Justice on possible justifications for barriers to the free movement of goods and services on consumer protection grounds does not provide a solution because it has been limited to case-specific issues.

- Although it is developing fast in many Member States, self-regulation, through codes of conduct, is severely constrained at EU-level. Recent attempts that have been made to develop EU-level self-regulation have had only mixed results. Self-regulation has been shown to be a potentially useful complement to regulation that can reduce the need for very detailed legislation and provide benefits for consumers. Although codes of conduct are specifically referred to in some EU legislation, they have been unable to fulfil their potential at EU level because of the degree of national legal diversity. Moreover, further

problems stem from the uncertainty over the status of commitments made in codes and their enforceability.

- In contrast to the work of standardisation bodies in the 'new approach[22]' and management and labour representatives in the social dialogue on employment regulation, there is no framework for formal stakeholder participation in the regulatory process at EU level. As markets diversify, there is a growing need for more expert input into regulation. Stakeholder involvement can also enhance the acceptance of regulatory decisions. Stakeholder participation at EU-level depends on competent and representative stakeholder bodies, able to represent interest groups effectively.

2.3 National consumer protection regulation and jurisprudence

Where no Community legislation or case law exists, Member States national regulation is applicable which may differ in its substance and its application. Each Member State has a relatively well developed regulatory environment aimed either specifically at consumer protection or which regulate business-consumer commercial practices to other ends. However in addition to the same kind of regulations that exist at EU level, many Member States have a general legal principle, sometimes supported by specific laws, for regulating business-consumer commercial practices.

General principles

The general principle of *contra bonos mores* can be seen in laws of Austria[23], Greece[24] and Portugal[25] and Germany[26]. The principle of *Fair commercial practices* can be seen in the legislation of Belgium[27], Italy[28], Luxembourg[29] and Spain[30]. France[31] and the Netherlands[32] adopt general provisions from the law of tort, the latter under the concept of *unlawfulness*. There are many similarities in the principle of *good marketing practices* adopted by Denmark[33], Finland[34] and Sweden[35]. Similar general principles can also be found in the legal systems of many third countries, but notably the US, Canada (where consumer protection is regulated at provincial level) and Australia. Although no such overarching legal standard regulating the consumer-business relationship exists in the UK or Ireland, equivalent principles do exist within their legal systems[36].

These general principles have either developed through further specific legislation or their development has been left to the courts, over many decades, which have produced a comprehensive and detailed jurisprudence. In each Member State its development has varied depending on the legal system and the scope and aim of the general principle. The principles originated for different reasons, even if they now serve to regulate business-consumer commercial practices. Thus in Germany and Austria, the appreciation of the general principle has been expanded from the protection of competitors against unfair commercial practices to also cover the protection of consumers. In France and Spain, these aims are treated separately - consumer protection is directly foreseen by specific legislation but consumers are protected indirectly by the general principles and regulations aimed at the protection of competitors. In contrast, Denmark and Sweden have adopted measures aimed specifically at the protection of both the consumer and competitors. The scope and application of these general unfair trading laws vary widely in practice between some Member States due to their objective and construction. The development of such variations can act as a barrier to trade and distort competition by ensuring that similar practices are treated in wholly different ways throughout the entire EU.

In addition, consumer protection rules at EU level generally allow Member States to take more detailed or stricter measures (through the so-called 'minimum clauses') to protect consumers, or, as is more common, to maintain existing rules, provided they are stricter than the EU rules. Thus, this generates further divergences between national laws in addition to those present in non-harmonised areas of consumer protection.

The main characteristics of the interaction between national and EU regulations within the internal market are as follows:

- Considerable divergences exist in the laws applied to business-consumer commercial practices in the internal market, whether resulting from national specific regulations, differences in general principles or from different jurisprudence. The treatment of advertising, through national rules on 'fair advertising', differs, as does the treatment of advertising claims (for health ('miracle products'), environmental or social benefits) and advertising to children (including sponsorship for educational programmes, sports events and marketing in schools). Marketing practices such as those covered by the proposed Regulation on sales promotions (i.e. discounts, simple reductions, rebates, joint-offers, free gifts, coupons, vouchers and commercial contests and games) and others, such as lotteries and gambling, mock auctions, pyramid selling, multi-level marketing and 'bait and switch' marketing are subject to different national rules. Commercial practices related to payment, the subject matter of the contract, price estimates, execution, performance, delivery, complaint-handling and after-sales service (e.g. premium rate help-lines, commercial guarantees, substitution, repair) also differ. The bulk of the differences in national rules concern information requirements, although some practices are wholly or partially prohibited in some Member States but permitted in others.

Case study: Multi-level direct selling.

Generally, this entails a supplier setting up a distribution network for its products through recruiting customers to sell to consumers they know. Some countries rely on general fraud provisions to regulate such practices, while others rely on consumer protection laws (e.g. Italy and the Netherlands), and still others rely on unfair competition laws (e.g. Austria, Belgium, France, Germany and Spain). The wide variety of divergent national rules ranging from outright prohibition of doorstep selling (e.g. as in Luxembourg for example), to detailed regulation of how legitimate Multi-level Direct Selling may be performed (e.g. for example in Spain and the UK), means that companies in this sector must restructure their marketing plans and materials from one country to another to ensure compliance with the individual Member States' rules. Multi-level Direct Selling companies are thus prevented from developing a truly pan-European sales and marketing strategy because of the numerous disparities among national laws throughout the EU.

- The use of self-regulation and codes of conduct varies greatly among the Member States. In Denmark, Sweden and Finland, the use of codes is encouraged to flesh out general rules. The involvement of the consumer enforcement bodies is more significant in elaborating these codes. Codes are also widespread in UK, Ireland and Netherlands, although consumer enforcement bodies have a more informal role. The use of self-regulation as a complement to regulation is less well-known in other Member States. The use of self-regulation appears to be growing in the EU, although along different lines in each Member State (see box below).

Case study: E-commerce codes of conduct

Codes of conduct have proved particularly popular for e-commerce. In Denmark, Sweden and Finland, efforts are underway to develop a national e-commerce code of conduct, bringing together business and consumer organisations under government sponsorship. In Netherlands, UK and Germany, recognising that many codes of conduct for e-commerce develop, governments have worked with consumers and business on projects to establish criteria for codes and arms-length bodies to monitor them. While the respective codes and criteria being developed have many common points, they all differ in order to reflect different underlying national rules.

- The impact of these differences on consumers and business seems likely to grow with the development of 'new economy' commercial practices, unforeseen by existing specific rules but which have already been caught by national general principles and treated in different ways. New advertising practices which challenge traditional print media distinctions between media content and advertising (e.g. website sponsorship, affiliation, remunerated search tools, use of meta-data and links, referrals and reviews) fall into this category. New marketing methods such as cookies, 'spidering', co-shopping and power shopping are also challenging traditional rules. Online gambling and gaming, internet currencies, internet auctions and the use of technology will also reveal differences in national rules in the internal market. As the development of the internet has led to new practices unforeseen by national rules, the development of commerce via mobile telephones seems likely to do the same.

Case studies

Powershopping (or co-shopping) describes an accumulation of customers that is gathered through the internet in order to buy goods or services at a reduced price that is granted by providers of the goods or services provided that a sufficient quantity has been ordered. It is unclear how such practices will be treated in all the Member States. However a German court, Landgericht Köln, on 12 October 2000 ruled that the practice of "power shopping", by which online shoppers obtain bigger discounts by banding together as a group is a violation of Germany's law against unfair competition.

New payment techniques such as the use of mobile and other telephone billing as a means for the supplier to charge for goods and services are emerging. Whilst this can provide opportunities for consumers it also poses serious risks, especially when employed by fraudsters who have been denied credit card payment facilities by banks. Evidence of this problem has emerged in the United States**.**

Question for consultation

- *What are the main barriers faced by consumers and business resulting from differences in national regulations on fair/good commercial practices in respect to advertising and practices related to the pre-contractual, contractual and after sales aspects of business-consumer relations?*

3. THE FUTURE DIRECTION OF EU CONSUMER PROTECTION

3.1 The need for action

The cumulative impact of this situation is a 'consumer internal market' that has not achieved its potential nor matched the development of the internal market in business-to-business transactions. Consumers rarely participate directly in the internal market through cross-border shopping. For business, above all for SMEs, the differing treatment of identical commercial practices in each Member State is a daunting deterrent to developing cross-border sales and exploiting the internal market. At best, there is lack of certainty and clarity about fifteen sets of legal obligations. At worst, the sheer number of obligations is off-putting to nearly all businesses but those who can afford to establish in all Member States. For consumers, the lack of clarity and security over their rights is an important brake on their confidence and trust. The internal market, like all markets, depends on consumer confidence. Directives such as the television without frontiers directive, which are based on internal market rules avoid the need to apply fifteen sets of national rules in the fields coordinated by these directives, as the country of origin rules apply. This also facilitates the control of the service provider by the responsible authority.

A fully functioning consumer internal market could make a substantial contribution to meeting the goals of the EU. The internal market's main asset is that it has the largest pool of consumer demand in the world - and this asset is not being fully exploited. Enabling businesses, especially SMEs, to access this potential, as easily as domestic markets would be a powerful stimulus to competitiveness. Simplifying existing rules and, where possible, deregulating would also help reduce disproportionate burdens on business. Consumers would have access to greater choice and better prices. Cross-border shopping would not supplant domestic shopping but would become a significant medium with a wider impact on markets than its share of retail sales. The experience of cars shows that cross-border shopping can have a powerful indirect competitive effect on national markets, as consumers put pressure on suppliers to match prices they can obtain elsewhere in the internal market. Commission and other studies on prices in the internal market are showing that substantial price divergences similar to those found for cars exist in other consumer products. A recent Commission Prices survey indicated that price differences of 30 or 40% between the EU countries with lowest and highest prices are not exceptional, for example, for branded consumer electronics goods (and such differences cannot be explained only by differences in indirect taxes)[37]. These divergences indicate, in part, the consequences of a consumer internal market that is not functioning properly.

This situation is not new. However, there is a case for further action to complete the consumer internal market now. The circulation of Euro notes and coins from 1 January 2002 will remove one major psychological obstacle to direct consumer participation in the internal market. E-commerce has the potential to remove many of the geographical and logistical barriers to the consumer internal market. SME's and consumers at different ends of the

European continent can develop commercial relationships more easily than ever before. This potential remains unfulfilled[38], with e-commerce representing not only a small part of retail sales but also largely confined within national borders.

The prospect of enlargement also calls for further action, since without some reform, it could further complicate the legal picture. It is also an opportunity to endow candidate countries that do not always have a long history of consumer protection with simple and effective rules.

The political case for reform has been recognised at the highest level. The Lisbon European Council set a new strategic goal for the Union *'to become the most competitive and dynamic knowledge-based economy in the world'* by completing the internal market, developing predictable rules for e-commerce and simplifying and improving the regulatory environment. The informal internal market/consumer Council at Lund on 27-28 April 2001 also acknowledged the need to enhance the consumer dimension of the internal market.

Finally a fully functioning consumer internal market could play an important part in the strategy to bring the EU closer to its citizens, by dispelling the myth that internal market is a corporate business project and delivering tangible economic benefits to their daily life.

3.2 Overall approach

Where cross-border restrictions to business-to-consumer trade exist, a greater degree of harmonisation of the rules that regulate business-consumer commercial practices is essential to the development of a fully functioning consumer internal market. The Commission has already acknowledged, in its communication on the internal market in services[39] that ‘additional harmonisation measures are likely to be appropriate in areas with significant health and consumer protection considerations'.

The central choice therefore revolves around the type of method needed to achieve greater harmonisation. There are essentially two options:

- A specific approach based on the adoption of a series of further directives, or
- a mixed approach of a comprehensive framework directive, supplemented by targeted directives, where necessary

3.3 Specific approach

Greater harmonisation could be achieved through a series of further specific directives. The number of directives needed is hard to estimate. Directives covering advertising (except the issues covered by the television without frontiers directive), marketing practices, payment and after sales services might be considered, together with certain sector-specific directives.

For example, the Commission has already begun work in the area of commercial communications and has examined in detail with Member States representatives in its Expert Group the possibilities of applying the principle of mutual recognition to the national rules in the sub-area of sales promotions[40]. Such commercial practices are used by businesses to publicise their products and services and are subject to detailed national rules or jurisprudence that differ widely across Member States. The work of the Expert Group has shown that the only means to allow for free movement of such services based on a high level of consumer protection in this field is to come forward with greater harmonisation. This is proposed in a draft Regulation on sales promotions in the internal market.

Such an approach has considerable advantages - it is a familiar, reliable method that has led to the adoption of existing legislative provisions. It is also in principle easier to reach agreement on directives with a relatively narrow scope and to introduce change in a specific way over a long period of time.

However, there are clearly some doubts as to the effectiveness of relying exclusively on this approach in delivering a genuine internal market. The limited scope of existing consumer protection regulation at EU level has justified the need for the so-called minimum clauses in EU directives. Continuing with the approach of selective, specific legislation would require a clear commitment from the Member States to change this policy, both in respect of existing and new directives. In addition, many of the existing consumer protection directives will require amendment in order to address the obsolescence that has developed through new market developments or legislative requirements becoming outdated. Together this represents a formidable, if achievable, long-term programme.

3.4 Mixed approach

The alternative would be to develop a comprehensive, technology-neutral, EU framework directive to harmonise national fairness rules for business-consumer commercial practices. This would be based on similar models to those seen in certain Member States and third countries for consumer protection and at EU level for product safety[41] and that proposed for food safety[42]. A framework directive would not override sector-specific directives such as the unfair contract terms directive, as well as future legislation, such as the proposed Regulation on sales promotions and future amendments to this legislation (e.g. television without frontiers directive). The framework directive would amount to a safety net to cover practices where cross-border restrictions are identified and which fall outside the coordinated fields of the sector-specific Directives. Where necessary, the framework directive would be accompanied in due course by a reform of existing consumer protection directives to ensure the overall coherence of the consumer protection system. Such a reform would be undertaken once the framework directive has been established and experience has been gained of its operation in practice.

To provide the required certainty and prevent differing legal interpretations by national courts, the framework directive would have to be more than simply a general principle regulating business-consumer commercial practices. It would address the main differences in national rules on commercial practices which affected the operation of the internal market, through establishing clear EU-wide rules through harmonisation.

The main advantage of a framework approach compared to a specific approach is that its comprehensive nature reduces the need for further detailed consumer protection regulation. The existence of general benchmarks enable emerging commercial practices to be addressed without recourse to new regulation. Business can innovate in greater certainty and unfair practices can be tackled without further rule-making. A framework approach also permits simplification of existing rules. For example, the directives on misleading and comparative advertising could be subsumed into the framework directive. The flexibility of a framework directive would also eliminate the justification for minimum clauses in EU consumer protection directives.

A framework directive could also provide a firm basis for EU-wide self-regulation in the field of consumer protection and for the development of non-binding practical guidance. Both these tools can potentially reduce the need for detailed prescriptive regulation. Finally, a

framework directive can provide the basis for some formal stakeholder participation in the regulatory process.

However, while a single framework directive is also in theory simpler and faster to negotiate than a series of directives, it would contain more issues of substance and therefore be harder to reach consensus.

Questions for consultation

- *Do you agree that there is a need to reform consumer protection as regards this aspect of the internal market?*
- *Should reform be pursued on the basis of the existing specific approach or the mixed approach outlined?*
- *What is the likely impact of the two approaches in terms of costs and benefits for consumers and business?*
- *What are the priorities for harmonisation under the specific approach?*

4. FURTHER ISSUES

If a mixed approach to the reform of consumer protection were chosen, a number of further issues would arise.

4.1 General framework for fair commercial practices

A framework directive would be based on a general clause for consumer-business relations. This could draw on existing legal models based on 'fair commercial practices' or 'good market behaviour'. In essence, it would be a requirement not to engage in unfair commercial practices and would include a general test. Such an approach is comparable to that in the unfair contract terms directive. National rules that purely covered general interest objectives in relation to commercial practices other than consumer protection (e.g. pluralism, the protection of culture, health and safety, decency) and national contract law requirements would be excluded.

The general clause would have to be supplemented with general tests of fairness and specific rules in order to eliminate differences in national rules on commercial practices. These could cover all the elements of fair trading e.g. information disclosure, misleading and deceptive practices or undue influence as well as rules on marketing and commercial practices linked to the contractual and after-sales phases of the transaction. These general principles and rules would address the main issues of uncertainty and diversity and would draw upon:

- ECJ jurisprudence and existing EU legal concepts, notably on misleading advertising and unfair contract terms tests, and;
- National examples on issues such as misleading and deceptive practices, undue influence or pressure, disclosure, vulnerable consumers, equitable bargains and good faith.

4.2 General framework covering misleading and deceptive practices

As an alternative to being based on fair commercial practices, the framework directive could be based on the more restrictive concept of misleading and deceptive practices. It would probably be easier to reach agreement on such a framework directive as this concept is in many ways the common core of unfair trading concepts across the EU. In particular this general prohibition has already been established as the test in the Misleading Advertising Directive. A common EU approach to these matters would be a significant step forward on both consumer protection and a simplification of the regulatory environment. It could also be

conceived as a first step towards a framework directive based on fair commercial practices. However, given the more limited scope the framework directive would not cover the full range of matters covered by a comprehensive duty to trade fairly (e.g. the use of selling techniques based on undue influence). Accordingly, divergent national approaches on matters falling outside the scope of the duty could continue to develop and further specific regulations at EU level would probably be needed.

4.3 Information

Given the importance of information requirements in consumer protection and the consumer's right to information in Article 153 of the EC Treaty, general obligations on information disclosure would be central to both alternatives. A key aspect of this would be a requirement for businesses to disclose all material information to consumers in a timely and clear manner. This would ensure a proper fulfilment of the right to information conferred on consumers by the Treaty. Within the framework directive for fair commercial practices it would also be possible to preclude practices such as deliberate information overload and excessive use of 'small print'. It would, moreover, demonstrate another important dimension of unfair trading, namely that omissions can also constitute an unfair trading practice.

4.4 Self and Co-regulation

Many problems may not be suitable for regulatory action. Self-regulation can achieve some consumer protection goals, especially in industries that recognise they have a strong common interest in retaining consumer confidence and where free riders or rogue traders can harm this confidence. Effective self-regulation that contains clear voluntarily binding commitments towards consumers and which is properly enforced can reduce the need for regulation or co-regulation. At present there is no means of ensuring effective EU-wide self-regulation in the field of consumer protection. A further option is for the framework directive to make this possible, thereby enabling businesses to sign up to one common code of conduct, rather than fifteen. The differences in national laws and general duties do not at present permit the development of genuine EU-wide codes.

Two vital elements would be needed to make the option for EU-wide self-regulation work. First, any general duty would have to define non-compliance with a voluntary commitment made by a business in respect of consumers as either a misleading or unfair trading practice. At present it is only possible to take action against failure to respect a voluntary commitment if this is repeated in advertising, in which case it may be subject to the misleading advertising directive. The introduction of a legal consequence for commitments made through codes of conduct and other voluntary commitments could possibly help business and consumers. Consumers would have the confidence that public enforcement bodies would act as the 'enforcer of last resort'. More rigorously enforced commitments through self-regulation would provide a stronger case for less substantive regulation. More rigorous self-regulation would also tackle the 'free rider' problem, since it would provide an additional point of reference for courts and enforcement authorities in tackling traders outside such agreements.

Second, the scope of the general duty would not only apply to business that traded with consumers but also to trade associations and other organisations that made recommendations on trading practices and drew up codes etc. This is currently the case for the Unfair Contract Terms Directive (Article 7). Given the influence trade associations have on the development of market practices, it makes sense to reinforce the responsibility of their actions in this way. Finally, there would be no provision for the explicit endorsement or approval of codes by the

Commission. Given the potential for abuses of competition rules through codes and the Commission's responsibility for enforcement of these rules, this would not be appropriate.

The Commission has urged the greater use of 'co-regulatory mechanisms' and 'framework directives' in its recent White Paper on Governance[43]. Any consumer protection proposal that includes co-regulation must therefore comply with the conditions for co-regulation set out in the White Paper. The role and responsibility of code-owners in developing codes and the role of public authorities in their enforcement could both be reinforced and clarified. The combination of a framework directive and a basis for EU-wide self-regulation could be seen as a co-regulatory approach, according to the terms of the White Paper, with some rough similarities with the 'New Approach'.

4.5 Practical guidance

Whilst a framework directive would provide a high degree of legal certainty for business and consumers, a certain risk of divergence in interpretation by national courts would always be present, albeit not to the degree that it exists today. However, a framework directive could make it easier for the ECJ to resolve these issues in future. Further directives could be used to ensure legal certainty, especially for sector-specific issues.

In addition, provision could be made for non-binding practical guidance to be developed in user-friendly language for the benefit of consumers or business, judges and enforcement officials. Although not legally binding, such guidance could enhance certainty and reduce the risk of fragmentation. Such guidance could either be expressed through Commission recommendations or through an indicative list of general and sector-specific examples of commercial practices. Such a list, similar to that used in the unfair contract terms directive, would have the advantage of being more formally linked to the underlying legislation. The possibility for the Commission and the Member States to update the list, through a regulatory committee, could also be considered to prevent obsolescence. In either case, the guidance would have to be developed in an environment of maximum transparency and consultation.

4.6 Stakeholder participation

The introduction of non-binding practical guidance could also permit the introduction of stakeholder participation in the elaboration of such guidance. Stakeholders could be invited by the Commission and the Member States to reach agreement on sector-specific parts of the guidance within a deadline. For this to be possible, the framework directive would have to establish a framework for this participation and criteria for the stakeholder bodies. EU-wide bodies would also need to be better organised and be more capable than at present and their financing would have to be re-examined.

Questions for consultation

If the mixed approach were to be pursued:

- *What would be the key elements of a general clause, the general tests and core rules for regulating commercial practices?*
- *Which would be better: a framework directive with a general clause based on fair commercial practices or based only on misleading and deceptive practices? Which approach is more feasible? Which is more likely to address the problem of fragmentation in the internal market in the interest of consumers?*
- *Would it be useful to include a basis for self-regulation in a framework directive? If so, what are the key elements of such options and criteria for their inclusion?*
- *Would it be useful for non-binding practical guidance to be developed? Would this guidance be preferable in the form of Commission recommendations or through an indicative list of permitted and illicit examples annexed to the directive?*
- *Should there be a role for stakeholder participation in the development of the non-binding legal guidance?*

5. ENFORCEMENT

5.1 Enforcement in the EU today

Any regulatory measures must be linked to adequate enforcement structures that ensure their consistent application. Markets need clear and certain rules but they also require that such rules are effectively enforced. Consumer confidence and a competitive internal market requires a consistent application and enforcement of the law wherever the consumer or business are located. Whether a specific or framework directive approach is employed as a regulatory tool, it needs to be linked to enforcement mechanisms if Member States are to be able to swiftly, efficiently and effectively co-operate in tackling cross-border enforcement issues.

The creation of the internal market has already necessitated the development of some co-operation on enforcement and co-ordination. For example, formal co-operation mechanisms have been put in place with respect to internal market policies on taxation, customs, food and product safety. For consumer protection a mixture of informal mechanisms and one legal instrument exists at present. The Injunctions Directive gives national consumer enforcement bodies and consumer associations nominated by the Member States the power to seek injunctions in courts in their own and other Member States to stop traders infringing EU consumer protection directives. The International Marketing Supervision Network (IMSN) is a bi-annual forum for informal co-operation between enforcement practitioners from around the world. An EU sub-group of enforcement officials also meets bi-annually.

The Commission is an active participant in the IMSN and has also pursued a dialogue with the Member States on the future of co-operation on enforcement issues. Its analysis of the

operation of enforcement in the internal market has identified the following main characteristics of consumer protection enforcement in the internal market:

- Although consumers and consumer associations will continue to have an essential enforcement role to play, through the courts, a fully functioning consumer internal market will also depend on public consumer enforcement authorities acting in co-operation as 'enforcers of last resort'. The ability of public authorities to act to prevent consumer detriment before it happens, when businesses act fraudulently, dishonestly or unfairly and to persuade businesses to change their ways without recourse to time-consuming legal procedures is an essential component of business and consumer confidence. An internal market needs co-ordinated market surveillance.

- The development of e-commerce in particular will increase the need for co-operation. The online environment provides unprecedented opportunities for fraudulent, dishonest or unfair businesses to target consumers from a different jurisdiction and evade enforcement authorities. Article 19 of the Directive on e-commerce requires that Member States have adequate means of supervision and investigation necessary to implement the Directive and co-operate with one another.

- Co-operation between public bodies in different Member States is essential to combat traders acting cross-border in a fraudulent, dishonest or unfair way. The existing informal co-operation arrangements have been highly successful within their informal framework. However they do not provide the necessary co-operation tools that have been developed in other policy areas.

- The injunctions Directive, while filling an important loophole and being an important tool for consumer associations is not likely to become a general-purpose tool to resolve these issues. The cost-benefit for a public authority of launching injunction procedures in foreign jurisdictions are never likely to be sufficiently positive for this to become a day-to-day enforcement tool.

- There is no framework for systematic information exchange ('mutual assistance') about potentially fraudulent, dishonest or unfair traders, spontaneously or on request. Extensive information exchange is the keystone of effective market surveillance. There is no legal basis for the sharing of such information confidentially between enforcement bodies. For example, a database has been created within the IMSN-EU sub-group. It is however limited to being a backward-looking historical tool rather than a 'real-time' enforcement tool, because of confidentiality requirements. Enforcement bodies act only on behalf of consumers within their own jurisdiction, rather, as the internal market demands, on behalf of all EU consumers. There is no framework for co-ordinated enforcement actions against traders targeting consumers in several Member States. Enforcement bodies exist at many levels of government in the Member States - there is however no formal single point of contact for authorities in another Member State and sufficient liaison within each Member State to ensure smooth co-operation.

- The lack of a framework for enforcement co-operation within the EU also has the consequence that the EU is unable to develop effective co-operation with third countries. The development of e-commerce, raising the prospect of global cross-border shopping, calls for such co-operation. To meet this challenge, a formal global co-operation network has been established by the US, Canada and Australia - the EU, Japan and other countries have been invited to participate. Already the global network has been able to overcome the confidentiality problems encountered by the IMSN-EU and has developed a 'real time'

database. The lack of an EU framework for co-operation prevents the EU joining the global network and influencing its development.

- As well as a lack of the practical tools of enforcement co-operation, familiar from other policy areas, there is a lack of a formal framework for co-operation on common projects and exchange of best practice on consumer education, information and representation. Good ideas are not systematically shared and attempts to avoid a duplication of efforts and pool resources have been limited and ad hoc. This is despite the finite and limited resources for enforcement and education, information and representation in all Member States.

- A fully functioning consumer internal market depends on enforcement that is more or less equally effective in all Member States. Article 153 of the EC Treaty was amended by the Treaty of Amsterdam to clarify the Commission's role as monitor of the effectiveness of national policies. At present there is no framework for the Commission to carry out this monitoring role and help to improve enforcement standards across the internal market. The need for the Commission to play this supportive role will increase with enlargement, and the accession of countries without a long history of consumer protection enforcement.

- The Commission is also hampered in its surveillance of the consumer internal market and the impact of consumer protection legislation by a lack of systematic feedback from on the ground in the Member States. In particular, the lack of feedback from enforcement authorities and systematic evidence from consumer complaints make it very hard to evaluate the development of the consumer internal market.

5.2 Options for reinforced co-operation on enforcement

A legal framework for formal co-operation between public authorities is much needed to build the consumer internal market and whilst its further development would clearly complement any regulatory reform as outlined under sections 3 and 4, there is still a clear independent need for such mechanisms. The advantage of a legal framework for co-operation, as can be seen from other policy areas, is that it opens up new possibilities and new tools for enforcement authorities. However, taking some further steps that do not need legislation would also make progress in this area. The use and practice of either formal or non-formal tools can develop over time and in line with need, but cannot begin until such tools are put in place.

A legal framework for co-operation would reap dividends for the internal market on the basis of the present EU consumer protection rules and without any of the reforms of consumer protection set out earlier in the paper being undertaken. The benefits of a legal framework for co-operation would however be greater if any of these options for reform were undertaken. A greater common basis of rules to enforce would help enforcement authorities build co-operation and trust more easily.

In any case, the development of a framework for co-operation would help to improve the feedback between enforcement and regulatory oversight. It is in the nature of consumer protection problems that a mixed policy response is often required, combining regulatory action with enforcement, information and education initiatives. The day to day management of enforcement and regulation should therefore be more closely integrated in future.

A number of possible co-operation tools could also be included in a legal framework for co-operation. These are set out below:

- The nomination of competent authorities by each Member State to co-ordinate enforcement co-operation among national, regional and local bodies and act as a single point of contact. Judicial co-operation would not be covered.

- The establishment of reciprocal mutual assistance rights and obligations among the Member States. Mutual assistance could cover information exchange on request and spontaneously, reciprocal use of national notification, surveillance, investigation and seizure powers. The principle that national enforcement bodies can act on behalf of all EU consumers could also be enshrined in the framework.

- The establishment of common databases and communication networks that respect confidentiality requirements.

- The establishment of obligations on Member States to supply information (statistics, complaints, risk patterns, emergencies) to the Commission for dissemination to other Member States to enhance the co-ordination of market surveillance. This could include the development of an EU system for complaint classification by type and sector. The establishment of obligations on the Commission to monitor and evaluate enforcement in the internal market and the implementation of national policies and to co-ordinate common projects.

- The possibility for Member States to carry out co-ordinated enforcement actions (simultaneous investigations, injunctions etc) albeit under national enforcement powers.

- The possibility to carry out common EU and national projects such as the creation of information and communication networks, common databases, training, seminars, exchanges and common inspections.

- The possibility for the EU to enter into co-operation with third countries on enforcement and join global enforcement networks. The possible association of candidate countries on co-operation initiatives, especially common projects.

Whatever tools were finally chosen for inclusion in the framework for co-operation, their management would require the establishment of a committee of the Commission and Member States, in accordance with Council decision 1999/468/EC[44]. It would have the role of implementing co-operation and acting as the forum for analysis, monitoring, troubleshooting and non-legislative action.

Questions for consultation

- *Is a legal framework for improving co-operation between consumer protection enforcement authorities needed?*

- *What should be the key elements of such a legal framework?*

[1] V.I.E.W. Study on the feasibility of a general legislative framework on fair trading. http://europa.eu.int/comm/consumers; PriceWaterhouseCoopers study on consumer law and the information society. http://europa.eu.int/comm/consumers and Lex Fori study to identify best practice in the use of soft law and to analyse how this best practice can be made to work for consumers in the EU. http://europa.eu.int/comm/consumers

[2] Council Directive 84/450/EC of 10 September 1984 relating to the approximations of laws, regulations and administrative provisions of the Member States concerning misleading advertisements (OJ L250, 19.09.1984)

[3] Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ L290 23.10.1997)

[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L95 21.04.1993, pp. 29-34)

[5] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171 of 07.07.1999, pp. 12-15

[6] Directive 95/58/EC of 29.11.95 European Parliament and of the Council amending 79/581/EEC on consumer protection in the indication of prices of foodstuffs and Directive 88/314/EEC on consumer protection of prices of non-food products (JO L 299 du 12.12.1995,pp.11-12)

[7] Council Directive 76/768/EEC of 27.7.1976 on the approximation of laws of the Member States relating to cosmetic products (OJ L262 of 27.9.1976, p.169), amended by Directive 79/661/EEC (OJ L192 of 31.7.1979, p.35), Directive 82/368/EEC (OJ L167 of 15.6.1982, p.1), Directive 83/574/EEC (OJ L332 of 28.11.1983, p.38), Directive 88/667/EEC (OJ L382 of 31.12.1988, 46), Directive 89/679/EEC (OJ L398 of 30.12.89, p.25), Directive 93/35/EEC (OJ L151 of 23.6.1993 p.32) and Directive 97/18/EC (OJ L114 of 1.5.1997).

[8] Directive 96/74/EC of the European Parliament and of the Council of 16.12.1996 on textile names (OJ L32 of 3.2.1997, p.38), amended by Directive 97/37/EC (OJ L169 of 27.6.1997, p.74)

[9] Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (OJ L113, 30.04.1992)

[10] Council Directive 90/314/EEC of 13.06.1990 on package travel, package holidays and package tours (OJ L 158 of 23.06.1990, pp. 59-64)

[11] Council Directive 85/577/EEC of 20.12.1985 to protect the consumer in respect of contracts negotiated away from business premises -"door to door selling"-(OJ L 372 of 31.12.1985, pp. 31-33)

[12] Council Directive 87/102/EEC of 22.12.1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42 of 12.02.1987, pp. 48-53). Amended by: Council Directive 90/88/EEC of 22.02.1990 (OJ L 61 of 10.03.1990, pp. 14-18) Council and European Parliament Directive 98/7/EC of 16.02.1998 (OJ L 101 of 01.04.1998, pp. 17-23)

[13] Directive 97/7/EC of the European Parliament and of the Council, of 20.05.97, on the protection of consumers in respect of distance contracts. (JO L 144 of 04.06.1997, pp. 19-28)

[14] Directive 90/384/EC of the Council on the harmonisation of the laws of the Member States relating to non-automatic weighing instruments OJ L189 of 20/07/1990 P 1-16

[15] Directive 94/47/EC of the European Parliament and the Council of 26.10.1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis (OJ L 280 of 29.10.1994, pp. 83-87)

[16] Directive 98/27/EC of the European Parliament and of the Council of 19.05.1998 on injunctions for the protection of consumers' interests. (OJ L 166 of 11.06.1998, pp. 51-56)

[17] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce), O.J. L178/1 of 17.7.2000

[18] Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ L298 of 17.10.1989, p.23) as amended by Directive 97/36/EC.

[19] Council Regulation (EC) no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, O.J. L12, 16 January 2001, p.1

[20] 80/934/EEC. Rome Convention on the law applicable to contractual obligations, O.J. L266, 9 October 1980

[21] Such examples include free gifts (*Oosthoek*, C-286/81 [1982] E.C.R. 4575), slavish imitation (*Industrie Diensten Groep v. Beele Handelmaastschzppij*, C-6/81 [1982] E.C.R. 707), sale at a loss (*Keck and Mithouard*, C-267 & 268/91 [1993] E.C.R. I-6097), parallel imports (*Dansk supermarked v. Imerco*, C-58/80 [1981] E.C.R. 181), misleading advertisement (*Pall corp. v Dahlhausen*, C-283/89 [1990] E.C.R. I-4827; *Verband Sozialer Wettbewerb e.V v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*, C-315/92 [1994] E.C.R. I-317; *Mars*, C-470/93 [1995] E.C.R. I923; *Commission v Germany "Sauce Hollandaise"*, C-51/94 [1995] E.C.R. I-3299; *Gut Springenheide*, C-210/96 [1998] E.C.R. I-4657, *Estée Lauder v Lancaster*, C-220/98 *unreported*), price comparisons and enticement (*GB-INNO*, C-362/88 [1990] E.C.R. I-667; *Yves Rocher*, C-156/91 [1993] E.C.R. I-2361), and information requirements (*Commission v UK*, C-207/83 [1985] E.CR. 1201; *Robertson*, C-220/81 [1982] E.C.R. 2349).

[22] Council Resolution on "A New Approach to technical harmonisation and standards" of 7 May 1985 OJ C136/1 of 04/06/1985.

[23] Article 1 of the Bundesgesetz gegen den unlauteren Wettbewerb

[24] Article 1 of the Act on Unfair Competition

[25] Article 260, para 1 Codigo da Propriedade Industrial

[26] § 1 Gesetz gegen unlautern Wettbewerb

[27] Article 93 and 94 Loi sur les pratiques du commerce et sur l'information et la protection du consommateur

[28] Article 2598 Codice Civile

[29] Article 16 Loi du 27 Novembre 1986 réglementant certaines pratiques commerciales et sanctionant la concurrance déloyale

[30] Article 5 Ley Competencia Desleal and Article 6(b) Ley General de Publicidad

[31] Art. 1382-1384 Code Civil

[32] Article 6:162 of the 'Burgerlijk Wetboek'

[33] §1 Marketing Practices Act

[34] Consumer Protection Act, part 2 §1

[35] Article 4, para 1 of the Marketing Act

[36] The English common law has developed principles such as 'unconscionability' and 'equity' as a means of ensuring balance and fairness in commercial transactions. A recent report by the UK Financial Services Authority "Treating Customers fairly after the point of sale" (June 2001) examined the concept of 'fairness' in the English law and broke it down into a number of identifiable elements which go to make up 'fair', and types of conduct which are indicative of acting fairly (see Annex 1).

[37] Single Market Scoreboard No 8 (28 May 2001) p.17-21.

[38] The Opinion of the Economic and Social Committee on 'The effects of e-commerce on the Single Market (SMO)' shows that in Europe e-commerce currently accounts for less than 1% of total final consumer transactions, i.e. less than traditional mail order business. (OJ C/123, 25.04.01, p.1-10)

[39] Communication from the Commission to the Council and the European Parliament: An internal market Strategy for Services : COM(2000) 888

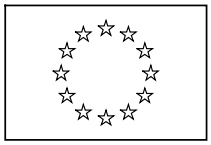
[40] see Opinion of the Expert Group – the regulation of cross-border discounts in the Community (Commercial Communications Journal, Issue 19, June 1999) and Opinion of the Expert Group on the regulation of cross border free gifts and premium offers in the Community (Commercial Communications journal, Issue 24, October 2000)

[41] Council Directive 92/59/EEC of 29 June 1992 on General Product Safety, O.J. L 228, 11.08.92, p. 24

[42] Proposal for a Regulation of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Authority, and laying down procedures in matters of food COM(2000) 716 final, 08.11.2000 (JO C 96 E du 27.3.2001, p. 247)

[43] European Governance: A White Paper (COM(2001) 428)

[44] Council Decision of 28.6.1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L184 of 17.7.1999, p.23)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.6.2002
COM(2002) 289 final

COMMUNICATION FROM THE COMMISSION

Follow-up Communication to the Green Paper on EU Consumer Protection

COMMUNICATION FROM THE COMMISSION

Follow-up Communication to the Green Paper on EU Consumer Protection

EXECUTIVE SUMMARY

The Green Paper[1], which was adopted in October 2001, set out a number of options and questions on the future of the regulation and enforcement of consumer protection. In particular, it suggested the idea of developing a framework directive on fair commercial practices. In addition, it suggested the development of a legal instrument for cooperation between enforcement authorities.

The Green Paper received a wide response from businesses, consumer organisations and national governments and agencies. The ideas set out in the Green Paper were broadly supported by respondents, although not all the ideas were welcomed by all groups of respondents. The consultation identified a broad consensus along the following lines:

- A majority of respondents accept the case for reform of EU consumer protection legislation. The current status quo is holding back the internal market for consumers and for businesses.

- A majority of the respondents who expressed a preference would like reform to proceed on the basis of a framework directive. A majority of those who expressed a preference said that this should be on the basis of fair commercial practices.

- A large majority of those who expressed a view endorsed the Commission's idea of developing a legal instrument for cooperation between national enforcement bodies responsible for consumer protection.

The Council has called on the Commission to follow-up the Green Paper as a matter of priority. The response to the consultation has also given the Commission clear support to develop a proposal for a framework directive. However, there is a strong case for further consultation on the detail before presenting a proposal. This communication therefore sets out an action plan for further consultation with the Member States and stakeholders. As a first step towards this consultation, an outline of the issues to be covered in a framework directive is attached in Annex I. This will be complemented in due course with more detailed consultation papers.

These initiatives are fully consistent and compatible with existing Community policies such as the Commission's audiovisual policy (notably the Television without frontiers Directive[2]) and its policy on commercial communications and the follow-up to the Commission's Internal Market Strategy for Services.

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1 COM (2001) 531

2 Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L298 of 17.10.1989, p.23), as amended by Directive 97/36/EC.

In the meantime, reactions to the communication are welcome and should be sent to the Commission by **30 September 2002**. All reactions should be sent by email to consultsanco@cec.eu.int. In addition, paper copies may also be sent to:

European Commission
DG Health and Consumer Protection
F101 06/52
B-1049 Bruxelles/Brussel

Separately the Commission services will begin the development of a proposal for a legal instrument on enforcement cooperation, consulting informally national governments and enforcement authorities that are most concerned, with the intention of adopting a proposal by the end of 2002.

I. INTRODUCTION

1. The central argument of the Green Paper was that the fragmentation of EU and national rules on consumer protection means that the internal market does not work properly for business to consumer transactions. It identified barriers to consumer confidence in purchasing cross-border and to business confidence in selling cross-border and in establishing in several Member States. The potential of the internal market to stimulate competition and benefit consumers has not been achieved. The Green Paper proposed a choice for further harmonisation, between the specific approach (consisting of additional vertical harmonisation measures) and the mixed approach of a framework directive on commercial practices, complemented as necessary with sectoral measures).

2. The Green Paper suggested an important role for EU-wide codes of conduct under a framework directive. As part of this it suggested that non-compliance with voluntary commitments relating to commercial practices made in codes should be defined as an unfair practice in itself. It also suggested making associations responsible for the conformity of their codes with legislation, but not liable for their members' compliance with their own codes.

3. The Green Paper consulted on the question of whether non-binding guidance, drawn up either through lists by a regulatory committee of the Member States, chaired by the Commission, or through Commission recommendations be developed. The guidance could serve to guide national enforcement bodies and so reduce the risk of fragmentation by ensuring a common approach. The Green Paper suggested that the Committee could mandate business and consumer organisations through stakeholder participation to negotiate non-binding guidelines. Finally the Green Paper proposed the establishment of a legal framework for enforcement co-operation between public bodies.

4. The consultation period closed on 15 January 2002. A public hearing on the Green Paper was held on 7 December 2001 in Brussels and was attended by over 200 participants[3].

[3] A report of the proceedings of the hearing can be found at http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/hearing_greenpap_en.html

5. In its conclusions in preparation of the Barcelona European Council, the Internal Market Council called for priority to be given to the follow-up to the Green Paper[4].

II. SUMMARY OF RESPONSES

6. The Green Paper has generated a large degree of interest, with 169 responses received[5], the majority from business organisations. The annexed table (Annex II) provides a more detailed breakdown of the responses. However, the response to the consultation was not geographically balanced. All Member States responded to the consultation. Of the EU institutions, the Economic and Social Committee has to date produced an opinion[6], which broadly supports the mixed approach of the Green Paper, whilst calling for more clarification.

The need for reform

7. On the overall case for reform, the responses to the Green Paper were divided, but with a majority of those who expressed a clear view (114 out of 141) agreeing with the Commission's analysis. All **Member States**, with one exception, accepted the need for reform. Two other Member States only accepted the need to reform existing EU directives. **Business** associations and company respondents were fairly evenly divided. An important group (36) and most of the multinational corporations that responded (8) confirmed this analysis. Some gave examples of barriers. Many argued that inconsistency between the national laws transposing the consumer protection directives containing minimum clauses was also a significant barrier.

8. Another important group of business associations (24 respondents) argued that the analysis was unproven. They called for more evidence on attitudes to cross-border trade generally and the role of consumer protection in these attitudes. Some within this group were less sceptical than others: they were open to being convinced by further evidence. For others the nature of any legal proposals was the determining factor. 17 business associations and 3 companies did not express a clear view either way.

9. A clear majority (30 out of 31) of **Consumer** organisations agreed with the need for reform and some supplied examples. One rejected the Green Paper analysis entirely; arguing that consumer protection was best carried out at national level.

Harmonisation

10. A large majority of the **Member States** (12) supported the **mixed approach** and a framework directive based on full harmonisation and fair commercial practices. The remaining three expressed a preference for the specific approach and considered that simplification and harmonisation of existing legislation should be the priority. These countries also expressed concerns that the framework directive might not reduce fragmentation sufficiently. Two Member States argued that the objective of the

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4 Report of the Internal Market/Consumer Affairs/Tourism Council of 1 March 2002 - Council Document 6503/02

5 A full list of respondents and copies of all responses can be found at: http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/responses/responses_en.html

6 CES 344/2002

framework directive should be to protect consumers, competitors and the general public by means of a ban on unfair trading practices. They maintain that the framework directive should be drafted in such a way that includes business-to-business trading relations as under their system of unfair competition, which includes trading practices such as protection of trade secrets or slavish imitation. They argued that this extension of the scope of the directive is justified by the fact that not only consumers, but also competitors, and particularly SMEs, need protection against unfair commercial practices.

11. Most **consumer associations** (29) were in favour of the mixed approach with a framework directive based on fair commercial practices. However, two of them expressed concerns about the idea that a framework directive would eliminate the justification for minimum clauses in consumer protection directives and create the conditions for the application of the country of origin principle.

12. **Business** was again fairly evenly divided, with views ranging from strong support to profound scepticism. 31 business associations and companies expressed a preference for pursuing the mixed approach. 27 expressed a preference for the specific approach and 30 expressed no clear preference, calling for further information, clarification or consultation. 18 business associations and companies preferred the idea of a framework directive based on fair commercial practices, 16 based on misleading practices, with 54 expressing no clear preference.

13. In general, those who were most sceptical were concerned that a framework directive would result in an increase in fragmentation of the internal market. These respondents questioned whether a framework directive would work in practice or whether it would truly harmonise national rules. In general these respondents also called for more evidence that a framework directive could overcome these obstacles. Several businesses would be more willing to contemplate a framework directive if it consolidated and simplified existing rules.

Codes of conduct, non-binding guidance and stakeholder participation

14. The Green Paper ideas on **codes of conduct** have provoked the most questions and the highest levels of 'don't knows', probably because of their novelty and because they were only briefly sketched out in the document. A majority of business association and company respondents were in favour of developing EU-wide codes of conduct in principle (55 for, 11 against, 22 no clear view). Some argued that codes, especially in advertising, had a strong quasi-regulatory role. Others argued the opposite: that codes of conduct could not be a complement to regulation or that too great a reliance on codes would confuse business and consumers.

15. A large majority of those business associations and companies who expressed a view (28 out of 35) were against the idea of making voluntary commitments binding. However, 53 expressed no view on this point. The role of nationally based codes raised many questions, especially from one Member State where codes are more established. There was support for the Green Paper line that codes of conduct should remain genuinely voluntary but some argued in favour of Commission endorsement of codes. Some concerns were expressed about making code-owners responsible for their codes.

16. Consumer groups and other respondents were cautiously positive, being more strongly in favour of making commitments binding. Of those who expressed a view, the idea of defining non-compliance with a commitment as unfair was a critical pre-condition for their support for codes of conduct (8 in favour, 0 against, 25 no view).

17. The Member States were mainly supportive of the use of codes of conduct in general. One called for further consultation. Two others supported the idea of codes of conduct in consumer protection in general. One of these two in particular argued strongly in favour of public endorsement of codes. Four Member States favour more public involvement in the negotiation of codes.

18. The ideas on **non-binding guidance** and a **regulatory committee** also provoked questions. There is broad support for the use of EU-level guidance as providing additional clarification of fair commercial practices. Consumer groups (15 in favour, 1 against, 17 no view) especially value this since it increases the adaptability of the regulatory framework. Business associations and companies were fairly evenly divided: 19 in favour, 17 against, 52 no clear view). Those in favour welcomed the idea as a contribution to certainty and clarity. Those against feared that guidance would not solve the problem of fragmentation. There is no clear view as to preferred form and legal character of this guidance: many respondents ignored these issues or have responded with questions. A small number of business respondents expressed concerns about how the guidance would be drawn up or would work in practice.

19. Those business respondents who expressed a view either had strong reservations to the idea of a regulatory committee producing non-binding guidance in general or had many questions about its operation and membership. Those Member States who supported the framework directive also generally supported the need for non-binding guidance.

20. Finally there was strong support for **stakeholder participation** from consumer groups (20 in favour, 0 against, 13 no view). A majority of business associations and companies liked the idea of being strongly involved as stakeholders (32 in favour, 11 against, 45 no view). Those Member States who supported the framework directive also generally supported stakeholder participation

Enforcement

21. This idea was strongly welcomed by those Business associations and companies (30 for, 7 against) and consumer associations (18 for, 1 against) who responded and most Member States (10) have also strongly welcomed this proposal. A few businesses expressed concern that information about companies should be kept confidential, so that unsubstantiated allegations are not made public. Of the Member States, one which does not have a tradition of public enforcement bodies in this area, preferred to emphasise the role of judicial cooperation and did not see a need for an instrument at this stage. Another also emphasised judicial cooperation and pointed out the obstacles to cooperation between its national enforcement body and other Member States from its confidentiality rules on criminal law proceedings. While supporting the need for enforcement cooperation in general, three other Member States preferred to enhance informal cooperation further in the short term. All other Member States strongly endorsed the need for such an instrument.

Follow-up

22. A large majority of respondents support the idea that the Commission proceeds with a proposal on **enforcement co-operation** and have not requested further consultation on this initiative. On a framework **directive**, most businesses have requested a White Paper. Most other respondents would either like to see further consultation or have raised questions that they wish to see answered. A majority of the Member States, whilst supporting the framework directive, would also like further consultation on the contents of such a directive, but would not insist on a White Paper if this would slow progress.

III. NEXT STEPS

The need for reform

- The response to the consultation is more than sufficiently clear to justify further steps towards reform. A number of respondents and the majority of the Member States have indicated that disparities between national rules, in particular in the field of marketing practices, do give rise to appreciable distortions of competition.

- The Commission recognises the need to continue to develop research work in this area. Accordingly a number of further surveys are planned, designed to improve the general understanding of business and consumer attitudes to trading cross-border and their perception of the barriers that they face and to measure price divergences. These surveys will help the Commission identify the Internal Market barriers that a future framework directive would resolve.

- In due course any major proposals would be accompanied by an impact assessment and a list of the relevant obstacles to cross-border trade.

23. Further evidence has come to light since the Green Paper was published. The Commission's Cardiff report on the functioning of the internal market[7] pointed to significant price divergences that remain in the internal market. The report showed that some retail prices can be up to 40% above or below the European average and that the average price difference is around 30%. The report concluded that these divergences were due to 'economic' not 'geographic' factors and that "economic reform and competition measures seem best to eliminate residual price dispersion in these markets". The report mentioned that the Green Paper "sets out some options to increase competition in business-to-consumer and retail markets".
Certain companies would clearly benefit from the continuation of these price divergences and may therefore be opposed to an increase in transparency and competition in this area.

24. The European Financial Services Round Table commissioned a report[8] that has recently been published on the benefits of a working European retail market for financial services. It estimated the cost saving potential at 5 billion Euro annually and a possible beneficial effect of 0.5% in economic growth. The report identifies differing national rules on consumer protection and commercial practices as

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7 COM 2001 (736) of 7 December 2001

8 www.zew.de/erfstudyresults/

important barriers which "render a pan-European marketing strategy and standardised products impossible".

25. A recent Eurobarometer carried out for the Commission[9] also demonstrated that consumers in the EU have significantly lower confidence in making purchases cross-border than domestically. The report showed that 32% of European consumers feel well protected when in dispute with a business based in another Member State, compared to 56% when in dispute with a domestic business. This lack of confidence is also reflected in the general take up of e-commerce. The recent eEurope benchmarking report revealed slower than expected growth, with only 4% of users in Europe classifying themselves as 'frequent purchasers'[10].

Harmonisation

The framework directive

- The response to the question supports the Commission to pursue the mixed approach and develop a proposal for a framework directive. There is a strong case for further consultation on the detail of a framework directive. Elements of a possible framework directive are set out in Annex I, as a basis for consultation.

A framework directive should bring about:

- maximum harmonisation with a high level of consumer protection. Given the need to achieve a properly functioning internal market, further consultation is needed on the required level of harmonisation in the framework directive.

- Simplification and, where possible, deregulation of existing provisions should be prioritised.

- Application of the principle of mutual recognition and control by the country of origin (Internal Market principles).

- A balance between legal certainty and adaptability to market circumstances. On the one hand, it is essential that the legislation provides a sufficient level of detail both to genuinely harmonise, and to provide certainty for business and consumers. It should be clearly drafted to ensure that questions of interpretation are kept to a minimum. On the other hand, the legislation should be as 'time-proof' and technology-neutral as possible, avoiding overly prescriptive rules.

- The scope of the legislation should be based on the wider concept of 'fair commercial practices' and not only the narrower concept of 'misleading practices'. It should also be phrased in terms of actions that are unfair – in other words an obligation not to trade unfairly, rather than a duty to trade fairly.

- A framework directive should be based on a general clause, which could consist of two core elements: the unfairness of the practice; and a "consumer detriment test" (developed in the annex). The general clause would have to be substantiated by a number of specific rules (the "fairness/unfairness categories") concerning

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9 FLASH BE 117 'Consumer Study' January 2002

10 COM (2002) 62 final of 5 February 2002

different stages of the business to consumer relationship. In order to further illustrate the general clause and categories, a non-exhaustive list of examples would be drawn up.

- Possible elements of fairness/unfairness categories include:

– A prohibition on business from engaging in commercial practices that are misleading or likely to mislead the consumer;

– A duty to disclose to the consumer all material information which is likely to affect the consumer's decision;

– A prohibition on the use of physical force, harassment, coercion or undue influence by business;

– Effective information disclosure and complaint handling in the after-sales period.

- The primary focus should be on unfair practices that cause detriment to the interests of consumers as a whole, rather than individual cases, in line with existing practice. The legislation should provide that injunctions could be taken to ensure such unfair practices are withdrawn rapidly. The framework directive would be included in the list of the directives covered by Article 1 of the Injunctions Directive[11].

In addition:

- According to two Member States, a framework directive should also cover fairness in business to business commercial relations. As it is clear from the Green Paper the Commission's initial orientation was to limit a framework directive to business to consumer transactions. On the one hand, there are some unfair practices, such as protection of trade secrets or slavish imitation, which appear to be purely "business to business" in nature and should be outside the scope of application of the framework directive. On the other hand, there are practices, such as misleading advertising, which may affect both consumer and competitors' interests, which fall more clearly within the scope, as far as consumers are concerned. Given that no other Member State advocated the extension of a framework directive to all business to business relationships, the Commission sees no reason to change its initial orientation of covering solely business to consumer transactions.

- The decision to pursue the framework directive approach does not mean, as was made clear in the Green Paper, that the use of sector-specific measures such as the Television without frontiers Directive will be abandoned. Where necessary they will continue to be used.

26. The Commission's proposal for a Regulation concerning sales promotion in the Internal Market is compatible with the mixed approach. The Council has stated that priority should be given to the effective follow-up to the Commission's Green Paper

[11] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

on consumer protection. This Communication responds to that call. The Council has also stated that work on the proposal for a Regulation on sales promotions should be continued. In this context, the Commission wants to restate that work on the proposal for a Regulation on sales promotions should be continued in parallel.

Existing consumer protection directives

27. The Green Paper, in describing the mixed approach, suggested that any reform of existing consumer protection directives "would be undertaken once a framework directive has been established and experienced has been gained of its operation in practice". The fundamental basis for this approach has not changed. The insistence of the Member States to insert minimum clauses into Commission proposals, was not an idle caprice. Rather it was due to the underlying differences of approach to consumer protection identified in the Green Paper. Despite the wishes of some respondents, it is not politically realistic to expect the Member States to abandon the minimum clauses in existing consumer protection directives without addressing these underlying differences.

- There is however some scope for repealing certain provisions of existing consumer protection directives and incorporating them into the framework directive.

- The possibilities for reform of contract law provisions in existing directives that have proved problematic would be examined in the context of the follow-up to the communication on European contract law[12], which will be submitted before the end of the year.

Codes of conduct, non-binding guidance and stakeholder participation

Codes of conduct

28. According to the Green Paper, a framework directive would address two aspects of codes of conduct:

- Definition of non-compliance with voluntary commitments contained in a code as an unfair commercial practice.

- The compatibility of codes that recommended commercial practices with the framework directive.

29. The development of codes of conduct at EU level in the field of consumer protection should be governed by the following criteria:

- The essence of codes of conduct is that they are voluntary: businesses should not be obliged to write codes nor to join them. Business should also not be obliged to negotiate codes with public authorities or other third parties. Codes should not be applied to non-signatories.

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[12] Communication from the Commission to the Council and the European Parliament on European Contract Law (COM(2001) 398 final)

- Ensuring that commitments made in codes of conduct are respected is essential if the Member States where there is no tradition of codes of conduct are to accept their wider use and a corresponding shift to less intrusive legislation. Non-compliance with a voluntary commitment should be considered as misleading and therefore an unfair commercial practice.

- Only commitments that concern business-consumer commercial practices would be covered.[13]. In addition, only non-compliance with a firm commitment, such as an undertaking to follow certain 'good practices' could be construed as misleading. Non-compliance with an aspirational commitment ('best efforts') would not be misleading.

- Code-owners should be responsible for ensuring the conformity of their codes with legislation but not legally liable for the compliance of their members with the code. Ensuring code-owners are responsible for their own codes should reinforce their credibility.

- The development of EU-wide codes should be encouraged. Membership of a code could provide an implicit 'presumption of conformity' equivalent to the role played by standards under the New Approach. At present, it is almost impossible to develop a genuine EU-wide code, given the differences in national rules. In addition, the status of commitments made in codes differs greatly between Member States.

- Public endorsement of codes of conduct must always come at a price, in terms of changes that may be demanded by the public authority. The Commission will consult further on whether there is a need to provide for endorsement of codes and the mechanisms needed to ensure that such codes are in conformity with Community law. Public endorsement would give rise to a presumption of conformity with the provision of the framework directive, but would be without prejudice to the compatibility of the codes with the Community or national law provisions on competition.

30. Important concerns have been expressed about extending the role of codes of conduct. Codes of conduct are not a panacea. They can be abused either to mislead consumers or for anti-competitive reasons. Codes do not have the same legal status as legislation. The ultimate fallback of sectoral legislation will always remain. Effective codes of conduct simply means that there will be less need to have recourse to this safeguard. In this context, the Commission encourages the development of codes which, rather than setting minimum compliance requirements, go beyond the provisions of the directives and provide a higher level of consumer protection.

Non-binding guidance and stakeholder participation

31. These instruments should be seen together with a framework directive as a whole, with each element providing a different degree of certainty and adaptability. The value of the guidance would lie principally in supplying a point of reference for business, consumers, enforcement authorities and judges and in minimising the risk

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[13] The Commission has launched an initiative on business-to-business codes of conduct in the area of e-commerce. See http://europa.eu.int/comm/enterprise/ict/policy/b2b-market-fair-trade.htm

of differing interpretations arising. The use of such guidance is an important aid to clarity in several national consumer protection regimes in the EU and in other EU policies. Although not binding it is a practical tool for building consensus on new issues. Most importantly it would provide the basis for reaching consensus among national public authorities whose own interpretations have a significant impact on the market.

32. Further consultation is needed both on the form and development of guidance and on the possible role for stakeholders in developing guidance. While the latter was welcomed in principle, further consultation and examination is needed on the mechanisms needed to give stakeholders a role in identifying the consensus.

Enforcement

33. The clear welcome to the Commission's proposals for enforcement cooperation has given clear support for work to proceed on a legislative proposal to establish a framework for cooperation. The Commission will now begin work on this with the intention of making a proposal by the end of 2002. Before making a proposal, the parties most concerned, national governments and enforcement authorities will be consulted informally. The detailed ideas (e.g. establishment of a central national liaison point, mutual assistance and common enforcement actions) presented in the Green Paper will be the basis of the Commission proposal.

IV. FOLLOW-UP

34. Further consultation on the questions that remain open should proceed on the basis of working documents. The outline of a framework directive set out in Annex I is the first such working document.

Fair commercial practices

Initial areas for investigation and assessment methodology

35. The first step will be to build on the outline framework by consulting with national experts and interested stakeholders to identify possible options. The initial key areas for investigation, which may be discussed on the basis of one or more working documents, will cover the national notions of fairness, namely general clauses and fairness/unfairness categories; codes of conduct; non binding guidance; and stakeholder participation. Any relevant information will be gathered in order to evaluate the impact of the proposals.

36. As regards the notions of fairness, the objective is to identify the notions/categories of fair/unfair commercial behaviour ("notions of fairness"), which are common to the legal systems of most Member States. The notions which are not common, but specific to the systems of one or a minority of Member States will have to be characterised by taking into account the following criteria: (i) the public interest objectives motivating the measure; (ii) whether the measure is linked to the invoked public interest objective; (iii) how efficient is the measure in achieving the invoked public interests objectives; (iv) whether the measure is characterised by cultural or social peculiarities.

37. On the basis of the information above, the Commission will carry out a legal assessment of whether the national measure is a proportionate response to a legitimate public interest in protecting consumers and coherent notably with other Community consumer protection measures.

Establishment of an expert group

38. The Commission will establish a group of experts from national governments to:

- Facilitate a more in-depth exchange of views between the Commission and Member States;
- Assist the Commission in identifying key cross-border obstacles in the field of the fairness of commercial practices faced by business and consumers, causing appreciable distortions of competition;
- Identify and compare concepts of fair commercial practices in the Member States;
- Identify common ground and the issues to be addressed in any framework directive, using the annex as a starting point to structure the debate, and the level of harmonisation necessary in order to apply the principles of mutual recognition and country of origin and thus achieve the Internal Market in this field;
- Identify obstacles in the field of the fairness of commercial practices which do not cause appreciable distortions of competition and thus may be solved through application of the principles of mutual recognition and country of origin in any framework directive without further harmonisation;
- Provide detailed analysis and options for future measures in this area to be used as a basis of wider consultation.

39. The Commission will chair the expert group. Its members will consist of governmental experts from the Member States. The Commission will invite interested stakeholders, in particular business associations and consumer organisations, to present their positions on specific issues being considered. The expert group will meet on a regular basis. The agenda of the expert group, any additional working papers prepared for it and reports of meetings will be made publicly available. The work of the expert group will be taken into account along with in-put from other sources.

Existing expert groups

40. The work and experience of a number of ongoing expert groups will be drawn on, where necessary and relevant, to give further insight and reflection on key issues. In particular, the work of the commercial communications expert group, the service strategy expert group, the OECD, the International Marketing Supervision Network (Europe), an important forum where Member State enforcers meet and discuss problems, will play a significant role. The Consumer Committee will also continue to be involved in discussions on an ad hoc basis.

Academic group

41. The Commission will also set up a group(s) of academics from different Member States to help it identify the notions of fairness which are common to the legal systems of the Member States and distinguish them from those that are specific to certain Member States. To this end, the academic group will carry out a comprehensive comparative law study.

Stakeholder involvement

42. The Commission considers that further stakeholder consultation is crucial and it will hold further dialogue with all stakeholders over the coming months. It will organise a number of open meetings in Brussels and, where appropriate, on the initiative of national governments, in the Member States to explore specific issues. In the meantime reactions to the communication are welcome and should be sent to the Commission **by 30 September 2002**. All reactions should be sent by email to consultsanco@cec.eu.int. In addition, paper copies may also be sent to:

European Commission
DG Health and Consumer Protection
F101 06/52
B-1049 Bruxelles/Brussel

43. Unless otherwise explicitly requested, the Commission will make all responses received public through the Internet.

European Parliament

44. The Commission will keep the European Parliament fully informed of the developments in the consultation, especially the outcomes of the expert groups and meetings with stakeholders.

Reviewing existing acquis

45. The Commission will also begin a comprehensive review of the existing consumer legislation to identify areas that may be consolidated and simplified. This will concern those parts of the acquis that address commercial practices having no effect on the contract law provisions of the Member States. The Commission will outline the key areas in order to consult widely on possible consolidation initiatives and ensure consistency with any follow-up measures on the Green Paper. Business, consumer and some Member States respondents have all complained about the barriers in this area, for example, differing withdrawal periods arising from the existing directives. As indicated earlier, the Commission will examine the barriers that arise from the contract law provisions of the existing acquis in the follow-up to the communication on European contract law.

ANNEX I

ELEMENTS OF A POSSIBLE FRAMEWORK DIRECTIVE

The following is a working document that outlines elements of a possible framework directive in order to provide a starting point to structure the debate within the expert group above.

I. Scope

A possible framework directive could harmonise the legal provisions of the Member States relating to the fairness of commercial practices in order to ensure a uniform high level of consumer protection and the smooth functioning of the Internal Market. The health and safety aspects relating to goods, services or property as well as contract law and contractual law remedies would not be covered.

The primary focus of a framework directive would be on unfair commercial practices harmful to the collective interests of consumers, rather than claims of individuals. Under the framework directive Member States would ensure that court actions under their national laws allow for the rapid adoption of measures, including interim measures designed to terminate any unfair practice. The framework directive would be included in the list of the directives covered by Article 1 of the Injunctions Directive.

A further question for consultation is whether or not the framework directive should provide for the exercise of an autonomous action by national enforcement bodies and/or consumer organisations. An additional issue to consider in this context is whether the most blatant and serious breaches of specific provisions of the framework (e.g. use of force, harassment or coercion, see below) directive could give rise to liability for damages proven by individual consumers.

The framework directive would apply only in so far as there are no specific Community law provisions regulating these commercial practices. For example, it would be without prejudice to the information requirements to be provided under the Consumer Credit Directive, [14] or the rules on sponsorship set out in the Television without frontiers Directive.

II. Structure

1. General clause

The framework directive would be based on a general clause, according to which Member States should ensure that traders established in their territory should not engage in unfair commercial practices.

The general clause could consist of two elements:

a) the unfairness of the commercial practice.

b) a “consumer detriment test”, i.e. the fact that the commercial practice should cause or be likely to cause direct detriment to the consumer. This test would

[14] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and subsequent amendments.

have to be measured against the standard of the consumer of average intelligence, reasonably well informed and reasonably circumspect, as defined by the Court of justice[15]. Where the business consciously directs its activities to a specific vulnerable group of consumers (such as children) that criteria could be adjusted accordingly.

2. Fairness/unfairness categories

The general clause would have to be substantiated by an exhaustive number of specific rules (the "fairness/unfairness categories") concerning different stages of the business to consumer relationship. In order to define these categories the Commission will have to examine the notions of fairness, which are common to most of the legal systems of the Member States.

Some common elements could be:

- misleading practices;
- failure to provide material information ("duty to disclose"), including representations, omissions and conduct;
- use of force, harassment, coercion and undue influence;
- failure to provide after sale customer assistance and effective complaint handling.

2.1 Misleading commercial practices

A framework directive should prohibit business from engaging in commercial practices that are misleading or likely to mislead the consumer to whom they are directed or effected. Possible examples of this are:

– any technique to promote the goods or services or property on offer that is not clearly identifiable as such by the consumer. In particular, features, announcements or promotions that are disseminated in exchange for a payment or other reciprocal arrangement should be clearly recognisable as such by the consumer;

– a representation that any good or service has sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that it does not have;

– a representation that any good or service is of a particular standard, quality, grade, style or model that it is not;

In this context, business would be required to be able to objectively substantiate all representations/claims, other than those specifically regulated in other EU legislation, made to consumers, whether direct or implied. This would not cover advertising cases based on subjective claims or on correctly stated opinions if consumers are made aware of the source

[15] *Pall corp. v Dahlhausen*, C-283/89 [1990] E.C.R. I-4827; *Verband Sozialer Wettbewerb e.V v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*, C-315/92 [1994] E.C.R. I-317; *Mars*, C-470/93 [1995] E.C.R. I923; *Commission v Germany "Sauce Hollandaise"*, C-51/94 [1995] E.C.R. I-3299; *Gut Springenheide*, C-210/96 [1998] E.C.R. I-4657, *Estée Lauder v Lancaster*, C-220/98 ECR I-117

and limitations of the communication. Further, "puffing" cases would not be covered since a reasonable person can recognise obviously exaggerated claims and do not take them seriously. Some of the above issues are partially covered by the misleading advertising directive, which could be subsumed into any framework directive.

2.2 Duty to disclose

Often information is given in brochures and lengthy contracts or in jargon. A framework directive should ensure transparency of the key facts such as hidden penalties or charges or restrictions on the goods or services that are likely to have an important impact on the consumer's decision to buy. The consumer should be provided with such information by the supplier prior to the purchase of any goods or services.

A framework directive could impose on traders a duty to disclose to the consumer all material information that is likely to affect the consumer's conduct or decision with regard to the goods or services.

For example, the following non-exhaustive aspects could be required:

- the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
- the price of the goods or services including all taxes indicated in the applicable currency;
- delivery charges, where appropriate;
- the arrangements for delivery or performance;
- the existence of any return, if foreseen by EU law, or any return, exchange or refund policy;
- the cost, if above the basic rate, that a consumer would incur to communicate with the trader, such as the use of premium telephone numbers;
- information relating to available after sales service;
- membership of a code of conduct and an alternative dispute settlement scheme, if applicable;

2.3 Use of force, harassment, coercion and undue influence

A framework directive could provide that business should not use physical force, harassment, coercion and undue influence in their relationship with consumers. This includes aggressive selling and would aim to target a business that:

a) exploits characteristics or circumstances of the consumer. For example, taking advantage of a specific situation or misfortune of the consumer such as a bereavement or serious illness in his family or anxieties about personal security or debt;

b) unduly pressures the consumer to agree to the purchase of goods or services. For example, making it clear to the consumer that he cannot leave the premises

until the contract is signed; or prolonged personal visits by sales representatives who ignore requests to leave.

2.4 After sale customer assistance and complaint handling

It will be necessary to examine which aspects of the after-sale customer assistance should be covered in the framework Directive.

An issue that could be covered is complaint-handling procedures. Practice varies but many suppliers do not give adequate priority to the effective handling of their customers' queries and complaints and this is reflected in systems, resources, cultures and outcomes. Under the framework directive, traders should ensure that they respond quickly and effectively to any complaint and make full redress when justified. Rules should focus on outcomes here, rather than prescribing methods, leaving companies free to organise their internal practices.

Examples of possible procedures may include:

- Co-ordinating the handling of complaints;
- Ensuring that information from complaints of general interest is reported to the firm's management;
- Informing consumers about how to make a complaint and the follow-up of their complaints;
- Contact points at which consumers can lodge a complaint; and
- Internal controls to ensure that complaints are properly dealt with.
- Information about third part resolution mechanisms.

A further question for consultation is whether other aspects of the after-sale ongoing relationship between the business and consumer (e.g. failure to provide relevant information over the life of a complex product or not having available spare parts or charging excessive prices for them) should be included as a specific unfair category. Alternatively, such issues could be covered by the information requirement under the duty to disclose.

2.5. Codes of conduct

Only voluntary commitments in codes of conduct made public by companies addressing business-consumer commercial practices would be relevant for the purposes of the framework directive. These commitments could be adopted collectively by an industry sector or an association of companies or an individual company. A code-owner would need to be defined as the body responsible for the development of the code (e.g. an association or the company itself in the case of an individual code).

The decision to join a code would also be voluntary. The representation by a firm of its association with a code gives rise to legitimate expectations. If the firm does not comply with the firm commitments in the code that type of behaviour would be considered as a misrepresentation and therefore unfair under the framework directive. A code-owner would be responsible for ensuring the conformity of the contents of the code with the framework directive. However, the framework directive would not seek to make code-owners liable for the compliance of code members with the code. The latter, as explained above, would be ultimately responsible if they fail to comply.

As indicated above, further consultation is needed on whether the framework directive should include an option for the endorsement of codes by public authorities. All codes, as agreements between undertakings, would remain under an obligation to respect competition rules. As

stated above, any endorsement by public authorities would create a presumption of conformity with the provisions of the framework directive, but would have no bearing on their compatibility with competition law provisions, notably those set out in Article 81 of the Treaty.

3. List of examples

In order to further illustrate the scope of application of the general clause and the fairness/unfairness categories a non-exhaustive list of examples would be contained in a list attached to the framework directive. For example, the following could be given as examples of misleading practices:

- A representation about the independence, neutrality or objectivity of their advice where this is not the case;

- A representation about the risk or probability of risk associated with goods or services that is not correct.

III. Mutual recognition and country of origin

The combination of an adequate level of harmonisation and the principles of mutual recognition and country of origin (which should be enshrined in the framework directive) will have as a consequence that divergent interpretations in jurisprudence at national level will not result in the fragmentation of the internal market.

IV. Non Binding Guidance

Rules for the use of guidance on the general clause and the fairness/unfairness categories should be established in the framework directive. The framework directive would make clear that this guidance is not legally binding. There are different options for the development of such guidance. One possibility is through Commission recommendations/interpretative communications, after having consulted Member States' representatives in an appropriate forum, business associations and consumer organisations.

V. Stakeholder participation

Depending on the option chosen for guidance, a framework directive would provide for the Commission to mandate stakeholders to try and identify consensus on such guidance.

The framework directive would need to provide for general criteria for the selection of stakeholders. These criteria should ensure that the stakeholders chosen represent the interests at stake in the issues concerned.

Further criteria for the granting of mandate and the verification that the mandate had been respected would have to be laid down. These criteria should ensure that the mandate is precise and that a clear deadline is supplied. The right of the Commission to produce guidance if the negotiations failed should be safeguarded in the framework directive.

Further consultation is required on the precise nature of the above provisions.

ANNEX II

	Reform			Approach			Practices			Codes			Guidance			Stakeholders			Enforcement		
	Yes	**No View/ More info**	**No**	**Mixed**	**No Pref./ No view/ More info.**	**Spec**	**Fair**	**No Pref./ No view/ More info.**	**Mislead**	**Yes**	**No Pref./ No view/ More info.**	**No**	**Yes**	**No Pref./ No view/ More info.**	**No**	**Yes**	**No Pref./ No view/ More info.**	**No**	**Yes**	**No Pref./ No view/ More info.**	**No**
Member States	12	2	1	12	0	3	13	1	1	10	2	3	10	5	0	11	4	0	10	3	2
Governments (other)	9	1	0	6	1	3	6	4	0	6	3	1	5	5	0	3	7	0	5	5	0
Consumer Org.	30	2	1	29	2	2	22	10	1	15	11	7	15	17	1	20	13	0	18	14	1
Business Assoc.	36	17	24	27	25	25	16	46	15	49	18	10	16	44	17	28	38	11	26	44	7
Companies	8	3	0	4	5	2	2	8	1	6	4	1	3	8	0	4	7	0	4	7	0
Lawyers	8	0	1	5	2	2	2	6	1	3	6	0	5	4	0	4	5	0	6	3	0
Others	11	3	0	12	1	1	9	4	1	9	4	1	7	6	1	8	6	0	7	7	0
TOTAL	114	28	27	95	36	38	70	79	20	98	48	23	61	89	19	78	80	11	76	83	10

31998L0006

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

Official Journal L 080 , 18/03/1998 P. 0027 - 0031

MORE INFO TEXT: PDF

DIRECTIVE 98/6/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 129a(2) thereof,
Having regard to the proposal from the Commission (1),
Having regard to the opinion of the Economic and Social Committee (2),
Acting in accordance with the procedure laid down in Article 189b of the Treaty (3), in the light of the joint text approved by the Conciliation Committee on 9 December 1997,
(1) Whereas transparent operation of the market and correct information is of benefit to consumer protection and healthy competition between enterprises and products;
(2) Whereas consumers must be guaranteed a high level of protection; whereas the Community should contribute thereto by specific action which supports and supplements the policy pursued by the Member States regarding precise, transparent and unambiguous information for consumers on the prices of products offered to them;
(3) Whereas the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (4) and the Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (5) provide for the establishment of common principles for indicating prices;
(4) Whereas these principles have been established by Directive 79/581/EEC concerning the indication of prices of certain foodstuffs (6) and Directive 88/314/EEC concerning the indication of prices of non-food products (7);
(5) Whereas the link between indication of the unit price of products and their pre-packaging in pre-established quantities or capacities corresponding to the values of the ranges adopted at Community level has proved overly complex to apply; whereas it is thus necessary to abandon this link in favour of a new simplified mechanism and in the interest of the consumer, without prejudice to the rules governing packaging standardisation;
(6) Whereas the obligation to indicate the selling price and the unit price contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons;

(7) Whereas, therefore, there should be a general obligation to indicate both the selling price and the unit price for all products except for products sold in bulk, where the selling price cannot be determined until the consumer indicates how much of the product is required;
(8) Whereas it is necessary to take into account the fact that certain products are customarily sold in quantities different from one kilogramme, one litre, one metre, one square metre or one cubic metre; whereas it is thus appropriate to allow Member States to authorise that the unit price refer to a different single unit of quantity, taking into account the nature of the product and the quantities in which it is customarily sold in the Member State concerned;
(9) Whereas the obligation to indicate the unit price may entail an excessive burden for certain small retail businesses under certain circumstances; whereas Member States should therefore be allowed to refrain from applying this obligation during an appropriate transitional period;
(10) Whereas Member States should also remain free to waive the obligation to indicate the unit price in the case of products for which such price indication would not be useful or would be liable to cause confusion for instance when indication of the quantity is not relevant for price comparison purposes, or when different products are marketed in the same packaging;
(11) Whereas in the case of non-food products, Member States, with a view to facilitating application of the mechanism implemented, are free to draw up a list of products or categories of products for which the obligation to indicate the unit price remains applicable;
(12) Whereas Community-level rules can ensure homogenous and transparent information that will benefit all consumers in the context of the internal market; whereas the new, simplified approach is both necessary and sufficient to achieve this objective;
(13) Whereas Member States must make sure that the system is effective; whereas the transparency of the system should also be maintained when the euro is introduced; whereas, to that end, the maximum number of prices to be indicated should be limited;
(14) Whereas particular attention should be paid to small retail businesses; whereas, to this end, the Commission should, in its report on the application of this Directive to be presented no later than three years after the date referred to in Article 11(1), take particular account of the experience gleaned in the application of the Directive by small retail businesses, inter alia, regarding technological developments and the introduction of the single currency; whereas this report, having regard to the transitional period referred to in Article 6, should be accompanied by a proposal,
HAVE ADOPTED THIS DIRECTIVE:

Article 1
The purpose of this Directive is to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices.

Article 2
For the purposes of this Directive:
(a) selling price shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes;
(b) unit price shall mean the final price, including VAT and all other taxes, for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member State concerned in the marketing of specific products;
(c) products sold in bulk shall mean products which are not pre-packaged and are measured in the presence of the consumer;

(d) trader shall mean any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity;
(e) consumer shall mean any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity.

Article 3
1. The selling price and the unit price shall be indicated for all products referred to in Article 1, the indication of the unit price being subject to the provisions of Article 5. The unit price need not be indicated if it is identical to the sales price.
2. Member States may decide not to apply paragraph 1 to:
- products supplied in the course of the provision of a service,
- sales by auction and sales of works of art and antiques.
3. For products sold in bulk, only the unit price must be indicated.
4. Any advertisement which mentions the selling price of products referred to in Article 1 shall also indicate the unit price subject to Article 5.

Article 4
1. The selling price and the unit price must be unambiguous, easily identifiable and clearly legible. Member States may provide that the maximum number of prices to be indicated be limited.
2. The unit price shall refer to a quantity declared in accordance with national and Community provisions.
Where national or Community provisions require the indication of the net weight and the net drained weight for certain pre-packed products, it shall be sufficient to indicate the unit price of the net drained weight.

Article 5
1. Member States may waive the obligation to indicate the unit price of products for which such indication would not be useful because of the products' nature or purpose or would be liable to create confusion.
2. With a view to implementing paragraph 1, Member States may, in the case of non-food products, establish a list of the products or product categories to which the obligation to indicate the unit price shall remain applicable.

Article 6
If the obligation to indicate the unit price were to constitute an excessive burden for certain small retail businesses because of the number of products on sale, the sales area, the nature of the place of sale, specific conditions of sale where the product is not directly accessible for the consumer or certain forms of business, such as certain types of itinerant trade, Member States may, for a transitional period following the date referred to in Article 11 (1), provide that the obligation to indicate the unit price of products other than those sold in bulk, which are sold in the said businesses, shall not apply, subject to Article 12.

Article 7
Member States shall provide appropriate measures to inform all persons concerned of the national law transposing this Directive.

Article 8
Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

Article 9
1. The transition period of nine years referred to in Article 1 of Directive 95/58/EC of the European Parliament and of the Council of 29 November 1995

amending Directive 79/581/EEC on consumer protection in the indication of the prices of foodstuffs and Directive 88/314/EEC on consumer protection in the indication of the prices of non-food products (8) shall be extended until the date referred to in Article 11(1) of this Directive.
2. Directives 79/581/EEC and 88/314/EEC shall be repealed with effect from the date referred to in Article 11 (1) of this Directive.

Article 10
This Directive shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty.

Article 11
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 18 March 2000. They shall forthwith inform the Commission thereof. The provisions adopted shall be applicable as of that date.
When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.
2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive.
3. Member States shall communicate the provisions governing the penalties provided for in Article 8, and any later amendments thereto.

Article 12
The Commission shall, not later than three years after the date referred to in Article 11(1), submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in particular on the application of Article 6, accompanied by a proposal.
The European Parliament and the Council shall, on this basis, re-examine the provisions of Article 6 and shall act, in accordance with the Treaty, within three years of the presentation by the Commission of the proposal referred to in the first paragraph.

Article 13
This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 14
This Directive is addressed to the Member States.

Done at Brussels, 16 February 1998.
For the European Parliament
The President
J. M. GIL-ROBLES
For the Council
The President
J. CUNNINGHAM

(1) OJ C 260, 5. 10. 1995, p. 5 and
OJ C 249, 27. 8. 1996, p. 2.
(2) OJ C 82, 19. 3. 1996, p. 32.
(3) Opinion of the European Parliament of 18 April 1996 (OJ C 141, 13. 5. 1996, p. 191). Council Common Position of 27 September 1996 (OJ C 333, 7. 11. 1996, p. 7) and Decision of the European Parliament of 18 February 1997 (OJ C 85, 17.

3. 1997, p. 26). Decision of the European Parliament of 16 December 1997 and Decision of the Council of 18 December 1997.
(4) OJ C 92, 25. 4. 1975, p. 1.
(5) OJ C 133, 3. 6. 1981, p. 1.
(6) OJ L 158, 26. 6. 1979, p. 19. Directive as last amended by Directive 95/58/EC (OJ L 299, 12. 12. 1995, p. 11).
(7) OJ L 142, 9. 6. 1988, p. 19. Directive as last amended by Directive 95/58/EC (OJ L 299, 12. 12. 1995, p. 11).
(8) OJ L 299, 12. 12. 1995, p. 11.

Commission Declaration
Article 2(b):
The Commission takes the view that the expression 'for one kilogramme, one litre, one metre, one square metre or cubic metre of the product or a different single unit of quantity` in Article 2(b) also applies to products sold by individual item or singly.

Commission Declaration
Article 12, first paragraph:
The Commission considers that Article 12, first paragraph, of the Directive cannot be construed as calling into question its right of initiative.

DIRECTIVE 1999/44/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 25 May 1999
on certain aspects of the sale of consumer goods and associated guarantees

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 18 May 1999 [3],

(1) Whereas Article 153(1) and (3) of the Treaty provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95 thereof;

(2) Whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed; whereas free movement of goods concerns not only transactions by persons acting in the course of a business but also transactions by private individuals; whereas it implies that consumers resident in one Member State should be free to purchase goods in the territory of another Member State on the basis of a uniform minimum set of fair rules governing the sale of consumer goods;

(3) Whereas the laws of the Member States concerning the sale of consumer goods are somewhat disparate, with the result that national consumer goods markets differ from one another and that competition between sellers may be distorted;

(4) Whereas consumers who are keen to benefit from the large market by purchasing goods in Member States other than their State of residence play a fundamental role in the completion of the internal market; whereas the artificial reconstruction of frontiers and the compartmentalisation of markets should be prevented; whereas the opportunities available to consumers have been greatly broadened by new communication technologies which allow ready access to distribution systems in other Member States or in third countries; whereas, in the absence of minimum harmonisation of the rules governing the sale of consumer goods, the development of the sale of goods through the medium of new distance communication technologies risks being impeded;

(5) Whereas the creation of a common set of minimum rules of consumer law, valid no matter where goods are purchased within the Community, will strengthen consumer confidence and enable consumers to make the most of the internal market;

(6) Whereas the main difficulties encountered by consumers and the main source of disputes with sellers concern the non-conformity of goods with the contract; whereas it is therefore appropriate to approximate national legislation governing the sale of consumer goods in this respect, without however impinging on provisions and principles of national law relating to contractual and non-contractual liability;

(7) Whereas the goods must, above all, conform with the contractual specifications; whereas the principle of conformity with the contract may be considered as common to the different national legal traditions; whereas in certain national legal traditions it may not be possible to rely solely on this principle to ensure a minimum level of protection for the consumer; whereas under such legal traditions, in particular, additional national provisions may be useful to ensure that the consumer is protected in cases where the parties have agreed no specific contractual terms or where the parties have concluded contractual terms or agreements which directly or indirectly waive or restrict the rights of the consumer and which, to the extent that these rights result from this Directive, are not binding on the consumer;

(8) Whereas, in order to facilitate the application of the principle of conformity with the contract, it is useful to introduce a rebuttable presumption of conformity with the contract covering the most common situations; whereas that presumption does not restrict the principle of freedom of contract; whereas, furthermore, in the absence of specific contractual terms, as well as where the minimum protection clause is applied, the elements mentioned in this presumption may be used to determine the lack of conformity of the goods with the contract; whereas the quality and performance which consumers can reasonably expect will depend *inter alia* on whether the goods are new or second-hand; whereas the elements mentioned in the presumption are cumulative; whereas, if the circumstances of the case render any particular element manifestly inappropriate, the remaining elements of the presumption nevertheless still apply;

(9) Whereas the seller should be directly liable to the consumer for the conformity of the goods with the contract; whereas this is the traditional solution enshrined in the legal orders of the Member States; whereas nevertheless the seller should be free, as provided for by national law, to pursue remedies against the producer, a previous seller in the same chain of

[1] OJ C 307, 16.10.1996, p. 8 and OJ C 148, 14.5.1998, p. 12.
[2] OJ C 66, 3.3.1997, p. 5.
[3] Opinion of the European Parliament of 10 March 1998 (OJ C 104, 6.4.1998, p. 30), Council Common Position of 24 September 1998 (OJ C 333, 30.10.1998, p. 46) and Decision of the European Parliament of 17 December 1998. (OJ C 98, 9.4.1999, p. 226). Decision of the European Parliament of 5 May 1999. Council Decision of 17 May 1999.

contracts or any other intermediary, unless he has renounced that entitlement; whereas this Directive does not affect the principle of freedom of contract between the seller, the producer, a previous seller or any other intermediary; whereas the rules governing against whom and how the seller may pursue such remedies are to be determined by national law;

(10) Whereas, in the case of non-conformity of the goods with the contract, consumers should be entitled to have the goods restored to conformity with the contract free of charge, choosing either repair or replacement, or, failing this, to have the price reduced or the contract rescinded;

(11) Whereas the consumer in the first place may require the seller to repair the goods or to replace them unless those remedies are impossible or disproportionate; whereas whether a remedy is disproportionate should be determined objectively; whereas a remedy would be disproportionate if it imposed, in comparison with the other remedy, unreasonable costs; whereas, in order to determine whether the costs are unreasonable, the costs of one remedy should be significantly higher than the costs of the other remedy;

(12) Whereas in cases of a lack of conformity, the seller may always offer the consumer, by way of settlement, any available remedy; whereas it is for the consumer to decide whether to accept or reject this proposal;

(13) Whereas, in order to enable consumers to take advantage of the internal market and to buy consumer goods in another Member State, it should be recommended that, in the interests of consumers, the producers of consumer goods that are marketed in several Member States attach to the product a list with at least one contact address in every Member State where the product is marketed;

(14) Whereas the references to the time of delivery do not imply that Member States have to change their rules on the passing of the risk;

(15) Whereas Member States may provide that any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him; whereas the detailed arrangements whereby rescission of the contract is effected may be laid down in national law;

(16) Whereas the specific nature of second-hand goods makes it generally impossible to replace them; whereas therefore the consumer's right of replacement is generally not available for these goods; whereas for such goods, Member States may enable the parties to agree a shortened period of liability;

(17) Whereas it is appropriate to limit in time the period during which the seller is liable for any lack of conformity which exists at the time of delivery of the goods; whereas Member States may also provide for a limitation on the period during which consumers can exercise their rights, provided such a period does not expire within two years from the time of delivery; whereas where, under national legislation, the time when a limitation period starts is not the time of delivery of the goods, the total duration of the limitation period provided for by national law may not be shorter than two years from the time of delivery;

(18) Whereas Member States may provide for suspension or interruption of the period during which any lack of conformity must become apparent and of the limitation period, where applicable and in accordance with their national law, in the event of repair, replacement or negotiations between seller and consumer with a view to an amicable settlement;

(19) Whereas Member States should be allowed to set a period within which the consumer must inform the seller of any lack of conformity; whereas Member States may ensure a higher level of protection for the consumer by not introducing such an obligation; whereas in any case consumers throughout the Community should have at least two months in which to inform the seller that a lack of conformity exists;

(20) Whereas Member States should guard against such a period placing at a disadvantage consumers shopping across borders; whereas all Member States should inform the Commission of their use of this provision; whereas the Commission should monitor the effect of the varied application of this provision on consumers and on the internal market; whereas information on the use made of this provision by a Member State should be available to the other Member States and to consumers and consumer organisations throughout the Community; whereas a summary of the situation in all Member States should therefore be published in the *Official Journal of the European Communities*;

(21) Whereas, for certain categories of goods, it is current practice for sellers and producers to offer guarantees on goods against any defect which becomes apparent within a certain period; whereas this practice can stimulate competition; whereas, while such guarantees are legitimate marketing tools, they should not mislead the consumer; whereas, to ensure that consumers are not misled, guarantees should contain certain information, including a statement that the guarantee does not affect the consumer's legal rights;

(22) Whereas the parties may not, by common consent, restrict or waive the rights granted to consumers, since otherwise the legal protection afforded would be thwarted; whereas this principle should apply also to clauses which imply that the consumer was aware of any lack of conformity of the consumer goods existing at the time the contract was concluded; whereas the

protection granted to consumers under this Directive should not be reduced on the grounds that the law of a non-member State has been chosen as being applicable to the contract;

(23) Whereas legislation and case-law in this area in the various Member States show that there is growing concern to ensure a high level of consumer protection; whereas, in the light of this trend and the experience acquired in implementing this Directive, it may be necessary to envisage more far-reaching harmonisation, notably by providing for the producer's direct liability for defects for which he is responsible;

(24) Whereas Member States should be allowed to adopt or maintain in force more stringent provisions in the field covered by this Directive to ensure an even higher level of consumer protection;

(25) Whereas, according to the Commission recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1], Member States can create bodies that ensure impartial and efficient handling of complaints in a national and cross-border context and which consumers can use as mediators;

(26) Whereas it is appropriate, in order to protect the collective interests of consumers, to add this Directive to the list of Directives contained in the Annex to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [2],

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope and definitions

1. The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.

2. For the purposes of this Directive:

(a) *consumer:* shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;

(b) *consumer goods:* shall mean any tangible movable item, with the exception of:

— goods sold by way of execution or otherwise by authority of law,

— water and gas where they are not put up for sale in a limited volume or set quantity,

— electricity;

(c) *seller:* shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;

(d) *producer:* shall mean the manufacturer of consumer goods, the importer of consumer goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods;

(e) *guarantee:* shall mean any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising;

(f) *repair:* shall mean, in the event of lack of conformity, bringing consumer goods into conformity with the contract of sale.

3. Member States may provide that the expression 'consumer goods' does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person.

4. Contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive.

Article 2

Conformity with the contract

1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.

2. Consumer goods are presumed to be in conformity with the contract if they:

(a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;

(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;

(c) are fit for the purposes for which goods of the same type are normally used;

(d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

3. There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

[1] OJ L 115, 17.4.1998, p. 31.
[2] OJ L 166, 11.6.1998, p. 51.

4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he:

— shows that he was not, and could not reasonably have been, aware of the statement in question,

— shows that by the time of conclusion of the contract the statement had been corrected, or

— shows that the decision to buy the consumer goods could not have been influenced by the statement.

5. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

Article 3

Rights of the consumer

1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.

3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.

A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:

— the value the goods would have if there were no lack of conformity,

— the significance of the lack of conformity, and

— whether the alternative remedy could be completed without significant inconvenience to the consumer.

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

4. The terms 'free of charge' in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

5. The consumer may require an appropriate reduction of the price or have the contract rescinded:

— if the consumer is entitled to neither repair nor replacement, or

— if the seller has not completed the remedy within a reasonable time, or

— if the seller has not completed the remedy without significant inconvenience to the consumer.

6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

Article 4

Right of redress

Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. the person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.

Article 5

Time limits

1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.

2. Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.

Member States shall inform the Commission of their use of this paragraph. The Commission shall monitor the effect of the existence of this option for the Member States on consumers and on the internal market.

Not later than 7 January 2003, the Commission shall prepare a report on the use made by Member States of this paragraph. This report shall be published in the *Official Journal of the European Communities*.

3. Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

Article 6

Guarantees

1. A guarantee shall be legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising.

2. The guarantee shall:

— state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee,

— set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

3. On request by the consumer, the guarantee shall be made available in writing or feature in another durable medium available and accessible to him.

4. Within its own territory, the Member State in which the consumer goods are marketed may, in accordance with the rules of the Treaty, provide that the guarantee be drafted in one or more languages which it shall determine from among the official languages of the Community.

5. Should a guarantee infringe the requirements of paragraphs 2, 3 or 4, the validity of this guarantee shall in no way be affected, and the consumer can still rely on the guarantee and require that it be honoured.

Article 7

Binding nature

1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.

Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.

2. Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.

Article 8

National law and minimum protection

1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.

2. Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.

Article 9

Member States shall take appropriate measures to inform the consumer of the national law transposing this Directive and shall encourage, where appropriate, professional organisations to inform consumers of their rights.

Article 10

The Annex to Directive 98/27/EC shall be completed as follows:

'10. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12).'.

Article 11

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive, or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 12

Review

The Commission shall, not later than 7 July 2006, review the application of this Directive and submit to the European Parliament and the Council a report. The report shall examine, *inter alia*, the case for introducing the producer's direct liability and, if appropriate, shall be accompanied by proposals.

Article 13

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 25 May 1999.

For the European Parliament	*For the Council*
The President	*The President*
J. M. GIL-ROBLES	H. EICHEL

32000L0013

Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs

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Directive 2000/13/EC of the European Parliament and of the Council
of 20 March 2000
on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,
Having regard to the proposal of the Commission,
Having regard to the opinion of the Economic and Social Committee(1),
Acting in accordance with the procedure laid down in Article 251 of the Treaty(2),
Whereas:
(1) Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs(3) has been frequently and substantially amended(4). Therefore, for reasons of clarity and rationality, the said Directive should be consolidated in a single text.
(2) Differences between the laws, regulations and administrative provisions of the Member States on the labelling of foodstuffs may impede the free circulation of these products and can lead to unequal conditions of competition.
(3) Therefore, approximation of these laws would contribute to the smooth functioning of the internal market.
(4) The purpose of this Directive should be to enact Community rules of a general nature applicable horizontally to all foodstuffs put on the market.
(5) Rules of a specific nature which apply vertically only to particular foodstuffs should be laid down in provisions dealing with those products.
(6) The prime consideration for any rules on the labelling of foodstuffs should be the need to inform and protect the consumer.
(7) That need means that Member States may, in compliance with the rules of the Treaty, impose language requirements.
(8) Detailed labelling, in particular giving the exact nature and characteristics of the product which enables the consumer to make his choice in full knowledge of the facts, is the most appropriate since it creates fewest obstacles to free trade.
(9) Therefore, a list should be drawn up of all information which should in principle be included in the labelling of all foodstuffs.
(10) However, the horizontal nature of this Directive does not allow, at the initial stage, the inclusion in the compulsory indications of all the indications which must be added to the list applying in principle to the whole range of foodstuffs. During a later stage, Community provisions should be adopted, aimed at

supplementing the existing rules.
(11) Furthermore, in the absence of Community rules of a specific nature Member States should retain the right to lay down certain national provisions which may be added to the general provisions of this Directive, nevertheless these provisions should be subject to a Community procedure.
(12) The said Community procedure must be that of a Community decision when a Member State wishes to enact new legislation.
(13) Provision should also be made for the Community legislator to derogate, in exceptional cases, from certain obligations that have been fixed generally.
(14) The rules on labelling should also prohibit the use of information that would mislead the purchaser or attribute medicinal properties to foodstuffs. To be effective, this prohibition should also apply to the presentation and advertising of foodstuffs.
(15) With a view to facilitating trade between Member States, it may be provided that, at stages prior to sale to the ultimate consumer, only information on the essential elements should appear on the outer packaging and certain mandatory particulars that must appear on a prepackaged foodstuff need appear only on commercial documents referring thereto.
(16) Member States should retain the right, depending on local practical conditions and circumstances, to lay down rules in respect of the labelling of foodstuffs sold in bulk; in such cases, information should nevertheless be provided for the consumer.
(17) With the aim of simplifying and accelerating the procedure, the Commission should be entrusted with the task of adopting implementing measures of a technical nature.
(18) The measures necessary for the implementing of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(5).
(19) This Directive should be without prejudice to the obligations of the Member States concerning the time limits for transposition of the Directives set out in Annex IV, Part B,
HAVE ADOPTED THIS DIRECTIVE:

Article 1
1. This Directive concerns the labelling of foodstuffs to be delivered as such to the ultimate consumer and certain aspects relating to the presentation and advertising thereof.
2. This Directive shall apply also to foodstuffs intended for supply to restaurants, hospitals, canteens and other similar mass caterers (hereinafter referred to as "mass caterers").
3. For the purpose of this Directive,
(a) "labelling" shall mean any words, particulars, trade marks, brand name, pictorial matter or symbol relating to a foodstuff and placed on any packaging, document, notice, label, ring or collar accompanying or referring to such foodstuff;
(b) "pre-packaged foodstuff" shall mean any single item for presentation as such to the ultimate consumer and to mass caterers, consisting of a foodstuff and the packaging into which it was put before being offered for sale, whether such packaging encloses the foodstuff completely or only partially, but in any case in such a way that the contents cannot be altered without opening or changing the packaging.

Article 2
1. The labelling and methods used must not:
(a) be such as could mislead the purchaser to a material degree, particularly:
(i) as to the characteristics of the foodstuff and, in particular, as to its nature,

identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;
(ii) by attributing to the foodstuff effects or properties which it does not possess;
(iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;
(b) subject to Community provisions applicable to natural mineral waters and foodstuffs for particular nutritional uses, attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties.
2. The Council, in accordance with the procedure laid down in Article 95 of the Treaty, shall draw up a non-exhaustive list of the claims within the meaning of paragraph 1, the use of which must at all events be prohibited or restricted.
3. The prohibitions or restrictions referred to in paragraphs 1 and 2 shall also apply to:
(a) the presentation of foodstuffs, in particular their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed;
(b) advertising.

Article 3
1. In accordance with Articles 4 to 17 and subject to the exceptions contained therein, indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:
(1) the name under which the product is sold;
(2) the list of ingredients;
(3) the quantity of certain ingredients or categories of ingredients as provided for in Article 7;
(4) in the case of prepackaged foodstuffs, the net quantity;
(5) the date of minimum durability or, in the case of foodstuffs which, from the microbiological point of view, are highly perishable, the "use by" date;
(6) any special storage conditions or conditions of use;
(7) the name or business name and address of the manufacturer or packager, or of a seller established within the Community.
However, the Member States shall be authorised, in respect of butter produced in their territory, to require only an indication of the manufacturer, packager or seller.
Without prejudice to the notification provided for in Article 24, Member States shall inform the Commission and the other Member States of any measure taken pursuant to the second paragraph;
(8) particulars of the place of origin or provenance where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff;
(9) instructions for use when it would be impossible to make appropriate use of the foodstuff in the absence of such instructions;
(10) with respect to beverages containing more than 1,2 % by volume of alcohol, the actual alcoholic strength by volume.
2. Notwithstanding the previous paragraph, Member States may retain national provisions which require indication of the factory or packaging centre, in respect of home production.
3. The provisions of this Article shall be without prejudice to more precise or more extensive provisions regarding weights and measures.

Article 4
1. Community provisions applicable to specified foodstuffs and not to foodstuffs in general may provide for derogations, in exceptional cases, from the requirements laid down in Article 3(1), points 2 and 5, provided that this does not result in the purchaser being inadequately informed.
2. Community provisions applicable to specified foodstuffs and not to foodstuffs

in general may provide that other particulars in addition to those listed in Article 3 must appear on the labelling.
Where there are no Community provisions, Member States may make provision for such particulars in accordance with the procedure laid down in Article 19.
3. The Community provisions referred to in paragraphs 1 and 2 shall be adopted in accordance with the procedure laid down in Article 20(2).

Article 5
1. The name under which a foodstuff is sold shall be the name provided for in the Community provisions applicable to it.
(a) In the absence of Community provisions, the name under which a product is sold shall be the name provided for in the laws, regulations and administrative provisions applicable in the Member State in which the product is sold to the final consumer or to mass caterers.
Failing this, the name under which a product is sold shall be the name customary in the Member State in which it is sold to the final consumer or to mass caterers, or a description of the foodstuff, and if necessary of its use, which is clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused.
(b) The use in the Member State of marketing of the sales name under which the product is legally manufactured and marketed in the Member State of production shall also be allowed.
However, where the application of the other provisions of this Directive, in particular those set out in Article 3, would not enable consumers in the Member State of marketing to know the true nature of the foodstuff and to distinguish it from foodstuffs with which they could confuse it, the sales name shall be accompanied by other descriptive information which shall appear in proximity to the sales name.
(c) In exceptional cases, the sales name of the Member State of production shall not be used in the Member State of marketing when the foodstuff which it designates is so different, as regards its composition or manufacture, from the foodstuff known under that name that the provisions of point (b) are not sufficient to ensure, in the Member State of marketing, correct information for consumers.
2. No trade mark, brand name or fancy name may be substituted for the name under which the product is sold.
3. The name under which the product is sold shall include or be accompanied by particulars as to the physical condition of the foodstuff or the specific treatment which it has undergone (e.g. powdered, freeze-dried, deep-frozen, concentrated, smoked) in all cases where omission of such information could create confusion in the mind of the purchaser.
Any foodstuff which has been treated with ionising radiation must bear one of the following indications:
- in Spanish:
"irradiado" or "tratado con radiación ionizante",
- in Danish:
"bestrålet/..." or "strålekonserveret" or "behandlet med ioniserende stråling" or "konserveret med ioniserende stråling",
- in German:
"bestrahlt" or "mit ionisierenden Strahlen behandelt",
- in Greek:
">ISO_7>åðåîåñãáóìÝíï ìå éïíßæïõóá áêôéíïâïëßá" >ISO_1>or
">ISO_7>áêôéíïâïëçìÝíï",
- >ISO_1>in English:
"irradiated" or "treated with ionising radiation",
- in France:
"traité par rayonnements ionisants" or "traité par ionisation",
- in Italian:

"irradiato" or "trattato con radiazioni ionizzanti",
- in Dutch:
"doorstraald" or "door bestraling behandeld" or "met ioniserende stralen behandeld",
- in Portuguese:
"irradiado" or "tratado por irradiação" or "tratado por radiação ionizante",
- in Finnish:
"säteilytetty" or "käsitelty ionisoivalla säteilyllä",
- in Swedish:
"bestrålad" or "behandlad med joniserande strålning".

Article 6
1. Ingredients shall be listed in accordance with this Article and Annexes I, II and III.
2. Ingredients need not be listed in the case of:
(a) - fresh fruit and vegetables, including potatoes, which have not been peeled, cut or similarly treated,
- carbonated water, the description of which indicates that it has been carbonated,
- fermentation vinegars derived exclusively from a single basic product, provided that no other ingredient has been added;
(b) - cheese,
- butter,
- fermented milk and cream,
provided that no ingredient has been added other than lactic products, enzymes and micro-organism cultures essential to manufacture, or the salt needed for the manufacture of cheese other than fresh cheese and processed cheese;
(c) products comprising a single ingredient, where:
- the trade name is identical with the ingredient name, or
- the trade name enables the nature of the ingredient to be clearly identified.
3. In the case of beverages containing more than 1,2 % by volume of alcohol, the Council, acting on a proposal from the Commission, shall, before 22 December 1982, determine the rules for labelling ingredients.
4. (a) "Ingredient" shall mean any substance, including additives, used in the manufacture or preparation of a foodstuff and still present in the finished product, even if in altered form.
(b) Where an ingredient of the foodstuff is itself the product of several ingredients, the latter shall be regarded as ingredients of the foodstuff in question.
(c) The following shall not be regarded as ingredients:
(i) the constituents of an ingredient which have been temporarily separated during the manufacturing process and later reintroduced but not in excess of their original proportions;
(ii) additives:
- whose presence in a given foodstuff is solely due to the fact that they were contained in one or more ingredients of that foodstuff, provided that they serve no technological function in the finished product,
- which are used as processing aids;
(iii) substances used in the quantities strictly necessary as solvents or media for additives or flavouring.
(d) In certain cases Decisions may be taken in accordance with the procedure laid down in Article 20(2) as to whether the conditions described in point (c)(ii) and (iii) are satisfied.
5. The list of ingredients shall include all the ingredients of the foodstuff, in descending order of weight, as recorded at the time of their use in the manufacture of the foodstuff. It shall appear preceded by a suitable heading which includes the word "ingredients".
However:
- added water and volatile products shall be listed in order of their weight in the

finished product; the amount of water added as an ingredient in a foodstuff shall be calculated by deducting from the total amount of the finished product the total amount of the other ingredients used. This amount need not be taken into consideration if it does not exceed 5 % by weight of the finished product,
- ingredients used in concentrated or dehydrated form and reconstituted at the time of manufacture may be listed in order of weight as recorded before their concentration or dehydration,
- in the case of concentrated or dehydrated foods which are intended to be reconstituted by the addition of water, the ingredients may be listed in order of proportion in the reconstituted product provided that the list of ingredients is accompanied by an expression such as "ingredients of the reconstituted product", or "ingredients of the ready-to-use product",
- in the case of mixtures of fruit or vegetables where no particular fruit or vegetable significantly predominates in proportion by weight, those ingredients may be listed in another order provided that that list of ingredients is accompanied by an expression such as "in variable proportion",
- in the case of mixtures of spices or herbs, where none significantly predominates in proportion by weight, those ingredients may be listed in another order provided that that list of ingredients is accompanied by an expression such as "in variable proportion".
6. Ingredients shall be designated by their specific name, where applicable, in accordance with the rules laid down in Article 5.
However:
- ingredients which belong to one of the categories listed in Annex I and are constituents of another foodstuff need only be designated by the name of that category.
Alterations to the list of categories in Annex I may be effected in accordance with the procedure laid down in Article 20(2).
However, the designation "starch" listed in Annex I must always be complemented by the indication of its specific vegetable origin, when that ingredient may contain gluten,
- ingredients belonging to one of the categories listed in Annex II must be designated by the name of that category, followed by their specific name or EC number; if an ingredient belongs to more than one of the categories, the category appropriate to the principal function in the case of the foodstuff in question shall be indicated.
Amendments to this Annex based on advances in scientific and technical knowledge shall be adopted in accordance with the procedure laid down in Article 20(2).
However, the designation "modified starch" listed in Annex II must always be complemented by the indication of its specific vegetable origin, when that ingredient may contain gluten,
- flavourings shall be designated in accordance with Annex III,
- the specific Community provisions governing the indication of treatment of an ingredient with ionising radiation shall be adopted subsequently in accordance with Article 95 of the Treaty.
7. Community provisions or, where there are none, national provisions may lay down that the name under which a specific foodstuff is sold is to be accompanied by mention of a particular ingredient or ingredients.
The procedure laid down in Article 19 shall apply to any such national provisions.
The Community provisions referred to in this paragraph shall be adopted in accordance with the procedure laid down in Article 20(2).
8. In the case referred to in paragraph 4(b), a compound ingredient may be included in the list of ingredients, under its own designation in so far as this is laid down by law or established by custom, in terms of its overall weight, provided that it is immediately followed by a list of its ingredients.
Such a list, however, shall not be compulsory:

(a) where the compound ingredient constitutes less than 25 % of the finished product; however, this exemption shall not apply in the case of additives, subject to the provisions of paragraph 4(c);
(b) where the compound ingredient is a foodstuff for which a list of ingredients is not required under Community rules.
9. Notwithstanding paragraph 5 the water content need not be specified:
(a) where the water is used during the manufacturing process solely for the reconstitution of an ingredient used in concentrated or dehydrated form;
(b) in the case of a liquid medium which is not normally consumed.

Article 7
1. The quantity of an ingredient or category of ingredients used in the manufacture or preparation of a foodstuff shall be stated in accordance with this Article.
2. The indication referred to in paragraph 1 shall be compulsory:
(a) where the ingredient or category of ingredients concerned appears in the name under which the foodstuff is sold or is usually associated with that name by the consumer; or
(b) where the ingredient or category of ingredients concerned is emphasised on the labelling in words, pictures or graphics; or
(c) where the ingredient or category of ingredients concerned is essential to characterise a foodstuff and to distinguish it from products with which it might be confused because of its name or appearance; or
(d) in the cases determined in accordance with the procedure laid down in Article 20(2).
3. Paragraph 2 shall not apply:
(a) to an ingredient or category of ingredients:
- the drained net weight of which is indicated in accordance with Article 8(4), or
- the quantities of which are already required to be given on the labelling under Community provisions, or
- which is used in small quantities for the purposes of flavouring, or
- which, while appearing in the name under which the food is sold, is not such as to govern the choice of the consumer in the country of marketing because the variation in quantity is not essential to characterise the foodstuff or does not distinguish it from similar foods. In cases of doubt it shall be decided by the procedure laid down in Article 20(2) whether the conditions laid down in this indent are fulfilled;
(b) where specific Community provisions stipulate precisely the quantity of an ingredient or of a category of ingredients without providing for the indication thereof on the labelling;
(c) in the cases referred to in the fourth and fifth indents of Article 6(5);
(d) in the cases determined in accordance with the procedure laid down in Article 20(2).
4. The quantity indicated, expressed as a percentage, shall correspond to the quantity of the ingredient or ingredients at the time of its/their use. However, Community provisions may allow for derogations from this principle for certain foodstuffs. Such provisions shall be adopted in accordance with the procedure laid down in Article 20(2).
5. The indication referred to in paragraph 1 shall appear either in or immediately next to the name under which the foodstuff is sold or in the list of ingredients in connection with the ingredient or category of ingredients in question.
6. This Article shall apply without prejudice to Community rules on nutrition labelling for foodstuffs.

Article 8
1. The net quantity of prepackaged foodstuffs shall be expressed:
- in units of volume in the case of liquids,

- in units of mass in the case of other products,
using the litre, centilitre, millilitre, kilogram or gram, as appropriate.
Community provisions or, where there are none, national provisions applicable to certain specified foodstuffs may derogate from this rule.
The procedure laid down in Article 19 shall apply to any such national provisions.
2. (a) Where the indication of a certain type of quantity (e.g. nominal quantity, minimum quantity, average quantity) is required by Community provisions or, where there are none, by national provisions, this quantity shall be regarded as the net quantity for the purposes of this Directive.
Without prejudice to the notification provided for in Article 24, Member States shall inform the Commission and the other Member States of any measure taken pursuant to this point.
(b) Community provisions or, where there are none, national provisions may, for certain specified foodstuffs classified by quantity in categories, require other indications of quantity.
The procedure laid down in Article 19 shall apply to any such national provisions.
(c) Where a prepackaged item consists of two or more individual prepackaged items containing the same quantity of the same product, the net quantity shall be indicated by mentioning the net quantity contained in each individual package and the total number of such packages. Indication of these particulars shall not, however, be compulsory where the total number of individual packages can be clearly seen and easily counted from the outside and where at least one indication of the net quantity contained in each individual package can be clearly seen from the outside.
(d) Where a prepackaged item consists of two or more individual packages which are not regarded as units of sale, the net quantity shall be given by indicating the total net quantity and the total number of individual packages. Community provisions or, where there are none, national provisions need not, in the case of certain foodstuffs, require indication of the total number of individual packages.
Without prejudice to the notification provided for in Article 24, Member States shall inform the Commission and the other Member States of any measure taken pursuant to this point.
3. In the case of foodstuffs normally sold by number, Member States need not require indication of the net quantity provided that the number of items can clearly be seen and easily counted from the outside or, if not, is indicated on the labelling.
Without prejudice to the notification provided for in Article 24, Member States shall inform the Commission and the other Member States of any measure taken pursuant to this paragraph.
4. Where a solid foodstuff is presented in a liquid medium, the drained net weight of the foodstuff shall also be indicated on the labelling.
For the purposes of this paragraph, "liquid medium" shall mean the following products, possibly in mixtures and also where frozen or quick-frozen, provided that the liquid is merely an adjunct to the essential elements of that preparation and is thus not a decisive factor for the purchase: water, aqueous solutions of salts, brine, aqueous solutions of food acids, vinegar, aqueous solutions of sugars, aqueous solutions of other sweetening substances, fruit or vegetable juices in the case of fruit or vegetables.
This list may be supplemented in accordance with the procedure laid down in Article 20(2).
Methods of checking the drained net weight shall be determined in accordance with the procedure laid down in Article 20(2).
5. It shall not be compulsory to indicate the net quantity in the case of foodstuffs:
(a) which are subject to considerable losses in their volume or mass and which are sold by number or weighed in the presence of the purchaser;
(b) the net quantity of which is less than 5 g or 5 ml; however, this provision shall not apply to spices and herbs.

Community provisions or, where there are none, national provisions applicable to specified foodstuffs may in exceptional cases lay down thresholds which are higher than 5 g or 5 ml provided that this does not result in the purchaser being inadequately informed.
Without prejudice to the notification provided for in Article 24, Member States shall inform the Commission and the other Member States of any measure taken pursuant to this paragraph.
6. The Community provisions referred to in paragraphs 1, second subparagraph, 2(b) and (d) and 5, second subparagraph, shall be adopted in accordance with the procedure laid down in Article 20(2).

Article 9
1. The date of minimum durability of a foodstuff shall be the date until which the foodstuff retains its specific properties when properly stored.
It shall be indicated in accordance with paragraphs 2 to 5.
2. The date shall be preceded by the words:
- "Best before ..." when the date includes an indication of the day,
- "Best before end ..." in other cases.
3. The words referred to in paragraph 2 shall be accompanied by:
- either the date itself, or
- a reference to where the date is given on the labelling.
If need be, these particulars shall be followed by a description of the storage conditions which must be observed if the product is to keep for the specified period.
4. The date shall consist of the day, month and year in uncoded chronological form.
However, in the case of foodstuffs:
- which will not keep for more than three months, an indication of the day and the month will suffice,
- which will keep for more than three months but not more than 18 months, an indication of the month and year will suffice,
- which will keep for more than 18 months, an indication of the year will suffice.
The manner of indicating the date may be specified according to the procedure laid down in Article 20(2).
5. Subject to Community provisions imposing other types of date indication, an indication of the durability date shall not be required for:
- fresh fruit and vegetables, including potatoes, which have not been peeled, cut or similarly treated. This derogation shall not apply to sprouting seeds and similar products such as legume sprouts,
- wines, liqueur wines, sparkling wines, aromatised wines and similar products obtained from fruits other than grapes, and beverages falling within CN codes 22060091, 2206 00 93 and 2206 00 99 and manufactured from grapes or grape musts,
- beverages containing 10 % or more by volume of alcohol,
- soft drinks, fruit juices, fruit nectars and alcoholic beverages in individual containers of more than five litres, intended for supply to mass caterers,
- bakers' or pastry cooks' wares which, given the nature of their content, are normally consumed within 24 hours of their manufacture,
- vinegar,
- cooking salt,
- solid sugar,
- confectionery products consisting almost solely of flavoured and/or coloured sugars,
- chewing gums and similar chewing products,
- individual portions of ice-cream.

Article 10

1. In the case of foodstuffs which, from the microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health, the date of minimum durability shall be replaced by the "use by" date.
2. The date shall be preceded by the words:
- in Spanish:
"fecha de caducidad",
- in Danish:
"sidste anvendelsesdato",
- in German:
"verbrauchen bis",
- in Greek:
">ISO_7>áíÜëùóç ìÝ÷ñé",
- >ISO_1>in English:
"use by",
- in French:
"à consommer jusqu'au",
- in Italian:
"da consumare entro",
- in Dutch:
"te gebruiken tot",
- in Portuguese:
"a consumir até",
- in Finnish:
"viimeinen käyttöajankohta",
- in Swedish:
"sista förbrukningsdag".
These words shall be accompanied by:
- either the date itself, or
- a reference to where the date is given on the labelling.
These particulars shall be followed by a description of the storage conditions which must be observed.
3. The date shall consist of the day, the month and, possibly, the year, in that order and in uncoded form.
4. In some cases it may be decided by the procedure laid down in Article 20(2) whether the conditions laid down in paragraph 1 are fulfilled.

Article 11
1. The instructions for use of a foodstuff shall be indicated in such a way as to enable appropriate use to be made thereof.
2. Community provisions or, where there are none, national provisions may, in the case of certain foodstuffs, specify the way in which the instructions for use should be indicated.
The procedure laid down in Article 19 shall apply to such national provisions.
The Community provisions referred to in this paragraph shall be adopted in accordance with the procedure laid down in Article 20(2).

Article 12
The rules concerning indication of the alcoholic strength by volume shall, in the case of products covered by tariff heading Nos 22.04 and 22.05, be those laid down in the specific Community provisions applicable to such products.
In the case of other beverages containing more than 1,2 % by volume of alcohol, these rules shall be laid down in accordance with the procedure provided for in Article 20(2).

Article 13
1. (a) When the foodstuffs are prepackaged, the particulars provided for in

Articles 3 and 4(2) shall appear on the prepackaging or on a label attached thereto.
(b) Notwithstanding point (a) and without prejudice to Community provisions on nominal quantities, where prepackaged foodstuffs are:
- intended for the ultimate consumer but marketed at a stage prior to sale to the ultimate consumer and where sale to a mass caterer is not involved at that stage,
- intended for supply to mass caterers for preparation, processing, splitting or cutting up,
the particulars required under Articles 3 and 4(2) need appear only on the commercial documents referring to the foodstuffs where it can be guaranteed that such documents, containing all the labelling information, either accompany the foodstuffs to which they refer or were sent before or at the same time as delivery.
(c) In the case referred to in point (b), the particulars referred to in Article 3(1) point 1, 5 and 7 and, where appropriate, that referred to in Article 10, shall also appear on the external packaging in which the foodstuffs are presented for marketing.
2. The particulars mentioned in Article 3 and Article 4(2) shall be easy to understand and marked in a conspicuous place in such a way as to be easily visible, clearly legible and indelible.
They shall not in any way be hidden, obscured or interrupted by other written or pictorial matter.
3. The particulars listed in Article 3(1), points 1, 4, 5 and 10 shall appear in the same field of vision.
This requirement may be extended to the particulars provided for in Article 4(2).
4. In the case of the glass bottles intended for reuse which are indelibly marked and which therefore bear no label, ring or collar and packaging or containers the largest surface of which has an area of less than 10 cm2 only the particulars listed in Article 3(1) points 1, 4 and 5 need be given.
In this case, paragraph 3 shall not apply.
5. Ireland, the Netherlands and the United Kingdom may derogate from Article 3(1) and paragraph 3 of this Article in the case of milk and milk products put up in glass bottles intended for reuse.
They shall inform the Commission of any measure taken pursuant to the first subparagraph.

Article 14
Where foodstuffs are offered for sale to the ultimate consumer or to mass caterers without prepackaging, or where foodstuffs are packaged on the sales premises at the consumer's request or prepackaged for direct sale, the Member States shall adopt detailed rules concerning the manner in which the particulars specified in Article 3 and Article 4(2) are to be shown.
They may decide not to require the provision of all or some of these particulars, provided that the purchaser still receives sufficient information.

Article 15
This Directive shall not affect the provisions of national laws which, in the absence of Community provisions, impose less stringent requirements for the labelling of foodstuffs presented in fancy packaging such as figurines or souvenirs.

Article 16
1. Member States shall ensure that the sale is prohibited within their own territories of foodstuffs for which the particulars provided for in Article 3 and Article 4(2) do not appear in a language easily understood by the consumer, unless the consumer is in fact informed by means of other measures determined in accordance with the procedure laid down in Article 20(2) as regards one or more labelling particulars.

2. Within its own territory, the Member State in which the product is marketed may, in accordance with the rules of the Treaty, stipulate that those labelling particulars shall be given in one or more languages which it shall determine from among the official languages of the Community.
3. Paragraphs 1 and 2 shall not preclude the labelling particulars from being indicated in several languages.

Article 17
Member States shall refrain from laying down requirements more detailed than those already contained in Articles 3 to 13 concerning the manner in which the particulars provided for in Article 3 and Article 4(2) are to be shown.

Article 18
1. Member States may not forbid trade in foodstuffs which comply with the rules laid down in this Directive by the application of non-harmonised national provisions governing the labelling and presentation of certain foodstuffs or of foodstuffs in general.
2. Paragraph 1 shall not apply to non-harmonised national provisions justified on grounds of:
- protection of public health,
- prevention of fraud, unless such provisions are liable to impede the application of the definitions and rules laid down by this Directive,
- protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition.

Article 19
Where reference is made to this Article, the following procedure shall apply should a Member State deem it necessary to adopt new legislation.
It shall notify the Commission and the other Member States of the measures envisaged and give the reasons justifying them. The Commission shall consult the Member States within the Standing Committee on Foodstuffs set up by Council Decision 69/414/EEC(6) if it considers such consultation to be useful or if a Member State so requests.
Member States may take such envisaged measures only three months after such notification and provided that the Commission's opinion is not negative.
In the latter event, and before the expiry of the abovementioned period, the Commission shall initiate the procedure provided for in Article 20(2) in order to determine whether the envisaged measures may be implemented subject, if necessary, to the appropriate modifications.

Article 20
1. The Commission shall be assisted by the Standing Committee on Foodstuffs (hereinafter referred to as "the Committee").
2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
The period referred to in Article 5(6) of Decision 1999/468/EC shall be set at three months.
3. The Committee shall adopt its rules of procedure.

Article 21
If temporary measures prove necessary to facilitate the application of this Directive, they shall be adopted in accordance with the procedure provided for in Article 20(2).

Article 22
This Directive shall not affect Community provisions relating to the labelling and

presentation of certain foodstuffs already adopted on 22 December 1978.
Any amendments necessary to harmonise such provisions with the rules laid down in this Directive shall be decided in accordance with the procedure applicable to each of the provisions in question.

Article 23
This Directive shall not apply to products for export outside the Community.

Article 24
Member States shall ensure that the Commission receives the text of any essential provision of national law which they adopt in the field governed by this Directive.

Article 25
This Directive shall also apply to the French overseas departments.

Article 26
1. Directive 79/112/EEC as amended by the Directives referred to in Annex IV, Part A, is repealed, without prejudice to the obligations of the Member States in respect of the deadlines for transposition laid down in Annex IV, Part B.
2. The reference made to the repealed Directive shall be construed as references to this Directive and should be read in accordance with the correlation table set out in Annex V.

Article 27
This Directive enters into force on the 20th day following its publication in the Official Journal of the European Communities.

Article 28
This Directive is addressed to the Member States.

Done at Brussels, 20 March 2000.

For the European Parliament
The President
N. Fontaine

For the Council
The President
J. Gama

(1) OJ C 258, 10.9.1999, p. 12.
(2) Opinion of the European Parliament of 18 January 2000 (not yet published in the Official Journal) and Council Decision of 13 March 2000.
(3) OJ L 33, 8.2.1979, p. 1. Directive as last amended by Directive 97/4/EC of the European Parliament and of the Council (OJ L 43, 14.2.1997, p. 21).
(4) See Annex IV, Part B.
(5) OJ L 184, 17.7.1999, p. 23.
(6) OJ L 291, 29.11.1969, p. 9.

ANNEX I

CATEGORIES OF INGREDIENTS WHICH MAY BE DESIGNATED BY THE NAME OF THE CATEGORY RATHER THAN THE SPECIFIC NAME
>TABLE POSITION>

ANNEX II

CATEGORIES OF INGREDIENTS WHICH MUST BE DESIGNATED BY THE NAME OF THEIR CATEGORY FOLLOWED BY THEIR SPECIFIC NAME OR EC NUMBER

Colour
Preservative
Antioxidant
Emulsifier
Thickener
Gelling agent
Stabiliser
Flavour enhancer
Acid
Acidity regulator
Anti-caking agent
Modified starch(1)
Sweetener
Raising agent
Anti-foaming agent
Glazing agent
Emulsifying salts(2)
Flour treatment agent
Firming agent
Humectant
Bulking agent
Propellent gas

(1) The specific name or EC number need not be indicated.
(2) Only for processed cheeses and products based on processed cheeses.

ANNEX III

DESIGNATION OF FLAVOURINGS IN THE LIST OF INGREDIENTS

1. Flavourings shall be designated either by the word "flavouring(s)" or by a more specific name or description of the flavouring.
2. The word "natural" or any other word having substantially the same meaning may be used only for flavourings in which the flavouring component contains exclusively flavouring substances as defined in Article 1(2)(b)(i) of Council Directive 88/388/EEC of 22 June 1988 on the approximation of the laws of the Member States relating to flavourings for use in foodstuffs and to source materials for their production(1) and/or flavouring preparations as defined in Article 1(2)(c) of the said Directive.
3. If the name of the flavouring contains a reference to the vegetable or animal nature or origin of the incorporated substances, the word "natural" or any other word having substantially the same meaning may not be used unless the flavouring component has been isolated by appropriate physical processes, enzymatic or microbiological processes or traditional food-preparation processes solely or almost solely from the foodstuff or the flavouring source concerned.

(1) OJ L 184, 15.7.1988, p. 61. Directive as amended by Commission Directive 91/71/EEC (OJ L 42, 15.2.1991, p. 25).

ANNEX IV

PART A
REPEALED DIRECTIVE AND ITS SUCCESSIVE AMENDMENTS
(referred to by Article 26)
Council Directive 79/112/EEC (OJ L 33, 8.2.1979, p. 1)
Council Directive 85/7/EEC (OJ L 2, 3.1.1985, p. 22), only Article 1(9)
Council Directive 86/197/EEC (OJ L 144, 29.5.1986, p. 38)
Council Directive 89/395/EEC (OJ L 186, 30.6.1989, p. 17)
Commission Directive 91/72/EEC (OJ L 42, 15.2.1991, p. 27)
Commission Directive 93/102/EC (OJ L 291, 25.11.1993, p. 14)
Commission Directive 95/42/EC (OJ L 182, 2.8.1995, p. 20)
European Parliament and Council Directive 97/4/EC (OJ L 43, 14.2.1997, p. 21)
PART B
DEADLINES FOR TRANSPOSITION INTO NATIONAL LAW
(referred to by Article 26)
>TABLE POSITION>

ANNEX V

CORRELATION TABLE
>TABLE POSITION>

31984L0450

Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising

Official Journal L 250 , 19/09/1984 P. 0017 - 0020
Finnish special edition: Chapter 15 Volume 4 P. 0211
Spanish special edition: Chapter 15 Volume 5 P. 0055
Swedish special edition: Chapter 15 Volume 4 P. 0211
Portuguese special edition Chapter 15 Volume 5 P. 0055

MORE INFO TEXT:

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COUNCIL DIRECTIVE
of 10 September 1984
relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising
(84/450/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas the laws against misleading advertising now in force in the Member States differ widely; whereas, since advertising reaches beyond the frontiers of individual Member States, it has a direct effect on the establishment and the functioning of the common market;

Whereas misleading advertising can lead to distortion of competition within the common market;

Whereas advertising, whether or not it induces a contract, affects the economic welfare of consumers;

Whereas misleading advertising may cause a consumer to take decisions prejudicial to him when acquiring goods or other property, or using services, and the differences between the laws of the Member States not only lead, in many cases, to inadequate levels of consumer protection, but also hinder the execution of advertising campaigns beyond national boundaries and thus affect the free circulation of goods and provision of services;

Whereas the second programme of the European Economic Community for a consumer protection and information policy (4) provides for appropriate action for the protection of consumers against misleading and unfair advertising;

Whereas it is in the interest of the public in general, as well as that of consumers and all those who, in competition with one another, carry on a trade, business, craft or profession, in the common market, to harmonize in the first instance national provisions against misleading advertising and that, at a second stage, unfair advertising and, as far as necessary, comparative advertising should be dealt with, on the basis of appropriate Commission proposals;

Whereas minimum and objective criteria for determining whether advertising is misleading should be established for this purpose;

Whereas the laws to be adopted by Member States against misleading advertising must be adequate and effective;
Whereas persons or organizations regarded under national law as having a legitimate interest in the matter must have facilities for initiating proceedings against misleading advertising, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings;
Whereas it should be for each Member State to decide whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with the complaint;
Whereas the courts or administrative authorities must have powers enabling them to order or obtain the cessation of misleading advertising;
Whereas in certain cases it may be desirable to prohibit misleading advertising even before it is published; whereas, however, this in no way implies that Member States are under an obligation to introduce rules requiring the systematic prior vetting of advertising;
Whereas provision should be made for accelerated procedures under which measures with interim or definitive effect can be taken;
Whereas it may be desirable to order the publication of decisions made by courts or administrative authorities or of corrective statements in order to eliminate any continuing effects of misleading advertising;
Whereas administrative authorities must be impartial and the exercise of their powers must be subject to judicial review;
Whereas the voluntary control exercised by self-regulatory bodies to eliminate misleading advertising may avoid recourse to administrative or judicial action and ought therefore to be encouraged;
Whereas the advertiser should be able to prove, by appropriate means, the material accuracy of the factual claims he makes in his advertising, and may in appropriate cases be required to do so by the court or administrative authority;
Whereas this Directive must not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection of consumers, persons carrying on a trade, business, craft or profession, and the general public,
HAS ADOPTED THIS DIRECTIVE:

Article 1

The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof.

Article 2

For the purposes of this Directive:
1. 'advertising' means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations;
2. 'misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor;
3. 'person' means any natural or legal person.

Article 3

In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning:
(a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;

(b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
(c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

Article 4

1. Member States shall ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public. Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising may:
(a) take legal action against such advertising; and/or
(b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.
It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5.
2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:
- to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading advertising, or
- if misleading advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication,
even without proof of actual loss or damage or of intention or negligence on the part of the advertiser.
Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:
- either with interim effect, or
- with definitive effect,
on the understanding that it is for each Member State to decide which of the two options to select.
Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of misleading advertising the cessation of which has been ordered by a final decision:
- to require publication of that decision in full or in part and in such form as they deem adequate,
- to require in addition the publication of a corrective statement.
3. The administrative authorities referred to in paragraph 1 must:
(a) be composed so as not to cast doubt on their impartiality;
(b) have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively;
(c) normally give reasons for their decisions.
Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given. Furthermore in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review.

Article 5

This Directive does not exclude the voluntary control of misleading advertising by self-regulatory bodies and recourse to such bodies by the persons or organizations referred to in Article 4 if proceedings before such bodies are in

addition to the court or administrative proceedings referred to in that Article.

Article 6

Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 4:

(a) to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interests of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; and

(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.

Article 7

This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public.

Article 8

Member States shall bring into force the measures necessary to comply with this Directive by 1 October 1986 at the latest. They shall forthwith inform the Commission thereof.

Member States shall communicate to the Commission the text of all provisions of national law which they adopt in the field covered by this Directive.

Article 9

This Directive is addressed to the Member States.

Done at Brussels, 10 September 1984.

For the Council

The President

P. O'TOOLE

(1) OJ No C 70, 21. 3. 1978, p. 4.

(2) OJ No C 140, 5. 6. 1979, p. 23.

(3) OJ No C 171, 9. 7. 1979, p. 43.

(4) OJ No C 133, 3. 6. 1981, p. 1.

31997L0055

Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising

Official Journal L 290 , 23/10/1997 P. 0018 - 0023

MORE INFO TEXT:

DIRECTIVE 97/55/EC OF EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3), in the light of the joint text approved by the Conciliation Committee on 25 June 1997,

(1) Whereas one of the Community's main aims is to complete the internal market; whereas measures must be adopted to ensure the smooth running of the said market; whereas the internal market comprises an area which has no internal frontiers and in which goods, persons, services and capital can move freely;

(2) Whereas the completion of the internal market will mean an ever wider range of choice; whereas, given that consumers can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonized; whereas if these conditions are met, this will help demonstrate objectively the merits of the various comparable products; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage;

(3) Whereas the laws, regulations and administrative provisions of the individual Member States concerning comparative advertising differ widely; whereas advertising reaches beyond the frontiers and is received on the territory of other Member States; whereas the acceptance or non-acceptance of comparative advertising according to the various national laws may constitute an obstacle to the free movement of goods and services and create distortions of competition; whereas, in particular, firms may be exposed to forms of advertising developed by competitors to which they cannot reply in equal measure; whereas the freedom to provide services relating to comparative advertising should be assured; whereas the Community is called on to remedy the situation;

(4) Whereas the sixth recital of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising (4) states that, after the harmonization of national provisions against misleading advertising, 'at a second stage . . ., as far as necessary, comparative advertising should be dealt with, on the basis of appropriate Commission proposals`;

(5) Whereas point 3 (d) of the Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (5) includes the right to information among the basic rights of consumers; whereas this right is confirmed by the Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (6), point 40 of the Annex, which deals specifically with consumer information; whereas comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage;
(6) Whereas it is desirable to provide a broad concept of comparative advertising to cover all modes of comparative advertising;
(7) Whereas conditions of permitted comparative advertising, as far as the comparison is concerned, should be established in order to determine which practices relating to comparative advertising may distort competition, be detrimental to competitors and have an adverse effect on consumer choice; whereas such conditions of permitted advertising should include criteria of objective comparison of the features of goods and services;
(8) Whereas the comparison of the price only of goods and services should be possible if this comparison respects certain conditions, in particular that it shall not be misleading;
(9) Whereas, in order to prevent comparative advertising being used in an anti-competitive and unfair manner, only comparisons between competing goods and services meeting the same needs or intended for the same purpose should be permitted;
(10) Whereas the international conventions on copyright as well as the national provisions on contractual and non-contractual liability shall apply when the results of comparative tests carried out by third parties are referred to or reproduced in comparative advertising;
(11) Whereas the conditions of comparative advertising should be cumulative and respected in their entirety; whereas, in accordance with the Treaty, the choice of forms and methods for the implementation of these conditions shall be left to the Member States, insofar as those forms and methods are not already determined by this Directive;
(12) Whereas these conditions should include, in particular, consideration of the provisions resulting from Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (7), and in particular Article 13 thereof, and of the other Community provisions adopted in the agricultural sphere;
(13) Whereas Article 5 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (8) confers exclusive rights on the proprietor of a registered trade mark, including the right to prevent all third parties from using, in the course of trade, any sign which is identical with, or similar to, the trade mark in relation to identical goods or services or even, where appropriate, other goods;
(14) Whereas it may, however, be indispensable, in order to make comparative advertising effective, to identify the goods or services of a competitor, making reference to a trade mark or trade name of which the latter is the proprietor;
(15) Whereas such use of another's trade mark, trade name or other distinguishing marks does not breach this exclusive right in cases where it complies with the conditions laid down by this Directive, the intended target being solely to distinguish between them and thus to highlight differences objectively;
(16) Whereas provisions should be made for the legal and/or administrative means of redress mentioned in Articles 4 and 5 of Directive 84/450/EEC to be available to control comparative advertising which fails to meet the conditions laid down by this Directive; whereas according to the 16th recital of the Directive, voluntary control by self-regulatory bodies to eliminate misleading advertising

may avoid recourse to administrative or juridical action and ought therefore to be encouraged; whereas Article 6 applies to unpermitted comparative advertising in the same way;
(17) Whereas national self-regulatory bodies may coordinate their work through associations or organizations established at Community level and inter alia deal with cross-border complaints;
(18) Whereas Article 7 of Directive 84/450/EEC allowing Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public, should not apply to comparative advertising, given that the objective of amending the said Directive is to establish conditions under which comparative advertising is permitted;
(19) Whereas a comparison which presents goods or services as an imitation or a replica of goods or services bearing a protected trade mark or trade name shall not be considered to fulfil the conditions to be met by permitted comparative advertising;
(20) Whereas this Directive in no way affects Community provisions on advertising for specific products and/or services or restrictions or prohibitions on advertising in particular media;
(21) Whereas, if a Member State, in compliance with the provisions of the Treaty, prohibits advertising regarding certain goods or services, this ban may, whether it is imposed directly or by a body or organization responsible under the law of that Member State for regulating the exercise of a commercial, industrial, craft or professional activity, be extended to comparative advertising;
(22) Whereas Member States shall not be obliged to permit comparative advertising for goods or services on which they, in compliance with the provisions of the Treaty, maintain or introduce bans, including bans as regards marketing methods or advertising which targets vulnerable consumer groups; whereas Member States may, in compliance with the provisions of the Treaty, maintain or introduce bans or limitations on the use of comparisons in the advertising of professional services, whether imposed directly or by a body or organization responsible under the law of the Member States for regulating the exercise of a professional activity;
(23) Whereas regulating comparative advertising is, under the conditions set out in this Directive, necessary for the smooth running of the internal market and whereas action at Community level is therefore required; whereas the adoption of a Directive is the appropriate instrument because it lays down uniform general principles while allowing the Member States to choose the form and appropriate method by which to attain these objectives; whereas it is in accordance with the principle of subsidiarity,
HAVE ADOPTED THIS DIRECTIVE:

Article 1
Directive 94/450/EEC is hereby amended as follows:
(1) The title shall be replaced by the following:
'Council Directive of 10 September 1984 concerning misleading and comparative advertising`;
(2) Article 1 shall be replaced by the following:
'Article 1
The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.`;
(3) The following point shall be inserted in Article 2:
'2a "comparative advertising" means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor; `

(4) The following Article shall be added:
'Article 3a
1. Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:
(a) it is not misleading according to Articles 2 (2), 3 and 7 (1);
(b) it compares goods or services meeting the same needs or intended for the same purpose;
(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
(f) for products with designation of origin, it relates in each case to products with the same designation;
(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.
2. Any comparison referring to a special offer shall indicate in a clear and unequivocal way the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions shall apply.`;
(5) The first and second subparagraphs of Article 4 (1) shall be replaced by the following:
'1. Member States shall ensure that adequate and effective means exist to combat misleading advertising and for the compliance with the provisions on comparative advertising in the interests of consumers as well as competitors and the general public.
Such means shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising or regulating comparative advertising may:
(a) take legal action against such advertising; and/or
(b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.`;
(6) Article 4 (2) is hereby amended as follows:
(a) the indents in the first subparagraph shall be replaced by the following:
'- to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading advertising or unpermitted comparative advertising, or
- if the misleading advertising or unpermitted comparative advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication,`;
(b) the introductory wording to the third subparagraph shall be replaced by the following:
'Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of misleading advertising or unpermitted comparative advertising, the cessation of which has been ordered by a final decision:`;
(7) Article 5 shall be replaced by the following:
'Article 5
This Directive does not exclude the voluntary control, which Member States may encourage, of misleading or comparative advertising by self-regulatory bodies

and recourse before such bodies are in addition to the court of administrative proceedings referred to in that Article.`;
(8) Article 6 (a) shall be replaced by the following:
'(a) to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interest of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case and in the case of comparative advertising to require the advertiser to furnish such evidence in a short period of time; and`;
(9) Article 7 shall be replaced by the following:
'Article 7
1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public.
2. Paragraph 1 shall not apply to comparative advertising as far as the comparison is concerned.
3. The provisions of this Directive shall apply without prejudice to Community provisions on advertising for specific products and/or services or to restrictions or prohibitions on advertising in particular media.
4. The provisions of this Directive concerning comparative advertising shall not oblige Member States which, in compliance with the provisions of the Treaty, maintain or introduce advertising bans regarding certain goods or services, whether imposed directly or by a body or organization responsible, under the law of the Member States, for regulating the exercise of a commercial, industrial, craft or professional activity, to permit comparative advertising regarding those goods or services. Where these bans are limited to particular media, the Directive shall apply to the media not covered by these bans.
5. Nothing in this Directive shall prevent Member States from, in compliance with the provisions of the Treaty, maintaining or introducing bans or limitations on the use of comparisons in the advertising of professional services, whether imposed directly or by a body or organization responsible, under the law of the Member States, for regulating the exercise of a professional activity.`

Article 2

Complaints systems
The Commission shall study the feasibility of establishing effective means to deal with cross-border complaints in respect of comparative advertising. Within two years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and the Council on the results of the studies, accompanied if appropriate by proposals.

Article 3
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest 30 months after its publication in the Official Journal of the European Communities. They shall forthwith inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
3. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

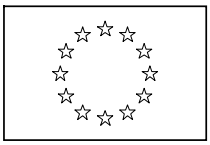
Article 4

This Directive is addressed to the Member States.

Done at Brussels, 6 October 1997.
For the European Parliament
The President
J. M. GIL-ROBLES
For the Council
The President
J. POOS

(1) OJ C 180, 11. 7. 1991, p. 14, and OJ C 136, 19. 5. 1994, p. 4.
(2) OJ C 49, 24. 2. 1992, p. 35.
(3) Opinion of the European Parliament of 18 November 1992 (OJ C 337, 21. 12. 1992, p. 142), Common Position of the Council of 19 March 1996 (OJ C 219, 27. 7. 1996, p. 14) and Decision of the European Parliament of 23 October 1996 (OJ C 347, 16. 11. 1996, p. 69). Decision of the European Parliament of 16 September 1997 and Decision of the Council of 15 September 1997.
(4) OJ L 250, 19. 9. 1984, p. 17.
(5) OJ C 92, 25. 4. 1975, p. 1.
(6) OJ C 133, 3. 6. 1981, p. 1.
(7) OJ L 208, 24. 7. 1992, p. 1.
(8) OJ L 40, 11. 2. 1989, p. 1. Directive as last amended by Decision 92/10/EEC (OJ L 6, 11. 1. 1992, p. 35).

Commission declaration
The Commission declares that it intends to submit the report referred to in Article 2 as far as possible at the same time as the report on complaints systems provided for in Article 17 of Directive 97/7/EC on the protection of consumers in respect of distance contracts.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.03.2000
COM(2000) 127 final

REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

on Consumer complaints in respect of distance selling and comparative advertising

(Article 17 of Directive 97/7/EC on distance contracts and Article 2 of Directive 97/55/EC on comparative advertising)

REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

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Annex

1. INTRODUCTION

1.1

On 20th May 1997 the European Parliament and the Council adopted Directive 97/7/EC on the protection of consumers in respect of distance contracts[1]. Article 17 of the Directive stipulates:

"Complaints systems

The Commission shall study the feasibility of establishing effective means to deal with consumers' complaints in respect of distance selling. Within two years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and the Council on the results of the studies, accompanied if appropriate by proposals."

On 6 October 1997 the European Parliament and the Council adopted Directive 97/55/EC amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising[2]. Article 2 of this Directive uses almost identical language as Article 17 of Directive 97/7:

"Complaints systems

The Commission shall study the feasibility of establishing effective means to deal with cross-border complaints in respect of comparative advertising. Within two years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and the Council on the results of the studies, accompanied if appropriate by proposals."

From these provisions emerges the Community legislator's concern with :

- the availability of complaints systems within the scope of both distance contracts and comparative advertising;
- the cross-border aspects of comparative advertising.

For this reason, in keeping with the declaration annexed to Directive 97/55/EC: "*The Commission declares that it intends to submit the report referred to in Article 2 as far as possible at the same time as the report on complaints systems provided for in Article 17 of Directive 97/7/EC…*", it seems appropriate to deal with consumer complaints within the scope of a single report.

The purpose of this report is precisely to submit to both Institutions, the European Parliament and the Council, the results of the studies and investigations carried out by the Commission on these issues. It is necessary to note that the deadline for the implementation of the Directive 97/7/EC has been established by the European Parliament and by the Council on 4 June 2000, and, for Directive 97/55/EC, on 23 April 2000.

This means that the relevant complaints on the grounds of infringements to both Directives cannot technically be submitted yet. Therefore it should be borne in mind that this report is necessarily based on data which do not entirely reflect the legal situation brought about by the Directives in question as regards consumer complaints.

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1 OJ L 144, 4.6.97 p.19

2 OJ L 290 , 23.10.97 p. 18

The two Directives' reporting requirements presuppose *prima faciae* - namely according to the letter of Article 17 of Directive 97/7/EC and Article 2 of Directive 97/55/EC - that no effective means for dealing with consumer complaints are presently available, as the Directives' reference to the "feasibility of establishing" such means seems to indicate.

However addressing the issues in question in such terms would be misleading because:

- A wide array of redress means does exist;
- Their effectiveness depends on a variety of factors;
- A substantial number of initiatives has so far been deployed at the European as well as at the national level to address the limitations of existing systems and to improve effectiveness significantly, in particular as regards the consumers' right to have access to easy, inexpensive and efficient complaints systems.

1.2

Indeed consumer complaints in the two specific areas of distance selling and comparative advertising are part of the wider issue of redress means and consumers' access to justice[3] to which the European institutions have been devoting a great deal of attention for more than a decade.

Several Community acts endow consumers with a set of rights in respect of a wide variety of transactions, contractual and market situations such as consumer credit, doorstep selling, package holidays, air transport (overbooking and air carrier liability), unfair contractual terms, distance contracts, timesharing, and consumer goods' guarantees. Other texts are under discussion (distance marketing of financial services).

An even wider range of consumer rights stems from the Member States' legislation, covering both the areas not regulated by European legislation and those domains where Community law allows for "more stringent protective measures" to be maintained or introduced at the national level.

Access to justice and appropriate means of redress are the necessary corollary of these rights, notably when the consumer wants to take full advantage of the opportunities of the Single Market.

Although the rules and procedures applicable to redress means are essentially regulated by the legal systems of the Member States, numerous initiatives have so far been developed at the

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[3] The EU institutions have been addressing consumer access to justice since the 1980s. The Commission presented its first memorandum in 1985 (COM(1984) 692 final of 4.01.1985), which, in 1987, was followed by a Communication (COM(1987) 210 final of 7.05.1987). The European Parliament adopted a Resolution on 13.03.1987 (OJ C 99 of 13.04.1987). In the same year, the Council adopted its own Resolution on consumer redress (87/C 176/02). Other relevant acts are the European Parliament's Resolution of 1992 (92/C 94/217), the Council Resolution of the same year on consumer protection priorities (OJ C 186 of 23.07.1992), the Commission Green Paper on access to justice and dispute settlement (COM(1993) 576 final of 16.11.1993) the Commission Communication on the same subject of 1996 (COM(1996) 13 final of 14.02.1996), the European Parliament's Resolution on the latter (OJ C 362 of 2.12.1996), and the Commission Communication on the out-of-court settlement of consumer disputes (COM(1998) 198 final, of 30.03.1998).

Community level to overcome the obstacles to handling effectively consumer disputes, particularly those involving cross-border transactions.

Indeed, distance related costs, delays, legal fees, psychological and formal barriers often conspire to form an unsurmountable wall designed to frustrate the legitimate consumers' expectation that their claims be heard and corrective measures be taken, where necessary.

2. THE COMMISSION APPROACH

For the purpose of the present report, the Commission has examined the problem using a two-pronged approach:

- Making an attempt to collect relevant data of the actual state of consumer complaints across the European Union, on the basis of a survey conducted with the co-operation of the national administrations of the Member States, the relevant professional associations, and the consumer Euro-info centres (the feedback received from the survey is described *infra*);

- Assessment of the present situation in the light of the EC Treaty rules as well as of the diverse initiatives in progress in respect of consumers' access to justice.

3. SOURCES OF INFORMATION

During the summer of 1999, the Commission asked the Member States' public authorities, as well as the relevant professional entities to provide information on the following points:

- Number of complaints (breakdown of data for the last three years, where available). As Directives 97/7 and 97/55 are not implemented yet, a loose definition of distance selling and comparative advertising applies to the cases arising so far at the national level;

- Grounds under which the complaints are brought and major problem areas;

- Systems used for dealing with consumer's complaints, whatever their formal status (judiciary, arbitration, administrative bodies, self-regulatory business schemes, consumer organisation-administered systems, etc.).

The information provided by the national authorities, and other entities having participated in the exercise is summarised in the Annex.

4. COMMUNITY INITIATIVES

Further to the 1993 Green Paper on access to justice and dispute settlement (cf. footnote No 2) and the adoption of Directives 97/7/EC and 97/55/EC, a number of Commission initiatives have been addressing the problem of consumer complaints.

These initiatives pursue two strands of work:

- one relates to strengthening the ways and means of effective collective redress; and its most significant achievement is the injunctions Directive (cf. *infra);*

- the other one concerns the improvement of redress avenues available to individual consumers in case of dispute.

4.1 Consumers' collective interests

As regards collective consumer access to justice - either before a court of law or an administrative authority - a very important result was achieved in 1998 with the adoption of Directive 98/27/EC on injunctions for the protection of consumers' interests[4].

This Directive is meant for the protection of consumers' collective interests, not for merely individual cases. It opens up for the first time the possibility for "qualified entities" (consumer organisations and/or public bodies) to react to the grossest infringements to Community law (and the national implementing measures thereof) beyond the national frontiers.

The Directive's scope covers the bulk of existing consumer Directives and, once implemented - the deadline expires at the end of 2000 - it will enable the qualified entities from one country to initiate proceedings in the Member State where acts contrary to the consumer Directives - as transposed into the national legal system - originate, harming the collective interests of consumers.

The possible applications of such a mechanism are countless: suffice it to think of cases of low-quality goods sold by means of distance communication to customers residing in a foreign country, of misleading advertising televised in a country by a broadcaster established in a different country, or of fraudulent timeshare schemes located in a country and sold to consumers of a different country. Such unlawful situations have a multinational dimension and presently take advantage of the possibility of moving the source of illegal practises to a different country, out of reach of the national enforcement authorities.

The Commission considers that these provisions, once properly implemented, will provide an at least partially satisfactory response - as well as an effective means of prevention of harmful situations - to those consumer complaints which are triggered by practises that infringe Community law and extend beyond the frontiers between the Member states.

4.2 The individual means of redress

Concerning individual means of redress, the focus of Commission initiatives is on improving communication between consumers and professionals with a view, in the event of disputes, to helping the parties involved in the controversy to find an amicable solution.

This is a constructive approach, as both consumers and economic operators are interested in avoiding the delays, hassles and cost of traditional litigation, without undermining consumer rights.

A) European Consumer Complaint Form

In addition to the voluntary systems managed at the national or local level by professional and consumer organisations - the results of which tend to vary widely - the Commission has contributed to this exercise by elaborating and introducing a consumer complaint form. It is designed to provide consumers with guidance in formulating their claims. Its utilisation

[4] OJ L 166/51 of 11.06.98.

concerns consumers, professionals, consumer associations, and out-of-court bodies for the settlement of consumer disputes.

The form can be used whatever the sum of money involved and whatever the type of consumer dispute. Its use is not mandatory: the parties concerned have the option of using the conventional redress means or any other voluntary system. If an amicable settlement is not attained, the form creates favourable conditions (by precisely defining the object and terms of controversy) for initiating an out-of-court procedure and/or formal proceedings.

Whilst the injunctions Directive is meant for the consumers' collective interests, the European Consumer Complaint Form is geared to facilitating and rationalising the management of individual consumer complaints. Indeed, although no accurate statistics are presently available, estimates indicate that hundreds of thousands of cases are annually dealt with by consumer organisations and bodies. Many others are simply not pursued at all because the costs of litigation largely outweigh the value of the goods or services involved in the transaction.

The European Consumer Complaint Form intends to contribute an easy, inexpensive means of reaching an amicable solution not only to disgruntled consumers, but also to the economic operators which do not wish to incur legal fees and have their reputation affected by lengthy court procedures. The form is available in all EU languages and also in electronic format on the Europa DG SANCO site at http://europa.eu.int/comm/dg24/.

Spreading the form's use contributes to inventorying consumer disputes, as a first step towards comprehensive monitoring of the phenomenon at the European level.

As the form was introduced in 1998, a thorough assessment of its effectiveness is premature at the present stage. An evaluation of the form's relevance and effectiveness is expected for 2000.

B) Out-of-court settlement of consumer disputes

In particular, in its communication on the out-of-court settlement of consumer disputes[5], the Commission i.a. suggested:

- the simplification and improvement of legal procedures;
- the improvements of communication between consumers and professionals;
- the re-shaping of out-of-court procedures to settle consumer disputes.

Alongside the usual judicial procedures, there are a wide range of "out-of-court methods" in Europe to deal with consumer disputes (e.g. procedures which are complementary to or prior to court hearings, such as mediation and conciliation, and more alternative mechanisms such as arbitration).

All these out-of-court systems are highly diverse in terms of structure and procedure. Precisely because of this diversity, the type of decisions taken can also vary widely. Some are no more than recommendations, others are binding only on the professional, while others apply equally to the two sides.

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5 COM (1998) 198 final of 30.03.1998.

In the interests of safeguarding consumer's rights, the important thing is to decide what court-style guarantees these procedures can offer (e.g. guarantees of independence and impartiality), while still improving the way they can help resolve conflicts.

The Recommendation included in the Communication of 30 March 1998 has set out a certain number of minimal guarantees that the bodies responsible for the out-of-court settlement of consumer disputes in each Member State should offer to their users. These minimal guarantees take the form of "principles" that out-of-court bodies should comply with.

Compliance by a given body with the seven principles (of independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation) is intended to guarantee people availing themselves to that system (consumers and professionals) that their claims will be given a treatment whose "fairness" and rigour is substantially similar to that of a conventional court.

Thus, the Recommendation aims at:

- enhancing consumer confidence by providing an acceptable standard of quality for out-of-court procedures;

- fostering mutual confidence on the part of the responsible bodies, so as they co-operate effectively in improving the processing of cross-border consumer disputes.

It is up to the Member States to provide the Commission with details of the out-of-court bodies which meet all the conditions set out in the Recommendation. This information is posted in the public-access data base accessible via the Commission's website on the Europa server.

To date 11 Member States have notified the Commission of data concerning the bodies that they consider as being in full conformity with the Recommendation (i.e. Austria, Belgium, Denmark, Finland, Greece, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom).

The Commission now plans to work out the necessary conditions so that bodies complying with the Recommendation's conditions can be networked. A number of steps were taken to address these challenges. Firstly, a workshop was held in December 1998 on "*Alternative Dispute Resolution Schemes (ADR) relating to consumers disputes in the EU*", which brought together some 40 experts in the field of ADR schemes and several potentially "notifiable" bodies. Secondly, a conference held in November 1999 at Lisbon, Portugal reflected upon the future co-operation of a network of cross border consumer resolution.

Subsequent steps include:

- a meeting with the responsible officials from justice and consumers affairs in the Member States, held in Brussels on 17 January 2000 where the Commission presented its plans to establish the network (EEJ-Net, on which see *infra*, end of chapter 6);

- a Conference that the Commission plans to organise later in the year 2000, which will bring together all "notified" schemes.

Two specific publications are designed to provide consumers confronted with a dissatisfactory situation with practical indications on how to protect their interests making full use of the redress systems and in particular, of the measures taken at the European level (including those concerning the complaint form and the out-of-court bodies) [6]:

- The first publication, elaborated in the framework of Community actions to enhance dialogue with citizens and businesses in the Single Market, will be called *"Exercising your rights in the Single Market – How to seek Redress"* and will be finalised in the first half of 2000.

- The second publication, called *"Consumer disputes - Labyrinthian Thread"*[7], was prepared in the context of the Commission's specific actions to improve the access to justice for consumers.

In the area of financial services, the development of a Europe-wide consumer complaints network is being addressed within the scope of implementation of the relevant legal framework[8].

4.3 The role of complaints in order to achieve the enforcement of EU consumer legislation

In March 1998 the Commission adopted a document about the enforcement of the consumer legislation[9]. This document aimed at establishing a broad picture of the situation concerning the enforcement of EU consumer legislation and presented some ideas for improvement.

The term "enforcement" covers two different questions:

- a timely and proper implementation,

- effective and correct practical application, which includes the existence of adequate redress mechanisms.

The document points out that, while monitoring the implementation can be managed by the Commission on the basis of notified national measures, the monitoring of the practical application necessitates strong support and co-operation from the Member States, not only vis-à-vis the Commission but in particular among themselves. When the Commission receives sufficient information showing incorrect application of consumer Directives, it can open infringement proceedings against the Member States concerned. This occurs in particular on the basis of complaints[10].

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6 Consumer Disputes, OPOCE, ISBN 92-828-6021-3.

7 Office for the Official Publications of the E.C., 1999, ISBN 92-828-6020-5.

8 Financial Services: Implementing the Framework for Financial Markets - Action plan; COM (1999) 232 of 11.05.1999.

9 Commission Working Paper on Enforcement of European Consumer Legislation; document SEC(1998)527 final, of 27.3.1998.

10 In those areas of commercial communication that are not currently subject to European harmonisation but where national laws diverge significantly, the Commission has established a Member States' Expert Group. The Group's work has i.a. identified the need to further improve cross-border redress for complaints relating to commercial communications. At the request of the experts the Commission is currently, on the basis of a questionnaire, collecting information on how cross-border complaints are handled in this area by judicial, administrative and extra-judicial bodies.

5. MEMBER STATES' INITIATIVES: CO-OPERATION WITHIN THE SCOPE OF THE INTERNATIONAL MARKETING SUPERVISION NETWORK

The International Marketing Supervision Network (IMSN) - or Réseau International de Contrôle de la Commercialisation (RICC) - was born in 1991 during the "Supervision of Marketing" Conference of Member States' "Consumer enforcement bodies" held in Copenhagen at the initiative of the Danish Consumer Ombudsman. Nevertheless, on the impulsion of its first Presidency (the UK), it immediately became a wider network including such countries as the US, New Zealand, Japan and other OECD members. It was not intended to cover product safety or the prudential regulation of financial institutions, nor specific redress for individual consumers.

The principal aim of this voluntary and informal network is to improve co-operation between the different countries in order to stop and prevent illegal marketing practices connected with cross-border transactions in both goods and services, and to help ensure exchanges of information among the participants for mutual benefit and understanding.

During the preparation of the working document on "Enforcement of European consumer legislation" the Commission was faced with the situation that in the non-safety area, there is no regular information about a possible follow-up by the Member States on the practical application of laws implementing EU Directives. Thus, the Commission, after looking into the functioning of the existing IMSN initiative, considered it as an instrument that, once completed and/or modified could, if its EU members agreed, be used for contributing to improving enforcement of non-safety consumer EU legislation.

As a consequence of that and following the Commission's initiative, the European members of the network decided, at the Network World Conference held in Bruges on the 25 March 1999, to set up a sub-group called 'IMSN Europe', the main task of which is to improve the conditions for co-operation and information exchange between the members concerning the application of harmonised consumer legislation. The first meeting of the sub-group was held in Oslo the 12-13 September 1999.

The technical instruments allowing the sub-group to optimise exchanges of information between its members (be it on specific problems or best practices) will be developed by the Commission and put at the disposal of the European Group. These include, in particular, an electronic message exchange system and a restricted-access database for collecting the information exchanged.

The aims and rules of procedure of IMSN-Europe can be summarised as follows:

- To strengthen and to improve co-operation and systematic exchange of information between the members in order to achieve more effective enforcement of European consumer legislation (with the exception of legislation dealing with health and safety matters);

- To discuss, exchange views and experiences concerning and seek common solutions to problems linked to the enforcement of European consumer legislation (with the exception of legislation dealing with health and safety matters);

- The activities are restricted to questions characterised by a specific European dimension;

- The members shall undertake to do all in their power to ensure optimum use of the network and the instruments for co-operation it provides (six-monthly meetings, information exchange system, database);

- As far as possible, the members shall endeavour to co-operate with the bodies responsible at regional or local level in their country with a view to collecting and forwarding relevant information of interest to IMSN-Europe.

6. CONCLUSIONS; FUTURE INITIATIVES

It is only possible to give a provisional description of the situation regarding consumer complaints on the basis of currently available data. Although the present report seeks to respond as precisely as possible to the requirements contained in the two Directives in question, it is inevitably patchy, (a) because it is based on information from diverse sources and (b) because it has to be submitted before implementation of the Directives in all Member States. In particular, the report cannot take account of eventual problems arising in connection with the practical operation of the regulatory frameworks for distance contracts and comparative advertising introduced by Directives 97/7/EC and 97/55/EC.

In the light of the factual and legal situation described above, the Commission finds that:

- The notion of "consumer complaints" covers a wide variety of situations characterised by consumer dissatisfaction with goods, services, after-sale assistance, contractual terms and conditions, price, quality, guarantees, product performance, operating instructions, safety, conformity to standards, delivery, return policy, etc;

- Virtually all consumer complaints can rely on redress systems. These means of redress are provided for by national legislation and, in some instances, are complemented by voluntary systems. Nevertheless, consumers are often uneasy about resorting to redress means, because of insufficient information and advice on how to address their problems and uncertainty over the duration, cost and effectiveness of available procedures.

For both trans-border and purely national complaints, the effectiveness of mandatory and voluntary systems is affected by the traditional problems of consumer access to justice (distance, cost, legal hurdles, etc.). A detailed analysis of these difficulties - on the basis of an ad hoc study - is to be found in the Green Paper on access to justice and dispute settlement (COM(1993) 576).

In recognition of this situation, Article 11(4) of Directive 97/7/EC on distance selling, provides the Member States with the option of "…voluntary supervision by self-regulatory bodies of compliance with the provisions of this Directive and recourse to such bodies for the settlement of disputes to be added to the means which Member States must provide to ensure compliance with the provisions of this Directive.";

- From the European perspective, due account should be taken of the complementary nature of European consumer policy and the Member States' own policies and initiatives. Furthermore, in the future effective redress means for consumer complaints could be enhanced by the potential created up by Title IV (Articles 61 to 69) of the EC Treaty - as amended by the Amsterdam Treaty -

which provides i.a. for "measures in the field of judicial co-operation in civil matters…" (Article 61(c)) and "the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases" (Article 65(a)).

As a consequence of this legal framework and the allocation of responsibilities deriving from it, the Commission considers it opportune to concentrate on:

– removing the obstacles to cross-border complaints;

– helping to establish a regulatory framework capable of addressing consumer complaints in the present circumstances of the Information-Society, notably when they involve contracting with businesses located outside the consumer's country of residence;

– reviewing existing consumer-related legislation to determine whether additional regulatory action may be necessary. In this respect, the Commission is - under the terms of Council Resolution of 19 January 1999 on the Consumer Dimension of the Information Society[11], required to present the European Parliament and the Council with a report accompanied, if necessary, by proposals.

Concerning the removal of obstacles in the area of complaints related to the collective interests of consumers, a significant step forward was achieved by the adoption of Directive 98/27/EC on injunctions. Once effectively implemented, this Directive will enable consumer organisations and bodies with a status as "qualified entities" to start proceeding and pursue cases in the jurisdiction of the country from which infringements to consumer legislation (EU Directives and the national implementing measures) originate.

As for individual consumer complaints - i.e. in cases where no collective consumer interests are at stake - there should be a gradual improvement of redress means in transactions which have a trans-border dimension as a result of:

- the application of the principles set out in Commission Recommendation No 98/257 on the principles applicable to out-of-court bodies. The Commission will report in 2000, giving an evaluation of the actual impact of those principles;

- increased use of the consumer claim form introduced by the Commission Communication of 1998 (COM(1998) 198) whose relevance and impact as a pilot project will also be assessed in 2000;

In addition to the above, the effectiveness of both individual and collective consumer complaints will benefit from the following accompanying measures:

- clarification of the private international law requirements applicable to contracts to which the consumer is part. Particularly significant are the initiatives designed to revise and update the 1968 Brussels Convention[12] and the 1988 Lugano Convention[13] devoted to judiciary competence and execution of rulings between respectively, the EU Member States and the Member States and the EFTA

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11 OJ C 23/1 of 28.01.1999.

12 OJ C 27 of 26.01.1998 (consolidate text taking account of Austria, Finland and Sweden's accession).

13 OJ L 319 of 25.11.1988.

countries. In this respect, progress should come, in particular, from the draft Regulation designed to incorporate the Brussels Convention. into the Community legal system[14]. The draft Regulation is a first, important step in the direction of cross-border co-operation in justice-related matters within the scope of Community law and, at the same time, an indication of the possibilities provided for effective action at the EU level, on the basis of Articles 61-69 of the EC Treaty;

- promotion at the international level of a consistent set of consumer protection principles suitable to enhance consumer confidence and enable consumer to take advantage of the increasing global marketplace.

After adoption by the OECD of a Recommendation on Guidelines for consumer protection in electronic commerce[15], the Commission intends to promote the adherence to the principles underlying the OECD Guidelines in all relevant international forums as well as in bilateral negotiations on consumer-related issues with third countries.

In the Consumer Policy Action Plan 1999-2001[16], the Commission announced that it will monitor the use in practice of the consumer complaints form and will use this experience, together with information from the databases of bodies responsible for out-of-court settlements, to assess whether further action is required to facilitate access to justice for individual consumers. In this context, the Commission will also take steps to improve the functioning of small claims procedures in trans-national situations and will consider the case for a European Consumer Ombudsman with competence for cross-border complaints.

The lack of comparable data on consumer complaints severely handicaps any attempt to assess of the effectiveness of systems dealing with complaints. Given that complaints are an essential input to the enforcement and policy making process, this is a real handicap for consumer policy in the Community. Therefore the Commission services intend to address the feasibility of an initiative designed to introduce a common basis for classification of consumer complaints. Such an action requires close co-operation between the European Statistical Office, the Euroguichets, the national statistical resources, and all administrations, bodies and organisations which receive consumer complaints. The intention is not to oblige any of these bodies to collect new data but simply, to the extent that they already record complaints, to do so according to same common guidelines and to send details to the Commission regularly. Such guidelines would not be mandatory but all organisations would have an interest in following the guidelines so that they had a better input into the EU policy making. In particular, the possibility of using the European consumer complaint form for the purpose of identifying and facilitating the monitoring of consumer complaints will be considered.

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14 COM (1999) 348 final of 14.07.1999.

15 Adoption took place on 9 December 1999.

16 Commission Communication n° COM (1998) 696 final of 1.12.1998.

Finally, the Commission intends to monitor closely the situation of consumer complaints as part of the work which is being done on the issue of consumer access to justice. In order to allow for appropriate follow-up on the part of the European Parliament and the Council, in parallel with the implementation of Directives 97/7/EC and 98/27/EC, the Commission intends to give special attention to consumer complaints in future reports and proposals for new legislation, in the regulatory framework of electronic commerce[17] and distance marketing of financial services[18], as well as other relevant Community legislation, in keeping with the outcome of the ongoing review of consumer-related legislation in the area of the Information Society.

Future initiatives

The Commission work programme for 2000 includes the following actions :

- Commission staff working paper on the recovery of legal costs and lawyers' fees. One of the barriers to consumer access to justice is the lack of proportionality between the costs required to bring legal proceedings and the actual amount claimed. If the total costs incurred are recovered when a consumer wins a case, this barrier is significantly reduced. The Member States have adopted a great variety of solutions to deal with this difficulty: The working paper will report on these issues and launch on this subject wide-ranging public debate.

- Commission staff working paper on the state of implementation of Directive 98/27/EC on injunctions for the protection of consumers' interests. Directive 98/27 gives consumer associations (or public bodies charged with consumer protection) the right to commence cessation proceedings to prevent infringements in breach of the provisions of a number of consumer directives. In cross-border cases, these actions can be brought directly before the courts where the professional is domiciled. However, to be effective, the Directive needs adoption by Member States of measures complementary to formal transposition.

- Commission staff working paper on the establishment of an European Network of extra-judiciary bodies responsible for the out-of-court settlement of consumer disputes. In 1998, the Commission adopted Recommendation 257/98 on the principles applicable to extra-judiciary bodies. Since then, the Member States have notified the Commission of their respective national bodies which respect these principles. It is now time to go further in providing the basis for the creation a network between these bodies, with the aim of facilitating the resolution of cross border litigation. In the area of financial services, the Commission will report later

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17 Amended Commission proposal (taking account of the European Parliament's first reading) for a draft Directive on certain legal aspects of electronic commerce in the internal market: COM (1999) 427 final of 17.08.99. As electronic commerce tends to become the most widespread form of distance contracting as well as a source of concern for consumers, the Commission proposal includes provisions on codes of conduct, out-of-court settlement and inclusion of infringements of the Directive's provisions among the cases which can trigger injunction proceedings under the terms of Directive 98/27/EC.

18 Modified proposal concerning the distance marketing of consumer financial services: COM (1999) 385 final of 23.07.99). Specific rules are proposed on sanctions, redress means, and most important, the supplier's burden of proof as to the obligation to inform consumers and consumers' consent to the conclusion of the contract, as contractual conditions making the burden of proof lie with the consumer shall be deemed unfair terms within the meaning of Directive 93/13/EEC (OJ L 95 of 21.04.93) on unfair terms in consumer contracts.

in 2000, in the context of a communication on electronic commerce and financial services, on the establishment of a network of out-of-court redress schemes.

– Commission staff working paper on the collective representation of consumers' interests in civil litigation (group actions). The working paper intends to report on the current state of national laws in relation to the possibility of bringing class actions in the name of a group of consumers who have suffered the same type of damage and encourage a wide-ranging public debate on this issue.

ANNEX

1. INFORMATION PROVIDED BY NATIONAL AUTHORITIES

A) Distance contracts

Austria

The information provided by the Austrian Federal Chancellery (*Bundeskanzleramt*) points out that, according to the Consumers Affairs Office, only a small percentage of the available data is statistically verifiable. Consumer advice centres deal with a large number of complaints by telephone; these cases are not, but for a few exceptions, statistically documented.

Total number of complaints in Austria:

- 1996: 3.565
- 1997: 4.829
- 1998: 5.149

Main areas of complaint:

Lotteries

- 1996: 705
- 1997: 989
- 1998: 1.210

Most complaints occur in relation to lotteries. The number of complaints is increasing rapidly, though a law came into force on 1.10.1999 under which misleading promises of prizes are punishable.

Unsolicited merchandise

- 1996: 223
- 1997: 245
- 1998: 281

Problems caused by unsolicited merchandise - arising especially in cases where the identity of a person placing an order by telephone is not carefully ascertained - are an increasingly frequent cause for complaint amongst consumers.

"Cold calling" (especially for insurance and investment products)

"Cold calling" designates the phenomenon of unsolicited telephone calls to consumers partially or totally unaware of the commercial drive of the contact. Although the practise may, within limits (particularly as regards the opt-in and opt-out provisions in Directives 97/7/EC and 97/66/EC) be legitimate, prospective customers are liable to be caught off-guard ("cold")

by skilled operators who manage to gain the interlocutor's confidence and take advantage of the situation, persuading consumers to accept heavy financial commitments or otherwise unfair deals to which they wouldn't have been subscribed under normal circumstances.

- 1996: 135
- 1997: 157
- 1998: 170

Defective goods/incomplete orders

- 1996: 287
- 1997: 304
- 1998: 322

These mainly comprise complaints about goods which are not delivered at all or are delivered late or only in part. When merchandise is defective, it is often not very easy to ensure that the problem is remedied.

Debt collection

- 1996: 382
- 1997: 409
- 1998: 427

As regards debt collection, delays in payment on hire purchase agreements and unclear, sometimes astronomically high, interest rates appear to be the main problems. Furthermore, the claim for payment is often not itemised.

Concerning the enforcement of consumers' rights, the Austrian authorities point out that some of the complaints are settled via the consumer associations. Only a small percentage go to court (which explains the lack of comprehensive data).

Belgium

In Belgium, the present provisions on distance selling are included in the Act on Commercial Practices[19] (articles 77 to 83) as amended by the Act of 25 May 1999, adopted to implement the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. On the basis of the statistics handled by the Economic Inspection, infringements to the above measures are rare bearing in mind the only recent entry into force of the national law. For example, in 1998, only 3 cases went to court on the grounds of infringement of article 77 (financial services) and only 5 cases throughout the period 1.1.1999-20.9.1999.

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[19] *Wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument - Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur.*

The data provided by the Belgian authorities show that eighteen cases went to court in 1998; ten cases were registered throughout the period 1.1.1999-20.9.1999. All of them concern consumer credit.

Denmark

Number of complaints in Denmark over the last three years

Denmark has no central register for complaints concerning distance selling. It is not possible for cases of this nature to be separated from other legal statistics. However, in the last three years, the Consumer Complaints Board (*Forbrugerklagenævnet)* registered the following civil actions relating to distance selling:

17 complaints in 1997;

25 complaints in 1998;

11 complaints in 1999 (as of August 1999).

In this connection, the Danish authorities observed that the definition of "distance selling" in the Danish Consumer Contracts Act (*Lov om visse forbrugeraftaler*) does not cover the provision of services. The Act also imposes a general ban on telephone selling (unsolicited approaches by telephone with a view to selling goods and services).

The Consumer Complaints Board's powers are limited in that complaints relating to certain specific fields are outside its area of competence. The Board's powers are also restricted to services involving a fee of no more than DKK 24 000 but not less than DKK 500. It is to be assumed that because of this lower limit of DKK 500, some complaints about distance selling do not come to its attention.

Complaints regarding telephone selling may also be filed with the Consumers' Ombudsman (*Forbrugerombudsmanden*) who is responsible for supervising compliance with public-law regulations in that field. Complaints addressed to the Consumers' Ombudsman are not registered in a way that allows those concerning distance selling to be identified. Therefore the information on the number of these complaints could not be provided.

Reasons for complaints and main problem areas

In the experience of the Danish Consumer Complaints Board, civil-law disputes normally concern inaccurate/misleading information contained in marketing material, or problems with the right to withdraw from a contract in a particular sector.

Complaints lodged with the Consumers' Ombudsman are normally concerned with misleading marketing and/or the difficulty of contacting firms engaged in distance selling. The most problematical area is distance selling via the Internet.

Bodies dealing with consumer complaints

For civil-law disputes concerning distance selling (which may be referred to the Consumer Complaints Board), it should be noted that the Consumer Complaints Board may grant exemptions from the lower limit DKK 500 mentioned above. This discretionary power may be used in the event of a large number of complaints about one specific disreputable firm, or in order to settle a matter of principle. This power was used, for instance, in a considerable

number of complaints against a particular firm offering "telephone sex services" or similar services on the Internet are dealt with by action on the part of the appropriate authority. (These complaints are not registered as relating to "distance selling" since the activities concerned do not fall within the current definition of the term in Denmark).

Under the Act establishing the Consumer Complaints Board (*Lov om Forbrugerklagenævnet)*, the Board may give official sanction to private-sector complaints boards or boards of appeal operating in specific sectors or areas of activity.

The following private-sector complaint and appeal bodies have been approved by the Consumer Complaints Board: building industry, property transactions, insurance industry, hotel, catering and tourism industries, cavity insulation, driving schools, financial institutions, mortgages, travel industry.

As mentioned above, complaints about firms engaged in distance selling may also be referred to the Consumers' Ombudsman, who is entitled under the Marketing Act (*Markedsføringsloven*) to take direct action in respect of such activities.

If a number of consumers all make the same type of claim for reimbursement in connection with an infringement of the Marketing Act, the Consumers' Ombudsman may also, on request, combine these to form a group action before the courts.

Finland

The Finnish authorities' sources of information were the municipal consumer advisors, the National Consumer Agency, the Consumer Complaints Board, the Finnish Consumers' Association and the consumer organisation *Kuluttajat Konsumenterna ry*.

The Finnish authorities pointed out that the figures emerging from the exercise are to regarded as indicative. In particular, no breakdown of cross-border cases was available.

Distance Selling:

Complaints received by municipal consumer advisers mostly concerned mail-oder sales. The problem areas primarily concern mishandled and/or incomplete deliveries, lack of conformity and failure to obtain refunds. In a limited number of cases, complaints are forwarded to the Consumer Ombudsman. Most cases are successfully dealt with at the consumer advisers' level.

The National Consumer Agency examined 21 cases in 1997, 36 in 1998 and 213 in 1999 (as of 30 September 1999). These cases mostly concerned mail-order and Internet-related sales. The significant raise in the number of complaints in 1999 springs from 1998 foreign advertising campaigns targeted at Finland. Such campaigns were found to be in breach of the Finnish Consumer Protection Act.

The Consumer Complaints Board dealt with 120 complaints about mail-order sales in 1997; in 1998 there were 88 cases and in 1999 (on the 30th of September) 87 cases were registered. The main problems were raised in connection with goods return policies. In one case, the Consumer Complaints Board dealt with Internet-related services sales to minors.

A significant proportion (about one third) of the complaints to the Board about door-to-door sales - 120 cases in 1997, 88 in 1998 and 87 in 1999 (as of 30 September 1999) - actually

concerned distance selling. The problem areas appeared to be cancellation and return policies, refunds and faulty goods.

The Finnish Consumer Association received 50 distance-selling related complaints in both 1997 and 1998. The total number for 1999 is estimated at 50-100 cases. The problem areas are contractual (unfair) terms, return policies and belated deliveries.

The overall number of distance-selling complaints is estimated by the Finnish authorities at about 315 cases in 1997, about 345 cases in 1998 and about 570 cases in 1999.

Germany

The Ministry of Justice *(Bundesministerium der Justiz)* reports that the Unfair Competition Law (§13) and the law on General Business Conditions (§13) allow consumers to start legal proceedings. No consumer complaints were brought to the knowledge of the Federal Government. No statistical information was available.

Greece

The Greek authorities reported the following consumer complaints on distance selling:

Areas of complaint	**1997**	**1998**	**1999**[20]
Misleading advertising	26	29	66
Unfair advertising	16	29	4
Failure to return money after withdrawal from contract	*	*	10
Charging for unsolicited goods	*	*	8
Liability for postal charges	*	3	4
Concealment of the consumer's right of withdrawal	*	*	6
Other	*	*	2

(*) Data are not available

Complaints are handled in three ways:

- Out-of-court procedure via the arbitration committees that exist in all the prefectures,
- Litigation,
- Administrative sanctions, which may range from a fine of GDR 20.000 (higher fines may be imposed on repeat offenders) to the firm's being struck off the competent government department's register and shut down.

[20] Oral and written procedures.

Note that to date two firms have been struck off the register and two other firms have not been allowed to start selling.

Ireland

The Department of Enterprise, Trade and Employment reported the following information provided by the Advertising Standards Authority of Ireland (ASAI):

Year	**Consumer Complaints on Distance Selling**
1996	5
1997	2
1998	1
1999 (8 months)	4

It should be taken into account that the ASAI gets few complaints about distance selling/direct mail. However, ASAI expects this aspect of its work to grow as the phenomenon itself grows in Ireland, particularly direct mailing.

Luxembourg

The Luxembourg authorities presented data provided by the "Euroguichet-Consommateur de l'Union Luxembourgeoise des Consommateurs" (ULC/Euroguichet), which is the Luxembourg consumers' customary contact point for cross-border issues.

The ULC/Euroguichet considers that distance selling includes all sale agreements whose passed and executed without physical contact between the supplier and the customer (this definition covers the use of telephone, television, minitel (in France) and Internet-related techniques).

On the basis of this approach, 271 cases where registered in 1997, 332 in 1998 and 153 up to the 30th of June, 1999. As these figures incorporate door-to-door and promotional excursions ("Kaffeefahrten") which account for 10-15% of cases, the ULC/Euroguichet estimates that, in keeping with the above definition, the overall number of cases should be reduced accordingly.

Most problems are effectively dealt with resorting to the legal framework available in Luxembourg law which provides adequate protection for the most frequent problems

such as non-conformity of goods, costs associated to bank transfers, mistaken card invoicing, VAT rates, defective goods, inertia selling, and guarantees.

The Netherlands

The Netherlands authorities' sources of information were the Consumer Association *(Consumentenbond)*, the Advertising Standards Organisation *(Stichting Reclame Code)* and the Association of Dispute Committees for Consumer Affairs *(Stichting Geschillencommissies Consumentenzaken);* within the scope of the latter, two dispute committees - the Home-Shopping Disputes Committee *(Geschillencommissie Thuiswinkel)*

and the Travel Disputes Committee *(Geschillencommissie Reizen)* deal with distance selling-related complaints.

The Dutch authorities noted that the data gathered from the above sources do not provide sufficient details to pinpoint the complaints of a cross-border nature, and that no information was available on disputes which have ended up in a civil court of law.

Distance selling complaints, 1996-1998:

Before the Home-Shopping Disputes Committee:

12 cases were filed in 1996 (year in which the Committee was set up and started its operations);

7 decisions in 1997 (the overall number of cases introduced in 1997 is not known);

81 cases were filed in 1998.

These cases mainly concern product non-conformity, failure to deliver (especially household furnishings and electrical appliances), and repairs/maintenance.

Before the Travel Disputes Committee:

In 1997, the Committee issued a ruling in 908 cases (the total number of cases is not known); 5 such cases concerned travel agreements concluded by means of distance selling. In 1998, 2707 complaints were filed and 1227 rulings issued, two of which originated by distance marketing of travel products.

These cases mainly regarded contractual terms, incorrect booking, unclear information, quality of accommodation and itinerary changes.

Before the Advertising Standards Organisation:

No figures are available.

Before the Consumer Association:

The Consumer Association receives about one hundred complaints a year about not cross-border-related distance selling. As many cases relate to advertising, they are also dealt with by the Advertising Standards Organisation.

These cases mainly concerned sweepstakes-related advertising in distance selling and occasionally, the quality of goods/services.

Before the Ministry of Economic Affairs:

The Ministry receives about five cross-border complaints a year (mainly from Belgium, France and the United Kingdom) about distance-selling advertising. These cases are forwarded to the Advertising Standards Organisation and/or the European Advertising Standards Alliance.

These cases raised issues such as the alleged misrepresentation of the sweepstakes attached to advertising messages and total or partial lack of delivery of goods/services.

Spain

The *Instituto Nacional del Consumo* (INC), a public agency that depends on the Ministry of Health and Consumer Affairs, has reported the following figures on distance selling-related complaints (data provided by the regional administrations -"*Comunidades Autónomas*"[21] - and by consumers' organisations) :

- 1997: 2.366
- 1998: 2.786
- 1999: 652 (January to September 1999)

Main areas of complaint

- Breach of contract,
- Refusal to replace goods,
- Defective goods,
- Misleading advertising,
- Misleading marketing advertising,
- Refusal to respect a cooling-off period,
- Price irregularities,
- Bad quality of the offered goods,
- Delayed delivery,
- Goods not delivered at all,
- Poor and incomplete information about goods, prices and cooling-off periods,
- Lack of information on the supplier's identity,
- Imposition of terms limiting the rights of the consumer,
- Insertion of personal data computerised archives and lists without the prior authorisation of the person concerned.

Systems used for dealing with consumers' complaints

- Sending the file to the competent agency,
- Initiation of the procedure by the agency where the complaint has been lodged,
- Mediation,

[21] In Spain, consumer affairs are handled by the regional governments which have specific competence in consumer policy, including complaint-handling agencies.

– Dismissing the complaint because of lack of proof, or claim withdrawal,

– Initiation of the arbitration procedure (when the firm has joined the arbitrationsystem),

– Bringing the complaint to court (little used option).

Sweden

The National Swedish Complaints Board *(Allmänna reklamationsnämnden (ARN))* is a public agency whose task is to examine litigation cases between consumers and economic operators. The ARN makes recommendations about how to solve the disputes. The procedure is written and free of charge for the parties involved, and the ARN activities are entirely financed by the State. Under government guidelines, ARN is required not to devote more than five months to litigation when consumers' complaints can be adjudicated within the scope of ARN's meetings.

There are eleven different sections that examine consumer litigation (banks, engines, textiles, travel, etc.). According to its own regulations, the ARN examines disputes between consumers and:

– all Swedish economic operators,

– the foreign economic operators having an office for their activities in Sweden,

– foreign economic operators, when the contract on a product or a service has been concluded in Sweden,

– foreign economic operators when the contract on a product or a service has been concluded abroad but the marketing has been made in Sweden, the consumer lives in Sweden and there is no reason to assume that an ARN recommendation would be ineffective.

The agency has reported that throughout the period 21.9.1996-21.9.1999, it has dealt with the following cases involving consumers living abroad:

1996: 2 (Spain)

1997: 38 (mainly USA, but also Denmark, France, Finland and others)

1998: 20 (Norway, USA, Denmark and others)

1999: 22 (Norway, Germany, Finland and others)

and foreign economic operators:

1996: 8 (from Denmark, Finland and some others)

1997: 35 (mainly from Denmark and Finland)

1998: 37 (mainly from Denmark but also Norway)

1999: 20 (mainly from Denmark)

Breakdown of cases according to the different sections of the ARN:

Cases concerning consumers living abroad

	1996	**1997**	**1998**	**1999**
General matters	0	5	4	3
Banks	0	1	0	2
Housing	0	0	1	2
Ships	0	0	0	2
Electricity	0	1	4	2
Insurance	2	1	0	4
Engines	0	0	5	3
Travel	0	7	4	3
Shoes	0	1	0	0
Textiles, leather	0	3	2	3
Dry cleaning	0	0	0	0

In some cases, the consumer lived in Sweden when the contract was concluded and moved abroad afterwards. In other cases, the consumer lived near the Swedish border. In seven cases, the ARN declared itself incompetent.

Cases concerning foreign economic operators

	1996	**1997**	**1998**	**1999**
General matters	2	3	3	1
Banks	0	0	0	0
Housing	0	0	1	3
Ships	0	0	0	0
Electricity	0	1	1	0
Insurance	0	3	0	2
Engines	0	0	0	0
Travel	3	20	31	12
Shoes	0	1	0	0
Textiles, leather	2	7	1	2

Most disputes with foreign economic operators concern travel-related transactions. The majority of complaints concern the rental of holidays bungalows or secondary residences. In twelve cases, ARN found itself incompetent.

The Market Court (*Marknadsdomstolen*)

The following matters have been referred to the Market Court on the grounds of infringement of the Marketing Act:

Year	**N° of cases**	**Object**
1996	----	----------
1997	----	----------
1998	3	- Marketing on the welcome page of a company - TV advertising targeted to children - Advertising pamphlet (Publipostage)
1999[22]	3	- Marketing (from abroad) of goods ordered by telephone - Mail order sales to children less than 16-year old. - Sales through an allowance system

United Kingdom

According to the information provided by the Department of Trade and Industry, in the field of distance selling, there are a number of self-regulatory codes in existence (eg those of the Direct Marketing Association and the Mail Order Traders Association). The British authorities pointed out that the information required by the Commission about consumer complaints in respect of distance selling is not available in sufficient detail.

The Office of Fair Trading has compiled the data on consumer complaints that the Local Authority Trading Standards departments, the Citizens Advice Bureaux and other advice agencies throughout the UK that also take up complaints on behalf of consumers, have provided. Unfortunately these data do not specify whether the goods and services have been provided using distance selling techniques, or not.

Nevertheless, the following conclusions can be drawn from the information received by the Commission's services (the data refer to 1996, 1997 and 1998[23]):

Consumer complaints on defective goods or substandard service (by number of complaints)

[22] January- September 1999

[23] 12 months to 30 September of each year.

– Second-hand cars

– Radio, TV, other electrical goods

– Clothing and footwear

– Food and drinks

– Package holidays and travel agents

Consumer complaints on non-delivery of goods, and delay or non-completion of services

– Furniture, pictures

– Radio, TV, other electrical goods

– Clothing and footwear

– Second-hand cars

– Non-life insurance

Consumer complaints on selling techniques, misleading claims, representations or advertisements, presentation of goods and services, and lack of information

– Second-hand cars

– Food and drinks

– Radio, TV, other electrical goods

– Clothing and footwear

– Package holidays and travel agents

Consumer complaints on mail order or prepayments

– Clothing and footwear

– Radio, TV, other electrical goods

– Books, newspapers and magazines

– Pharmaceutical products and medical services

– Food and drinks

B) Comparative Advertising

Austria

The Austrian authorities have not reported any cross-border complaints on comparative advertising.

Belgium

The unit "Commercial policy" of the Ministry of Economic Affairs has reported that, given that new legislation allowing comparative advertising has been recently adopted, there are no registered complaint cases for the time being.

Denmark

The information provided by the Danish authorities shows that the Consumers' Ombudsman receives only very few complaints about comparative advertising from consumers, since it is complaints from competitors that dominate in this area. Nevertheless, the complaints may touch on aspects which are of relevance to consumers, and it is therefore often the case that the Consumers' Ombudsman must assume responsibility for dealing with these matters.

Over the years, the Consumer Complaints Board (*Forbrugerklagenævnet*) has dealt with a number of civil actions in which the information contained in comparative advertising has had implications under civil law.

Complaints from competitors refer to comparative advertising considered misleading and/or unfair. The complaints relate to comparisons based on price or price-levels. Complaints regarding comparisons in terms of quality are rarer, however.

In the last few years, the Consumers' Ombudsman has been busy with matters concerning retail chains' comparative advertising based on price or price-levels.

Finland

The National Consumer Agency received 6 comparative-advertising related complaints in 1997, 13 in 1998 and 6 in 1999 (until 30 September 1999). Some of these cases were dealt with by the consumer ombudsman and concerned misrepresentation of prices and misleading price comparisons in industries such as telephone services, motor boats, car crash tests and environmentally-friendly features. None of these cases was related to cross-border marketing.

The Finnish Consumers Association registered less than ten complaints about comparative advertising during the years in question.

The total number of complaints related to comparative advertising is estimated by the Finnish authorities at about 17 in 1997, about 24 in 1998 and about 17 in 1999.

Germany

In Germany all legal proceedings are open for consumer complaints. Nevertheless

cross-border complaints in relation to comparative advertising are not known to the Ministry of Justice, nor to consumer organisations or professional trade associations.

Greece

No complaints have been reported in the field of comparative advertising.

Italy

The Italian authorities transmitted the text of three cases (two in 1998, one in 1999) of complaints on the grounds of comparative advertising dealt with by the national competition authority *(Autorità Garante della Concorrenza e del Mercato)*. None of such cases are of a cross-border nature.

Ireland

The Irish authorities reported that no complaints were lodged in the field of comparative advertising throughout the period January 1996-August 1999.

Luxembourg

The *Direction de la Concurrence et de la Protection des Consommateurs* of the Ministry of Economic Affairs points out that to date Comparative advertising has been prohibited in Luxembourg, therefore there are no registered complaint cases for the time being.

The Netherlands

Three complaints were filed in 1996, 2 in 1997 and 6 in 1998 before the Advertising Standards Organisation; none of such cases were of a cross-border nature.

The main issue of concern appears to be misrepresentation and is often raised by competitors. In addition to the Advertising Standards Committee, an Appeals Tribunal *(College van Beroep)* provides redress through a specific procedure for dealing with cross-border advertising complaints.

Spain

The *Instituto Nacional del Consumo* has reported that no complaints (cross-border or not) have been laid throughout the period January 1997-September 1999.

Sweden

The ARN has not reported complaints on comparative advertising. Nevertheless, the following issues relating to commercial communication have been referred to the Market Court:

Year	**N° of cases**	**Object**
1996	6	Pens; magazines; car rentals; printing machines; dog food
1997	1	Comparison of prices
1998	4	Slogans rejected on the grounds of the Marketing Practices Law
1999[24]	2	Dental-care insurance; price and quality of colours

[24] January- September 1999

It should be taken into account that comparative advertising was allowed in Sweden before the adoption of the Directive.

United Kingdom

The systems used for dealing with complaints in the UK are generally self-regulatory in the field of comparative advertising. The Advertising Standards Authority monitors the British Codes of Advertising Practice and the broadcasting authorities (the Independent Television Authority and the Radio Authority) are responsible for dealing with complaints about broadcast advertising.

There are no detailed data on consumer complaints in the field of comparative advertising (see the UK data on distance selling).

2. INFORMATION PROVIDED BY PROFESSIONAL ASSOCIATIONS

A) Distance Contracts

The European Advertising Standards Alliance (EASA)[25] ran a survey among its EU Members, on Consumers' Complaints in Distance Selling. The survey was carried out in co-operation with the European Federation of Direct Marketing (FEDMA).

- The survey shows that there is a system of self-regulation in place in each country to deal with problems arising from distance selling. Eight of the eighteen EU EASA members have a specific code of conduct or note of guidance, whilst seven others apply the provisions of their general advertising codes to the area. The codes and principles that these organisations adhere to are based on the International Chamber of Commerce (ICC) general code of advertising practice and have been further elaborated for distance selling, where necessary, according to the circumstances of each individual country;

- EASA members co-operate closely with the relevant national direct marketing association and indeed in some countries responsibility for handling complaints has been assumed by the local DMA (Direct Marketing Association). In Scandinavian countries, the existence and role of the Consumer Ombudsman, and, as is the case in Sweden, a number of specific self-regulatory organisations (i.e. on sexual or racial discrimination) allow only a very limited scope for general advertising self-regulation;

- The main cause of complaint relates to misleading and fraudulent practices. Some self-regulatory organisations have a system of ad alerts related to unfair practices and fraud, and co-operate with public authorities in cases of fraudulent activities;

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25 The European Advertising Standards Alliance (EASA) is a non-profit making organisation based in Brussels (Belgium) which is the co-ordination point for the views of national advertising self-regulatory bodies across Europe. Its members (27 from 22 European countries including all Member States of the EU) are the national self-regulatory bodies responsible for administrating their respective national self-regulatory systems and applying national codes of advertising practice based on those put in place by the International Chamber of Commerce. Its aims are to promote and support the development of effective self-regulation; to co-ordinate the handling of cross-border complaints; and to provide information and support on advertising self-regulation in Europe. EASA has developed its own cross-border complaint procedure.

- One-third of the eighteen EU EASA Members have experienced problems in either the type of complaints or enforcement, in the area of distance-selling advertising. These include: misleading mailings, non-fulfilment of offers, unsolicited mail, and illegal offers being made through direct mailings;

- The most complained about products or services relating to distance-selling advertising are medicines (and products claiming to have healing or therapeutic effects), slimming products, and book clubs.

B) Comparative Advertising

The European Advertising Standards Alliance (EASA) operates its own "Cross-Border Complaints Procedure". All cross-border advertising complaint case records are stored on an electronic database managed by the EASA Secretariat. Upon resolution of the complaints, a report of the closed cases is published in the EASA quarterly newsletter, '*Alliance Update'*.

EASA database shows no evidence of cross-border complaints directly linked to comparative advertising. Issues arising from comparative advertising are as yet difficult to analyse as Directive 97/55 is not yet implemented throughout the European Union. EASA provided details of two cases related to plagiarism, which are only marginally linked to comparative advertising.

Country of Origin of the Media*	Country of Consumer	Complaint	Case outline
UK	Germany	Plagiarism	Complaint from a German company about the alleged plagiarism in the UK of its pan-European slogan. Upon examination of the case, the UK's Advertising Standards Authority concluded that the ad did not mislead or cause confusion. Complaint not upheld.
UK	Greece	Plagiarism	Complaint from a Greek property agency who alleged that an ad in the World Property Magazine offering property for sale in Greece, used wording identical to its ad for the same region which appeared on the reverse page of the magazine. The complainant felt that this would lead to confusion between the two companies. The complaint was not upheld by the UK's Advertising Standards Authority.

** Country of Origin of the Media, as defined in the EU Broadcasting Directive.*

3. DATA EMERGING FROM THE CROSS-BORDER CO-OPERATION INITIATIVE ON CONSUMER ACCESS TO JUSTICE AND RESOLUTION OF CONSUMER DISPUTES IN THE SINGLE MARKET - 1998

The cross border initiative was carried out in 1998 by a group of consumer organisations[26] with the support of the Commission services and co-ordinated by the *Institut Européen Interrégional de la Consommation* of Lille (IEIC). This action focuses on the follow-up of consumer complaints in ten geographical border areas [Luxembourg; Alsace, Nord-Pas-de-Calais and Languedoc-Roussillon (France); Nordrhein-Westfalen (Garmany); Ostbelgien (Belgium); Cataluña and Madrid (Spain); Milano and Südtirol (Italy); Innsbruck (Austria); and Athina (Greece)]which - mainly because of their location - tend to concentrate a significant number of cases.

[26] Union Luxembourgeoise des Consommateurs, Chambre de la Consommation d'Alsace, Centre Régional de la Consommation Nord-Pas-de-Calais, Verbraucher-Zentrale Nordrhein-Westfalen, Verbraucherschutz-zentrale Ostbelgien, Institut Català del Consum, CTRC Languedoc-Roussillon, Comitato Difesa Consumatori (Milano), VZ Südtirol, Eurokons Inssbruck, ABC Test-Achats, OCU (Madrid), EK.PI.ZO (Athina).

Within the scope of this exercise, 5552 cases were inventoried in 1998. The areas affected by consumer complaints are: cars, furniture, financial services, consumer credit, insurance, building industry, lotteries and games, and timeshare. The highest proportion of disputes concerns financial services and timeshare.

The breakdown of data does not fit into the categories of distance contracts and comparative advertising. Despite their lack of specific indications on consumer complaints as referred to in Directives 97/7/EC and 97/55/EC, these data contribute to the general knowledge of the phenomenon of consumer complaints in situations characterised by a significant number of cross-border transactions, particularly in the central European countries where consumer habits tend for geographical reasons to include cross border shopping.

31989L0552

Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities

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MORE INFO TEXT:

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COUNCIL DIRECTIVE
of 3 October 1989
on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities
(89/552/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas the objectives of the Community as laid down in the Treaty include establishing an even closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, ensuring the economic and social progress of its countries by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its peoples as well as ensuring the preservation and strengthening of peace and liberty;

Whereas the Treaty provides for the establishment of a common market, including the abolition, as between Member States, of obstacles to freedom of movement for services and the institution of a system ensuring that competition in the common market is not distorted;

Whereas broadcasts transmitted across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Community; whereas measures should be adopted to permit and ensure the transition from national markets to a common programme production and distribution market and to establish conditions of fair competition without prejudice to the public interest role to be discharged by the television broadcasting services;

Whereas the Council of Europe has adopted the European Convention on Transfrontier Television;

Whereas the Treaty provides for the issuing of directives for the coordination of provisions to facilitate the taking up of activities as self-employed persons;

Whereas television broadcasting constitutes, in normal circumstances, a service within the meaning of the Treaty;

Whereas the Treaty provides for free movement of all services normally provided against payment, without exclusion on grounds of their cultural or other content and without restriction of nationals of Member States established in a Community

country other than that of the person for whom the services are intended;
Whereas this right as applied to the broadcasting and distribution of television services is also a specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all Member States; whereas for this reason the issuing of directives on the broadcasting and distribution of television programmes must ensure their free movement in the light of the said Article and subject only to the limits set by paragraph 2 of that Article and by Article 56 (1) of the Treaty;
Whereas the laws, regulations and administrative measures in Member States concerning the pursuit of activities as television broadcasters and cable operators contain disparities, some of which may impede the free movement of broadcasts within the Community and may distort competition within the common market;
Whereas all such restrictions on freedom to provide broadcasting services within the Community must be abolished under the Treaty;
Whereas such abolition must go hand in hand with coordination of the applicable laws; whereas this coordination must be aimed at facilitating the pursuit of the professional activities concerned and, more generally, the free movement of information and ideas within the Community;
Whereas it is consequently necessary and sufficient that all broadcasts comply with the law of Member State from which they emanate;
Whereas this Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting; whereas, therefore, it does not affect the responsibility of the Member States and their authorities with regard to the organization - including the systems of licensing, administrative authorization or taxation - financing and the content of programmes; whereas the independence of cultural developments in the Member States and the preservation of cultural diversity in the Community therefore remain unaffected;
Whereas it is necessary, in the common market, that all broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State, should respect the law of the originating Member State applicable to broadcasts intended for reception by the public in that Member State and the provisions of this Directive;
Whereas the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States; whereas, however, the receiving Member State may, exceptionally and under specific conditions provisionally suspend the retransmission of televised broadcasts;
Whereas it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole;
Whereas this Directive, being confined specifically to television broadcasting rules, is without prejudice to existing or future Community acts of harmonization, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition;
Whereas co-ordination is nevertheless needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities;
Whereas minimum requirements in respect of all public or private Community television programmes for European audio-visual productions have been a means of promoting production, independent production and distribution in the abovementioned industries and are complementary to other instruments which are already or will be proposed to favour the same objective;
Whereas it is therefore necessary to promote markets of sufficient size for

television productions in the Member States to recover necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions where practicable and by appropriate means a majority proportion in television programmes of all Member States; whereas, in order to allow the monitoring of the application of these rules and the pursuit of the objectives, Member States will provide the Commission with a report on the application of the proportions reserved for European works and independent productions in this Directive; whereas for the calculation of such proportions account should be taken of the specific situation of the Hellenic Republic and the Portuguese Republic; whereas the Commission must inform the other Member States of these reports accompanied, where appropriate by an opinion taking account of, in particular, progress achieved in relation to previous years, the share of first broadcasts in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audio-visual production capacity or restricted language area;

Whereas for these purposes 'European works' should be defined without prejudice to the possibility of Member States laying down a more detailed definition as regards television broadcasters under their jurisdiction in accordance with Article 3 (1) in compliance with Community law and account being taken of the objectives of this Directive; Whereas it is important to seek appropriate instruments and procedures in accordance with Community law in order to promote the implementation of these objectives with a view to adopting suitable measures to encourage the activity and development of European audio-visual production and distribution, particularly in countries with a low production capacity or restricted language area;

Whereas national support schemes for the development of European production may be applied in so far as they comply with Community law;

Whereas a commitment, where practicable, to a certain proportion of broadcasts for independent productions, created by producers who are independent of broadcasters, will stimulate new sources of television production, especially the creation of small and medium-sized enterprises; whereas it will offer new opportunities and outlets to the marketing of creative talents of employment of cultural professions and employees in the cultural field; whereas the definition of the concept of independent producer by the Member States should take account of that objective by giving due consideration to small and medium-sized producers and making it possible to authorize financial participation by the coproduction subsidiaries of television organizations;

Whereas measures are necessary for Member States to ensure that a certain period elapses between the first cinema showing of a work and the first television showing;

Whereas in order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as these rules are in conformity with Community law, and in particular are not applicable to the retransmission of broadcasts originating in other Member States;

Whereas in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction;

Whereas Member States, with due regard to Community law and in relation to broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more Member States, must be able to lay down different conditions for the insertion of advertising and different limits for the volume of advertising in order to facilitate these particular broadcasts;

Whereas it is necessary to prohibit all television advertising promoting cigarettes

and other tobacco products including indirect forms of advertising which, whilst not directly mentioning the tobacco product, seek to circumvent the ban on advertising by using brand names, symbols or other distinctive features of tobacco products or of undertakings whose known or main activities include the production or sale of such products;

Whereas it is equally necessary to prohibit all television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls and to introduce strict criteria relating to the television advertising of alcoholic products;

Whereas in view of the growing importance of sponsorship in the financing of programmes, appropriate rules should be laid down;

Whereas it is, furthermore, necessary to introduce rules to protect the physical, mental and moral development of minors in programmes and in television advertising;

Whereas although television broadcasters are normally bound to ensure that programmes present facts and events fairly, it is nevertheless important that they should be subject to specific obligations with respect to the right of reply or equivalent remedies so that any person whose legitimate interests have been damaged by an assertion made in the course of a broadcast television programme may effectively exercise such right or remedy.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

Definitions

Article 1

For the purpose of this Directive:

(a) 'television broadcasting' means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services;

(b) 'television advertising' means any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations, in return for payment.

(1) OJ No C 179, 17. 7. 1986, p. 4.

(2) OJ No C 49, 22. 2. 1988, p. 53, and OJ No C 158, 26. 6. 1989.

(3) OJ No C 232, 31. 8. 1987, p. 29.

Except for the purposes of Article 18, this does not include direct offers to the public for the sale, purchase or rental of products or for the provision of services in return for payment;

(c) 'surreptitious advertising' means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration;

(d) 'sponsorship' means any contribution made by a public or private undertaking not engaged in television broadcasting activities or in the production of audio-visual works, to the financing of television programmes with a view to promoting its name, its trade mark, its image, its activities or its products.

CHAPTER II

General provisions

Article 2

1. Each Member State shall ensure that all television broadcasts transmitted

- by broadcasters under its jurisdiction, or
- by broadcasters who, while not being under the jurisdiction of any Member State, make use of a frequency or a satellite capacity granted by, or a satellite up-link situated in, that Member State,

comply with the law applicable to broadcasts intended for the public in that Member State.

2. Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.

Member States may provisonally suspend retransmissions of television broadcasts if the following conditions are fulfilled:

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22;

(b) during the previous 12 months, the broadcaster has infringed the same provision on at least two prior occasions;

(c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of its intention to restrict retransmission should any such infringement occur again;

(d) consultations with the transmitting State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists.

The Commission shall ensure that the suspension is compatible with Community law. It may ask the Member State concerned to put an end to a suspension which is contrary to Community law, as a matter of urgency. This provision is without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.

3. This Directive shall not apply to broadcasts intended exclusively for reception in States other than Member States, and which are not received directly or indirectly in one or more Member States.

Article 3

1. Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this Directive.

2. Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions of this Directive.

CHAPTER III

Promotion of distribution and production of television programmes

Article 4

1. Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

2. Where the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1988 in the Member State concerned.

However, in respect of the Hellenic Republic and the Portuguese Republic, the year 1988 shall be replaced by the year 1990. 3. From 3 October 1991, the Member States shall provide the Commission every two years with a report on the application of this Article and Article 5.

That report shall in particular include a statistical statement on the achievement of the proportion referred to in this Article and Article 5 for each of the television programmes falling within the jurisdiction of the Member State concerned, the reasons, in each case, for the failure to attain that proportion and the measures

adopted or envisaged in order to achieve it.
The Commission shall inform the other Member States and the European Parliament of the reports, which shall be accompanied, where appropriate, by an opinion. The Commission shall ensure the application of this Article and Article 5 in accordance with the provisions of the Treaty. The Commission may take account in its opinion, in particular, of progress achieved in relation to previous years, the share of first broadcast works in the programming, the particular circumstances of new television broadcasters and the specific situation of countries with a low audiovisual production capacity or restricted language area.
4. The Council shall review the implementation of this Article on the basis of a report from the Commission accompanied by any proposals for revision that it may deem appropriate no later than the end of the fifth year from the adoption of the Directive.
To that end, the Commission report shall, on the basis of the information provided by Member States under paragraph 3, take account in particular of developments in the Community market and of the international context.
Article 5
Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services, or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.
Article 6
1. Within the meaning of this chapter, 'European works' means the following:
(a) works originating from Member States of the Community and, as regards television broadcasters falling within the jurisdiction of the Federal Republic of Germany, works from German territories where the Basic Law does not apply and fulfilling the conditions of paragraph 2;
(b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2;
(c) works originating from other European third countries and fulfilling the conditions of paragraph 3.
2. The works referred to in paragraph 1 (a) and (b) are works mainly made with authors and workers residing in one or more States referred to in paragraph 1 (a) and (b) provided that they comply with one of the following three conditions:
(a) they are made by one or more producers established in one or more of those States; or
(b) production of the works is supervised and actually controlled by one or more producers established in one or more of those States; or
(c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.
3. The works referred to in paragraph 1 (c) are works made exclusively or in co-production with producers established in one or more Member State by producers established in one or more European third countries with which the Community will conclude agreements in accordance with the procedures of the Treaty, if those works are mainly made with authors and workers residing in one or more European States.
4. Works which are not European works within the meaning of paragraph 1, but made mainly with authors and workers residing in one or more Member States, shall be considered to be European works to an extent corresponding to the

proportion of the contribution of Community co-producers to the total production costs.

Article 7

Member States shall ensure that the television broadcasters under their jurisdiction do not broadcast any cinematographic work, unless otherwise agreed between its rights holders and the broadcaster, until two years have elapsed since the work was first shown in cinemas in one of the Member States of the Community; in the case of cinematographic works co-produced by the broadcaster, this period shall be one year. Article 8

Where they consider it necessary for purposes of language policy, the Member States, whilst observing Community law, may as regards some or all programmes of television broadcasters under their jurisdiction, lay down more detailed or stricter rules in particular on the basis of language criteria.

Article 9

This chapter shall not apply to local television broadcasts not forming part of a national network.

CHAPTER IV

Television advertising and sponsorship

Article 10

1. Television advertising shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.

2. Isolated advertising spots shall remain the exception.

3. Advertising shall not use subliminal techniques.

4. Surreptitious advertising shall be prohibited.

Article 11

1. Advertisements shall be inserted between programmes. Provided the conditions contained in paragraphs 2 to 5 of this Article are fulfilled, advertisements may also be inserted during programmes in such a way that the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced.

2. In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements shall only be inserted between the parts or in the intervals.

3. The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their programmed duration is more than 45 minutes, may be interrupted once for each complete period of 45 minutes. A further interruption is allowed if their programmed duration is at least 20 minutes longer than two or more complete periods of 45 minutes.

4. Where programmes, other than those covered by paragraph 2, are interrupted by advertisements, a period of at least 20 minutes should elapse between each successive advertising break within the programme.

5. Advertisements shall not be inserted in any broadcast of a religious service. News and current affairs programmes, documentaries, religious programmes, and children's programmes, when their programmed duration is less than 30 minutes shall not be interrupted by advertisements. If their programmed duration is of 30 minutes or longer, the provisions of the previous paragraphs shall apply.

Article 12

Television advertising shall not:

(a) prejudice respect for human dignity:

(b) include any discrimination on grounds of race, sex or nationality;

(c) be offensive to religious or political beliefs;

(d) encourage behaviour prejudicial to health or to safety;

(e) encourage behaviour prejudicial to the protection of the environment.

Article 13

All forms of television advertising for cigarettes and other tobacco products shall

be prohibited.

Article 14

Television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls shall be prohibited.

Article 15

Television advertising for alcoholic beverages shall comply with the following criteria:

(a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;

(b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;

(c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;

(d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;

(e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;

(f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

Article 16

Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection: (a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;

(b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;

(c) it shall not exploit the special trust minors place in parents, teachers or other persons;

(d) it shall not unreasonably show minors in dangerous situations.

Article 17

1. Sponsored television programmes shall meet the following requirements:

(a) the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes;

(b) they must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programmes;

(c) they must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services.

2. Television programmes may not be sponsored by natural or legal persons whose principal activity is the manufacture or sale of products, or the provision of services, the advertising of which is prohibited by Article 13 or 14.

3. News and current affairs programmes may not be sponsored.

Article 18

1. The amount of advertising shall not exceed 15 % of the daily transmission time. However, this percentage may be increased to 20 % to include forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, provided the amount of spot advertising does not exceed 15 %.

2. The amount of spot advertising within a given one-hour period shall not exceed 20 %.

3. Without prejudice to the provisions of paragraph 1, forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services shall not exceed one hour per day.

Article 19

Member States may lay down stricter rules than those in Article 18 for

programming time and the procedures for television broadcasting for television broadcasters under their jurisdiction, so as to reconcile demand for televised advertising with the public interest, taking account in particular of:
(a) the role of television in providing information, education, culture and entertainment;
(b) the protection of pluralism of information and of the media.
Article 20
Without prejudice to Article 3, Member States may, with due regard for Community law, lay down conditions other than those laid down in Article 11 (2) to (5) and in Article 18 in respect of broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more other Member States.
Article 21
Member States shall, within the framework of their laws, ensure that in the case of television broadcasts that do not comply with the provisions of this chapter, appropriate measures are applied to secure compliance with these provisions.
CHAPTER V
Protection of minors
Article 22
Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.
CHAPTER VI
Right of reply
Article 23
1. Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies.
2. A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.
3. Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.
4. An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil law proceedings or would transgress standards of public decency.
5. Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.
CHAPTER VII
Final provisions
Article 24
In fields which this Directive does not coordinate, it shall not affect the rights and obligations of Member States resulting from existing conventions dealing with telecommunications or broadcasting.

Article 25
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 3 October 1991. They shall forthwith inform the Commission thereof.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the fields governed by this Directive.
Article 26
Not later than the end of the fifth year after the date of adoption of this Directive and every two years thereafter, the Commission shall submit to the European Parliament, the Council, and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting.
Article 27
This Directive is addressed to the Member States.
Done at Luxembourg, 3 October 1989.
For the Council
The President
R. DUMAS

31995L0046

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

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DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 24 October 1995
on the protection of individuals with regard to the processing of personal data and on the free movement of such data

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,
Having regard to the proposal from the Commission (1),
Having regard to the opinion of the Economic and Social Committee (2),
Acting in accordance with the procedure referred to in Article 189b of the Treaty (3),
(1) Whereas the objectives of the Community, as laid down in the Treaty, as amended by the Treaty on European Union, include creating an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, ensuring economic and social progress by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights recognized in the constitution and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;
(3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded;
(4) Whereas increasingly frequent recourse is being had in the Community to the processing of personal data in the various spheres of economic and social activity; whereas the progress made in information technology is making the processing and exchange of such data considerably easier;
(5) Whereas the economic and social integration resulting from the establishment and functioning of the internal market within the meaning of Article 7a of the Treaty will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States; whereas the exchange of personal data between undertakings in different Member States is set to increase;

whereas the national authorities in the various Member States are being called upon by virtue of Community law to collaborate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State within the context of the area without internal frontiers as constituted by the internal market;

(6) Whereas, furthermore, the increase in scientific and technical cooperation and the coordinated introduction of new telecommunications networks in the Community necessitate and facilitate cross-border flows of personal data;

(7) Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; whereas this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law; whereas this difference in levels of protection is due to the existence of a wide variety of national laws, regulations and administrative provisions;

(8) Whereas, in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; whereas this objective is vital to the internal market but cannot be achieved by the Member States alone, especially in view of the scale of the divergences which currently exist between the relevant laws in the Member States and the need to coordinate the laws of the Member States so as to ensure that the cross-border flow of personal data is regulated in a consistent manner that is in keeping with the objective of the internal market as provided for in Article 7a of the Treaty; whereas Community action to approximate those laws is therefore needed;

(9) Whereas, given the equivalent protection resulting from the approximation of national laws, the Member States will no longer be able to inhibit the free movement between them of personal data on grounds relating to protection of the rights and freedoms of individuals, and in particular the right to privacy; whereas Member States will be left a margin for manoeuvre, which may, in the context of implementation of the Directive, also be exercised by the business and social partners; whereas Member States will therefore be able to specify in their national law the general conditions governing the lawfulness of data processing; whereas in doing so the Member States shall strive to improve the protection currently provided by their legislation; whereas, within the limits of this margin for manoeuvre and in accordance with Community law, disparities could arise in the implementation of the Directive, and this could have an effect on the movement of data within a Member State as well as within the Community;

(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

(11) Whereas the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data;

(12) Whereas the protection principles must apply to all processing of personal data by any person whose activities are governed by Community law; whereas there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses;

(13) Whereas the acitivities referred to in Titles V and VI of the Treaty on European Union regarding public safety, defence, State security or the acitivities of the State in the area of criminal laws fall outside the scope of Community law, without prejudice to the obligations incumbent upon Member States under Article 56 (2), Article 57 or Article 100a of the Treaty establishing the European Community; whereas the processing of personal data that is necessary to safeguard the economic well-being of the State does not fall within the scope of this Directive where such processing relates to State security matters;
(14) Whereas, given the importance of the developments under way, in the framework of the information society, of the techniques used to capture, transmit, manipulate, record, store or communicate sound and image data relating to natural persons, this Directive should be applicable to processing involving such data;
(15) Whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question;
(16) Whereas the processing of sound and image data, such as in cases of video surveillance, does not come within the scope of this Directive if it is carried out for the purposes of public security, defence, national security or in the course of State activities relating to the area of criminal law or of other activities which do not come within the scope of Community law;
(17) Whereas, as far as the processing of sound and image data carried out for purposes of journalism or the purposes of literary or artistic expression is concerned, in particular in the audiovisual field, the principles of the Directive are to apply in a restricted manner according to the provisions laid down in Article 9;
(18) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out under the responsibility of a controller who is established in a Member State should be governed by the law of that State;
(19) Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; whereas the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfils the obligations imposed by the national law applicable to its activities;
(20) Whereas the fact that the processing of data is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; whereas in these cases, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;
(21) Whereas this Directive is without prejudice to the rules of territoriality applicable in criminal matters;
(22) Whereas Member States shall more precisely define in the laws they enact or when bringing into force the measures taken under this Directive the general circumstances in which processing is lawful; whereas in particular Article 5, in conjunction with Articles 7 and 8, allows Member States, independently of general rules, to provide for special processing conditions for specific sectors and for the various categories of data covered by Article 8;
(23) Whereas Member States are empowered to ensure the implementation of the protection of individuals both by means of a general law on the protection of individuals as regards the processing of personal data and by sectorial laws such as those relating, for example, to statistical institutes;

(24) Whereas the legislation concerning the protection of legal persons with regard to the processing data which concerns them is not affected by this Directive;
(25) Whereas the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the right conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing in certain circumstances;
(26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;
(27) Whereas the protection of individuals must apply as much to automatic processing of data as to manual processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this would create a serious risk of circumvention; whereas, nonetheless, as regards manual processing, this Directive covers only filing systems, not unstructured files; whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to the personal data; whereas, in line with the definition in Article 2 (c), the different criteria for determining the constituents of a structured set of personal data, and the different criteria governing access to such a set, may be laid down by each Member State; whereas files or sets of files as well as their cover pages, which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive;
(28) Whereas any processing of personal data must be lawful and fair to the individuals concerned; whereas, in particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed; whereas such purposes must be explicit and legitimate and must be determined at the time of collection of the data; whereas the purposes of processing further to collection shall not be incompatible with the purposes as they were originally specified;
(29) Whereas the further processing of personal data for historical, statistical or scientific purposes is not generally to be considered incompatible with the purposes for which the data have previously been collected provided that Member States furnish suitable safeguards; whereas these safeguards must in particular rule out the use of the data in support of measures or decisions regarding any particular individual;
(30) Whereas, in order to be lawful, the processing of personal data must in addition be carried out with the consent of the data subject or be necessary for the conclusion or performance of a contract binding on the data subject, or as a legal requirement, or for the performance of a task carried out in the public interest or in the exercise of official authority, or in the legitimate interests of a natural or legal person, provided that the interests or the rights and freedoms of the data subject are not overriding; whereas, in particular, in order to maintain a balance between the interests involved while guaranteeing effective competition, Member States may determine the circumstances in which personal data may be used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies; whereas Member States may similarly

specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organization or by any other association or foundation, of a political nature for example, subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons;

(31) Whereas the processing of personal data must equally be regarded as lawful where it is carried out in order to protect an interest which is essential for the data subject's life;

(32) Whereas it is for national legislation to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public administration or another natural or legal person governed by public law, or by private law such as a professional association;

(33) Whereas data which are capable by their nature of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent; whereas, however, derogations from this prohibition must be explicitly provided for in respect of specific needs, in particular where the processing of these data is carried out for certain health-related purposes by persons subject to a legal obligation of professional secrecy or in the course of legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms;

(34) Whereas Member States must also be authorized, when justified by grounds of important public interest, to derogate from the prohibition on processing sensitive categories of data where important reasons of public interest so justify in areas such as public health and social protection - especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system - scientific research and government statistics; whereas it is incumbent on them, however, to provide specific and suitable safeguards so as to protect the fundamental rights and the privacy of individuals;

(35) Whereas, moreover, the processing of personal data by official authorities for achieving aims, laid down in constitutional law or international public law, of officially recognized religious associations is carried out on important grounds of public interest;

(36) Whereas where, in the course of electoral activities, the operation of the democratic system requires in certain Member States that political parties compile data on people's political opinion, the processing of such data may be permitted for reasons of important public interest, provided that appropriate safeguards are established;

(37) Whereas the processing of personal data for purposes of journalism or for purposes of literary of artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority; whereas this should not, however, lead Member States to lay down exemptions from the measures to ensure security of processing; whereas at least the supervisory authority responsible for this sector should also be provided with certain ex-post powers, e.g. to publish a regular report or to refer matters to the judicial authorities;

(38) Whereas, if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are

collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection;
(39) Whereas certain processing operations involve data which the controller has not collected directly from the data subject; whereas, furthermore, data can be legitimately disclosed to a third party, even if the disclosure was not anticipated at the time the data were collected from the data subject; whereas, in all these cases, the data subject should be informed when the data are recorded or at the latest when the data are first disclosed to a third party;
(40) Whereas, however, it is not necessary to impose this obligation of the data subject already has the information; whereas, moreover, there will be no such obligation if the recording or disclosure are expressly provided for by law or if the provision of information to the data subject proves impossible or would involve disproportionate efforts, which could be the case where processing is for historical, statistical or scientific purposes; whereas, in this regard, the number of data subjects, the age of the data, and any compensatory measures adopted may be taken into consideration;
(41) Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing; whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15 (1); whereas this right must not adversely affect trade secrets or intellectual property and in particular the copyright protecting the software; whereas these considerations must not, however, result in the data subject being refused all information;
(42) Whereas Member States may, in the interest of the data subject or so as to protect the rights and freedoms of others, restrict rights of access and information; whereas they may, for example, specify that access to medical data may be obtained only through a health professional;
(43) Whereas restrictions on the rights of access and information and on certain obligations of the controller may similarly be imposed by Member States in so far as they are necessary to safeguard, for example, national security, defence, public safety, or important economic or financial interests of a Member State or the Union, as well as criminal investigations and prosecutions and action in respect of breaches of ethics in the regulated professions; whereas the list of exceptions and limitations should include the tasks of monitoring, inspection or regulation necessary in the three last-mentioned areas concerning public security, economic or financial interests and crime prevention; whereas the listing of tasks in these three areas does not affect the legitimacy of exceptions or restrictions for reasons of State security or defence;
(44) Whereas Member States may also be led, by virtue of the provisions of Community law, to derogate from the provisions of this Directive concerning the right of access, the obligation to inform individuals, and the quality of data, in order to secure certain of the purposes referred to above;
(45) Whereas, in cases where data might lawfully be processed on grounds of public interest, official authority or the legitimate interests of a natural or legal person, any data subject should nevertheless be entitled, on legitimate and compelling grounds relating to his particular situation, to object to the processing of any data relating to himself; whereas Member States may nevertheless lay down national provisions to the contrary;
(46) Whereas the protection of the rights and freedoms of data subjects with regard to the processing of personal data requires that appropriate technical and organizational measures be taken, both at the time of the design of the processing system and at the time of the processing itself, particularly in order to maintain security and thereby to prevent any unauthorized processing; whereas it is incumbent on the Member States to ensure that controllers comply with these measures; whereas these measures must ensure an appropriate level of security,

taking into account the state of the art and the costs of their implementation in relation to the risks inherent in the processing and the nature of the data to be protected;

(47) Whereas where a message containing personal data is transmitted by means of a telecommunications or electronic mail service, the sole purpose of which is the transmission of such messages, the controller in respect of the personal data contained in the message will normally be considered to be the person from whom the message originates, rather than the person offering the transmission services; whereas, nevertheless, those offering such services will normally be considered controllers in respect of the processing of the additional personal data necessary for the operation of the service;

(48) Whereas the procedures for notifying the supervisory authority are designed to ensure disclosure of the purposes and main features of any processing operation for the purpose of verification that the operation is in accordance with the national measures taken under this Directive;

(49) Whereas, in order to avoid unsuitable administrative formalities, exemptions from the obligation to notify and simplification of the notification required may be provided for by Member States in cases where processing is unlikely adversely to affect the rights and freedoms of data subjects, provided that it is in accordance with a measure taken by a Member State specifying its limits; whereas exemption or simplification may similarly be provided for by Member States where a person appointed by the controller ensures that the processing carried out is not likely adversely to affect the rights and freedoms of data subjects; whereas such a data protection official, whether or not an employee of the controller, must be in a position to exercise his functions in complete independence;

(50) Whereas exemption or simplification could be provided for in cases of processing operations whose sole purpose is the keeping of a register intended, according to national law, to provide information to the public and open to consultation by the public or by any person demonstrating a legitimate interest;

(51) Whereas, nevertheless, simplification or exemption from the obligation to notify shall not release the controller from any of the other obligations resulting from this Directive;

(52) Whereas, in this context, ex post facto verification by the competent authorities must in general be considered a sufficient measure;

(53) Whereas, however, certain processing operation are likely to pose specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, such as that of excluding individuals from a right, benefit or a contract, or by virtue of the specific use of new technologies; whereas it is for Member States, if they so wish, to specify such risks in their legislation;

(54) Whereas with regard to all the processing undertaken in society, the amount posing such specific risks should be very limited; whereas Member States must provide that the supervisory authority, or the data protection official in cooperation with the authority, check such processing prior to it being carried out; whereas following this prior check, the supervisory authority may, according to its national law, give an opinion or an authorization regarding the processing; whereas such checking may equally take place in the course of the preparation either of a measure of the national parliament or of a measure based on such a legislative measure, which defines the nature of the processing and lays down appropriate safeguards;

(55) Whereas, if the controller fails to respect the rights of data subjects, national legislation must provide for a judicial remedy; whereas any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage, in particular in cases where he establishes fault on the part of the data subject or in case of force majeure; whereas sanctions must be imposed on any person, whether governed by private of public law, who fails to comply with the national measures taken under this Directive;

(56) Whereas cross-border flows of personal data are necessary to the expansion of international trade; whereas the protection of individuals guaranteed in the Community by this Directive does not stand in the way of transfers of personal data to third countries which ensure an adequate level of protection; whereas the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations;
(57) Whereas, on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited;
(58) Whereas provisions should be made for exemptions from this prohibition in certain circumstances where the data subject has given his consent, where the transfer is necessary in relation to a contract or a legal claim, where protection of an important public interest so requires, for example in cases of international transfers of data between tax or customs administrations or between services competent for social security matters, or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest; whereas in this case such a transfer should not involve the entirety of the data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or if they are to be the recipients;
(59) Whereas particular measures may be taken to compensate for the lack of protection in a third country in cases where the controller offers appropriate safeguards; whereas, moreover, provision must be made for procedures for negotiations between the Community and such third countries;
(60) Whereas, in any event, transfers to third countries may be effected only in full compliance with the provisions adopted by the Member States pursuant to this Directive, and in particular Article 8 thereof;
(61) Whereas Member States and the Commission, in their respective spheres of competence, must encourage the trade associations and other representative organizations concerned to draw up codes of conduct so as to facilitate the application of this Directive, taking account of the specific characteristics of the processing carried out in certain sectors, and respecting the national provisions adopted for its implementation;
(62) Whereas the establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data;
(63) Whereas such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings; whereas such authorities must help to ensure transparency of processing in the Member States within whose jurisdiction they fall;
(64) Whereas the authorities in the different Member States will need to assist one another in performing their duties so as to ensure that the rules of protection are properly respected throughout the European Union;
(65) Whereas, at Community level, a Working Party on the Protection of Individuals with regard to the Processing of Personal Data must be set up and be completely independent in the performance of its functions; whereas, having regard to its specific nature, it must advise the Commission and, in particular, contribute to the uniform application of the national rules adopted pursuant to this Directive;
(66) Whereas, with regard to the transfer of data to third countries, the application of this Directive calls for the conferment of powers of implementation on the Commission and the establishment of a procedure as laid down in Council Decision 87/373/EEC (1);
(67) Whereas an agreement on a modus vivendi between the European Parliament, the Council and the Commission concerning the implementing

measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty was reached on 20 December 1994;
(68) Whereas the principles set out in this Directive regarding the protection of the rights and freedoms of individuals, notably their right to privacy, with regard to the processing of personal data may be supplemented or clarified, in particular as far as certain sectors are concerned, by specific rules based on those principles;
(69) Whereas Member States should be allowed a period of not more than three years from the entry into force of the national measures transposing this Directive in which to apply such new national rules progressively to all processing operations already under way; whereas, in order to facilitate their cost-effective implementation, a further period expiring 12 years after the date on which this Directive is adopted will be allowed to Member States to ensure the conformity of existing manual filing systems with certain of the Directive's provisions; whereas, where data contained in such filing systems are manually processed during this extended transition period, those systems must be brought into conformity with these provisions at the time of such processing;
(70) Whereas it is not necessary for the data subject to give his consent again so as to allow the controller to continue to process, after the national provisions taken pursuant to this Directive enter into force, any sensitive data necessary for the performance of a contract concluded on the basis of free and informed consent before the entry into force of these provisions;
(71) Whereas this Directive does not stand in the way of a Member State's regulating marketing activities aimed at consumers residing in territory in so far as such regulation does not concern the protection of individuals with regard to the processing of personal data;
(72) Whereas this Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive,
HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I GENERAL PROVISIONS

Article 1
Object of the Directive
1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.

Article 2
Definitions
For the purposes of this Directive:
(a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;
(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;
(c) 'personal data filing system' ('filing system') shall mean any structured set of

personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis;
(d) 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law;
(e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;
(f) 'third party' shall mean any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data;
(g) 'recipient' shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;
(h) 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.

Article 3
Scope
1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.
2. This Directive shall not apply to the processing of personal data:
- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,
- by a natural person in the course of a purely personal or household activity.

Article 4
National law applicable
1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:
(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
(b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.
2. In the circumstances referred to in paragraph 1 (c), the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself.

CHAPTER II GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA

Article 5
Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.

SECTION I
PRINCIPLES RELATING TO DATA QUALITY

Article 6
1. Member States shall provide that personal data must be:
(a) processed fairly and lawfully;
(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.
2. It shall be for the controller to ensure that paragraph 1 is complied with.

SECTION II
CRITERIA FOR MAKING DATA PROCESSING LEGITIMATE

Article 7
Member States shall provide that personal data may be processed only if:
(a) the data subject has unambiguously given his consent; or
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
(d) processing is necessary in order to protect the vital interests of the data subject; or
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

SECTION III
SPECIAL CATEGORIES OF PROCESSING

Article 8
The processing of special categories of data
1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.
2. Paragraph 1 shall not apply where:

(a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or
(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards; or
(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or
(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or
(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.
3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.
4. Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.
5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.
Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority.
6. Derogations from paragraph 1 provided for in paragraphs 4 and 5 shall be notified to the Commission.
7. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.

Article 9
Processing of personal data and freedom of expression
Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.
SECTION IV
INFORMATION TO BE GIVEN TO THE DATA SUBJECT

Article 10
Information in cases of collection of data from the data subject
Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any;
(b) the purposes of the processing for which the data are intended;
(c) any further information such as
- the recipients or categories of recipients of the data,
- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,
- the existence of the right of access to and the right to rectify the data concerning him
in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

Article 11
Information where the data have not been obtained from the data subject
1. Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with at least the following information, except where he already has it:
(a) the identity of the controller and of his representative, if any;
(b) the purposes of the processing;
(c) any further information such as
- the categories of data concerned,
- the recipients or categories of recipients,
- the existence of the right of access to and the right to rectify the data concerning him
in so far as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.
2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards.
SECTION V
THE DATA SUBJECT'S RIGHT OF ACCESS TO DATA

Article 12
Right of access
Member States shall guarantee every data subject the right to obtain from the controller:
(a) without constraint at reasonable intervals and without excessive delay or expense:
- confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,
- communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,
- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1);
(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;
(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

SECTION VI
EXEMPTIONS AND RESTRICTIONS

Article 13
Exemptions and restrictions
1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6 (1), 10, 11 (1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard:
(a) national security;
(b) defence;
(c) public security;
(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;
(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);
(g) the protection of the data subject or of the rights and freedoms of others.
2. Subject to adequate legal safeguards, in particular that the data are not used for taking measures or decisions regarding any particular individual, Member States may, where there is clearly no risk of breaching the privacy of the data subject, restrict by a legislative measure the rights provided for in Article 12 when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics.
SECTION VII
THE DATA SUBJECT'S RIGHT TO OBJECT

Article 14
The data subject's right to object
Member States shall grant the data subject the right:
(a) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;
(b) to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses.
Member States shall take the necessary measures to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of (b).

Article 15
Automated individual decisions
1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.
2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:
(a) is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract,

lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view; or
(b) is authorized by a law which also lays down measures to safeguard the data subject's legitimate interests.

SECTION VIII
CONFIDENTIALITY AND SECURITY OF PROCESSING

Article 16
Confidentiality of processing
Any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on instructions from the controller, unless he is required to do so by law.

Article 17
Security of processing
1. Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.
Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.
2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures.
3. The carrying out of processing by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:
- the processor shall act only on instructions from the controller,
- the obligations set out in paragraph 1, as defined by the law of the Member State in which the processor is established, shall also be incumbent on the processor.
4. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in paragraph 1 shall be in writing or in another equivalent form.

SECTION IX
NOTIFICATION

Article 18
Obligation to notify the supervisory authority
1. Member States shall provide that the controller or his representative, if any, must notify the supervisory authority referred to in Article 28 before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.
2. Member States may provide for the simplification of or exemption from notification only in the following cases and under the following conditions:
- where, for categories of processing operations which are unlikely, taking account of the data to be processed, to affect adversely the rights and freedoms of data subjects, they specify the purposes of the processing, the data or categories of data undergoing processing, the category or categories of data subject, the recipients or categories of recipient to whom the data are to be disclosed and the length of time the data are to be stored, and/or
- where the controller, in compliance with the national law which governs him,

appoints a personal data protection official, responsible in particular:
- for ensuring in an independent manner the internal application of the national provisions taken pursuant to this Directive
- for keeping the register of processing operations carried out by the controller, containing the items of information referred to in Article 21 (2),
thereby ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.
3. Member States may provide that paragraph 1 does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person demonstrating a legitimate interest.
4. Member States may provide for an exemption from the obligation to notify or a simplification of the notification in the case of processing operations referred to in Article 8 (2) (d).
5. Member States may stipulate that certain or all non-automatic processing operations involving personal data shall be notified, or provide for these processing operations to be subject to simplified notification.

Article 19
Contents of notification
1. Member States shall specify the information to be given in the notification. It shall include at least:
(a) the name and address of the controller and of his representative, if any;
(b) the purpose or purposes of the processing;
(c) a description of the category or categories of data subject and of the data or categories of data relating to them;
(d) the recipients or categories of recipient to whom the data might be disclosed;
(e) proposed transfers of data to third countries;
(f) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 17 to ensure security of processing.
2. Member States shall specify the procedures under which any change affecting the information referred to in paragraph 1 must be notified to the supervisory authority.

Article 20
Prior checking
1. Member States shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof.
2. Such prior checks shall be carried out by the supervisory authority following receipt of a notification from the controller or by the data protection official, who, in cases of doubt, must consult the supervisory authority.
3. Member States may also carry out such checks in the context of preparation either of a measure of the national parliament or of a measure based on such a legislative measure, which define the nature of the processing and lay down appropriate safeguards.

Article 21
Publicizing of processing operations
1. Member States shall take measures to ensure that processing operations are publicized.
2. Member States shall provide that a register of processing operations notified in accordance with Article 18 shall be kept by the supervisory authority.
The register shall contain at least the information listed in Article 19 (1) (a) to (e).
The register may be inspected by any person.

3. Member States shall provide, in relation to processing operations not subject to notification, that controllers or another body appointed by the Member States make available at least the information referred to in Article 19 (1) (a) to (e) in an appropriate form to any person on request.
Member States may provide that this provision does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can provide proof of a legitimate interest.

CHAPTER III JUDICIAL REMEDIES, LIABILITY AND SANCTIONS

Article 22
Remedies
Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question.

Article 23
Liability
1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.
2. The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage.

Article 24
Sanctions
The Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to this Directive.

CHAPTER IV TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

Article 25
Principles
1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.
2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.
3. The Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.
4. Where the Commission finds, under the procedure provided for in Article 31 (2), that a third country does not ensure an adequate level of protection within the

meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.
5. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.
6. The Commission may find, in accordance with the procedure referred to in Article 31 (2), that a third country ensures an adequate level of protection within the meaning of paragraph 2 of this Article, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 5, for the protection of the private lives and basic freedoms and rights of individuals.
Member States shall take the measures necessary to comply with the Commission's decision.

Article 26
Derogations
1. By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2) may take place on condition that:
(a) the data subject has given his consent unambiguously to the proposed transfer; or
(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or
(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
(d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
(e) the transfer is necessary in order to protect the vital interests of the data subject; or
(f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.
2. Without prejudice to paragraph 1, a Member State may authorize a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.
3. The Member State shall inform the Commission and the other Member States of the authorizations it grants pursuant to paragraph 2.
If a Member State or the Commission objects on justified grounds involving the protection of the privacy and fundamental rights and freedoms of individuals, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 31 (2).
Member States shall take the necessary measures to comply with the Commission's decision.
4. Where the Commission decides, in accordance with the procedure referred to in Article 31 (2), that certain standard contractual clauses offer sufficient safeguards as required by paragraph 2, Member States shall take the necessary measures to

comply with the Commission's decision.

CHAPTER V CODES OF CONDUCT

Article 27
1. The Member States and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors.
2. Member States shall make provision for trade associations and other bodies representing other categories of controllers which have drawn up draft national codes or which have the intention of amending or extending existing national codes to be able to submit them to the opinion of the national authority.
Member States shall make provision for this authority to ascertain, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives.
3. Draft Community codes, and amendments or extensions to existing Community codes, may be submitted to the Working Party referred to in Article 29. This Working Party shall determine, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives. The Commission may ensure appropriate publicity for the codes which have been approved by the Working Party.

CHAPTER VI SUPERVISORY AUTHORITY AND WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

Article 28
Supervisory authority
1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.
These authorities shall act with complete independence in exercising the functions entrusted to them.
2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.
3. Each authority shall in particular be endowed with:
- investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,
- effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,
- the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.
Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.
4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall

be informed of the outcome of the claim.
Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of this Directive apply. The person shall at any rate be informed that a check has taken place.
5. Each supervisory authority shall draw up a report on its activities at regular intervals. The report shall be made public.
6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State. The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.
7. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.

Article 29
Working Party on the Protection of Individuals with regard to the Processing of Personal Data
1. A Working Party on the Protection of Individuals with regard to the Processing of Personal Data, hereinafter referred to as 'the Working Party', is hereby set up. It shall have advisory status and act independently.
2. The Working Party shall be composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission.
Each member of the Working Party shall be designated by the institution, authority or authorities which he represents. Where a Member State has designated more than one supervisory authority, they shall nominate a joint representative. The same shall apply to the authorities established for Community institutions and bodies.
3. The Working Party shall take decisions by a simple majority of the representatives of the supervisory authorities.
4. The Working Party shall elect its chairman. The chairman's term of office shall be two years. His appointment shall be renewable.
5. The Working Party's secretariat shall be provided by the Commission.
6. The Working Party shall adopt its own rules of procedure.
7. The Working Party shall consider items placed on its agenda by its chairman, either on his own initiative or at the request of a representative of the supervisory authorities or at the Commission's request.

Article 30
1. The Working Party shall:
(a) examine any question covering the application of the national measures adopted under this Directive in order to contribute to the uniform application of such measures;
(b) give the Commission an opinion on the level of protection in the Community and in third countries;
(c) advise the Commission on any proposed amendment of this Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms;
(d) give an opinion on codes of conduct drawn up at Community level.
2. If the Working Party finds that divergences likely to affect the equivalence of

protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly.
3. The Working Party may, on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community.
4. The Working Party's opinions and recommendations shall be forwarded to the Commission and to the committee referred to in Article 31.
5. The Commission shall inform the Working Party of the action it has taken in response to its opinions and recommendations. It shall do so in a report which shall also be forwarded to the European Parliament and the Council. The report shall be made public.
6. The Working Party shall draw up an annual report on the situation regarding the protection of natural persons with regard to the processing of personal data in the Community and in third countries, which it shall transmit to the Commission, the European Parliament and the Council. The report shall be made public.

CHAPTER VII COMMUNITY IMPLEMENTING MEASURES

Article 31
The Committee
1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.
2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter.
The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.
The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. It that event:
- the Commission shall defer application of the measures which it has decided for a period of three months from the date of communication,
- the Council, acting by a qualified majority, may take a different decision within the time limit referred to in the first indent.

FINAL PROVISIONS

Article 32
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest at the end of a period of three years from the date of its adoption.
When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.
2. Member States shall ensure that processing already under way on the date the national provisions adopted pursuant to this Directive enter into force, is brought into conformity with these provisions within three years of this date.
By way of derogation from the preceding subparagraph, Member States may provide that the processing of data already held in manual filing systems on the date of entry into force of the national provisions adopted in implementation of this Directive shall be brought into conformity with Articles 6, 7 and 8 of this

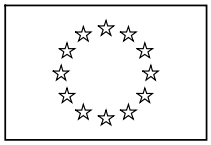
Directive within 12 years of the date on which it is adopted. Member States shall, however, grant the data subject the right to obtain, at his request and in particular at the time of exercising his right of access, the rectification, erasure or blocking of data which are incomplete, inaccurate or stored in a way incompatible with the legitimate purposes pursued by the controller.
3. By way of derogation from paragraph 2, Member States may provide, subject to suitable safeguards, that data kept for the sole purpose of historical research need not be brought into conformity with Articles 6, 7 and 8 of this Directive.
4. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field covered by this Directive.

Article 33
The Commission shall report to the Council and the European Parliament at regular intervals, starting not later than three years after the date referred to in Article 32 (1), on the implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments. The report shall be made public.
The Commission shall examine, in particular, the application of this Directive to the data processing of sound and image data relating to natural persons and shall submit any appropriate proposals which prove to be necessary, taking account of developments in information technology and in the light of the state of progress in the information society.

Article 34
This Directive is addressed to the Member States.

Done at Luxembourg, 24 October 1995.
For the European Parliament
The President
K. HAENSCH
For the Council
The President
L. ATIENZA SERNA

(1) OJ No C 277, 5. 11. 1990, p. 3 and OJ No C 311, 27. 11. 1992, p. 30.
(2) OJ No C 159, 17. 6. 1991, p 38.
(3) Opinion of the European Parliament of 11 March 1992 (OJ No C 94, 13. 4. 1992, p. 198), confirmed on 2 December 1993 (OJ No C 342, 20. 12. 1993, p. 30); Council common position of 20 February 1995 (OJ No C 93, 13. 4. 1995, p. 1) and Decision of the European Parliament of 15 June 1995 (OJ No C 166, 3. 7. 1995).
(1) OJ No L 197, 18. 7. 1987, p. 33.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.5.2003
COM(2003) 265 final

REPORT FROM THE COMMISSION

First report on the implementation of the Data Protection Directive (95/46/EC)

INDEX

1. THE REASONS FOR THE REPORT AND THE OPEN CONSULTATION ON THE IMPLEMENTATION OF DIRECTIVE 95/46/EC

> *'The Commission shall report to the Council and the European Parliament at regular intervals, starting not later than three years after the date referred to in Article 32 (1), on the implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments.'* (Article 33 of EC Directive 95/46)

The present report is the Commission's response to the above requirement. The Commission has delayed its report by 18 months because the Member States have been slow to transpose the Directive into national law[1].

The Commission has approached the preparation of this report from a broad perspective. It has gone beyond the simple examination of the Member States' acts of implementation and has conducted in addition an open public debate, encouraging a wide participation on the part of stakeholders. This approach is not only in line with the Commission's approach to governance at the European level as set out in its White Paper of July 2001[2]; it is also justified by first, the specific nature of Directive 95/46 and second, the rapid pace of technological development in the information society and other international developments which have brought about significant changes since the Directive was finalised in 1995.

1.1. A Directive with very broad impact

Directive 95/46 enshrines two of the oldest ambitions of the European integration project: the achievement of an Internal Market (in this case the free movement of personal information) and the protection of fundamental rights and freedoms of individuals. In the Directive, both objectives are equally important.

In legal terms, however, the existence of the Directive rests on Internal Market grounds. Legislation at the EU level was justified because differences in the way that Member States approached this issue impeded the free flow of personal data between the Member States[3]. Its legal base was thus Article 100a (now Article 95) of the Treaty. However, the proclamation of the Charter of Fundamental Rights of the

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1 The Commission decided in December 1999 to take France, Germany, Ireland, Luxembourg and the Netherlands to the European Court of Justice for failure to notify all the necessary measures to implement Directive 95/46. In 2001 the Netherlands and Germany notified and the Commission closed the cases against them. France notified the data protection law of 1978 so that the proceedings for non notification against that state were dropped. France announced at the same time its intention to pass a new law that is not yet adopted. In the case of Luxembourg, the Commission action has led to this Member State being condemned by the Court of Justice for failure to fulfil its obligations. The Directive was then implemented with a new law that entered into force in 2002. Ireland notified a partial implementation in 2001; a complete bill has however recently been passed. The implementation status in Member States is available at: http://europa.eu.int/comm/internal_market/privacy/law/implementation_en.htm

2 COM(2001) 428 final http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf

3 See COM (90) 314 final - SYN 287 AND 288, 13 September 1990, page 4: *"The diversity of national approaches and the lack of a system of protection at Community level are an obstacle to completion of the internal market. If the fundamental rights of data subjects, in particular their right to privacy, are not safeguarded at Community level, the cross-border flow of data might be impeded…"*

European Union[4] by the European Parliament, the Council and the Commission in December 2000, and in particular Article 8 thereof which incorporates the right to data protection, has given added emphasis to the fundamental rights dimension of the Directive.

Moreover, by its nature, the Directive has a very broad impact. Every individual is a data subject and entities in every sector of the economy are data controllers. Thus, even if its legal justification is rather specific, its effects are very wide and its implementation must be examined with that in mind.

1.2. Developments in information technology and increased security concerns have sharpened the debate on data protection

Since the adoption of the Directive in 1995, there has been an exponential growth in the number of households and businesses connected to the Internet and thus in the number of people leaving an increasing amount of personal information of all kinds on the web. At the same time, the means of collecting personal information has become increasingly sophisticated and less easily detectable: closed circuit TV systems monitoring public places; spyware installed in PCs by web-sites to which they have been connected which collect information about users' browsing habits, information that the sites often sell to others; or the monitoring of employees', including the use of emails and internet, at the workplace.

This "data explosion" inevitably raises the question whether legislation can fully cope with some of these challenges, especially traditional legislation which has a limited geographical field of application, with physical frontiers which the Internet is rapidly rendering increasingly irrelevant[5].

Notably as a response to technological developments, Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector[6] translated the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector. Directive 2002/58/EC on privacy and electronic communications of 12 July 2002[7] has recently updated Directive 97/66/EC to reflect developments in the markets and technologies for electronic communications services, such as the Internet, so as to provide an equal level of protection of personal data and privacy, regardless of the technologies used.

The emergence of a knowledge based economy combined with technological progress and the growing role attributed to human capital have intensified the

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4 http://europa.eu.int/comm/justice_home/unit/charte/index_en.html

5 The report "Future bottlenecks in the information society" prepared for the Joint Research Centre of the Commission and the Institute for Prospective Technological Studies in June 2001 concludes that there are some emerging areas that do not fit easily with the provisions of the Directive and that it may therefore be necessary to revise it in the future. At the same time, the report notes that "although we have the Directive implemented in all Member States, there is increasing social anxiety with regard to the abuse and misuse of personal data within on-line information systems". Evidence gathered during the preparation of this report lends some support to this conclusion. http://www.jrc.es/FutureBottlenecksStudy.pdf

6 OJ No L 24, 30.1.1998, p. 1-8

7 OJ No L 201, 31 July 2002, p. 37-47. Member States have until 31 October 2003 to transpose the new Directive into national law.

collection of workers' personal data in the employment context. These developments gave rise to a number of concerns and risks and brought the issue of effective protection of workers' personal data into focus. The Commission noted, in its second stage consultation document addressed to the European social partners in October 2002, that there is scope for EU legislative action under Article 137 (2) of the Treaty, aiming at improving working conditions by establishing a European framework of principles and rules in this field. The Commission is currently reflecting on the follow-up to this consultation and intends to decide thereon before the end of 2003. Such a European framework would build on the existing general principles of Directive 95/46 EC while supplementing and clarifying these principles in the employment context.

As regards consumer credit, the Commission has set out, in its proposal for a European Parliament and Council Directive on the harmonisation of laws, regulations and administrative provisions of the Member States concerning credit for consumers[8], some specific provisions on data protection aimed at further strengthening the protection of consumers.

At the same time, increased concerns about security, especially following the events of 11 September 2001, have put civil liberties in general and the rights to privacy and the protection of personal data in particular under some pressure. This is neither new nor surprising. The European Court for Human Rights found it necessary to issue the following warning in 1978: "States may not…, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate… the danger (is that) of undermining or even destroying democracy on the ground of defending it".[9]

The Directive does not of course apply to the processing of personal data in the course of so-called "third pillar" activities[10] and data protection in these areas is not therefore covered by this report. The same distinction is however often not made in Member States laws. This raises a number of questions and problems, which have in particular been highlighted by the European Parliament and which deserve further debate.

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8 COM (2002) 443 final of 11.09.2002

9 Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28

10 Article 3.2. first indent excludes from the scope of the Directive "activity falling outside the scope of Community law… and in any case processing operations concerning public security, defence, State security (including the public well-being of the State when the processing operations relate to State security matters) and the activities of the States in areas of criminal law".

2. THE OPEN REVIEW PROCESS PRECEDING THE PREPARATION OF THIS REPORT

Against the above background, the Commission sought to organise an open debate with the widest possible participation to accompany its review of the implementation of the Directive. All interested parties - governments, institutions, business and consumer associations, even individual companies and citizens - have been given the opportunity to participate and express their views[11]. The Commission regards this process as positive. It has enriched the sources of information on which the Commission has drawn for this report and the recommendations for future action that it makes. It has also confirmed the shift in opinion that had already been discerned among data controllers in general[12] and representatives of the business community in particular: data controllers are now constructively engaged in a dialogue about how to ensure the effective protection of personal data in an efficient way, instead of opposing regulation in this field outright.

The Commission regrets, on the other hand, the limited response of consumer organisations to the consultation process.[13]

This report summarises the Commission's findings in the light of the input it has gathered and its recommendations for action. The Commission considers however that this can only be regarded as the first step in a longer process.

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11 The Commission addressed questions to Member State governments and separately to supervisory authorities; commissioned two studies by academic experts; issued a general invitation to make contributions published in the Official Journal and on the Commission's web-site; placed two questionnaires on its web-site for over two months, one aimed at data controllers and the other at data subjects; held an international conference at which a wide range of issues were discussed in six separate workshops.

12 Although this report usually refers to data controllers as "Industry" or "business representatives" (because they are those that most have contributed to the debates), public authorities carrying out activities within the scope of Community law are also data controllers and of course the recommendations and observations contained in this report also concern them.

13 Only BEUC, the European Consumer's Organisation, submitted a position paper, stating i.al. that in response to those who have argued that the Directive needs to be adapted to the imperatives of the online environment, in their view it is the online environment that needs to be adapted to ensure full respect of the principles of the Directive.

3. THE MAIN RESULTS OF THE REVIEW

3.1. For and against the amendment of the directive

The Commission considers that results of the review on balance militate against proposing modifications to the Directive at this stage.

In the course of the consultations conducted, few contributors explicitly advocated the modification of the Directive. The most notable exception was the detailed proposals for amendments submitted jointly by Austria, Sweden, Finland and the UK[14]. These proposals for amendments concerned only a small number of provisions (notably Article 4 which determines the applicable law, Article 8 on sensitive data, Article 12 on the right of access, Article 18 on notification and Articles 25 and 26 on transfers to third countries), leaving most of the provisions and all of the principles of the Directive untouched. The specific difficulties arising from these and some other provisions will be looked at in more detail later in this report.

The Commission believes that the following general considerations make it unwise to make proposals to amend this Directive in the immediate future:

– Experience with the implementation of the Directive is so far very limited. Only few Member States implemented the Directive on time. Most Member States only notified implementing measures to the Commission in the years 2000 and 2001, and Ireland has still not notified its recent implementation. Important implementation legislation is still pending in some Member States. This constitutes an inadequate basis of experience for a proposal for a revised Directive.

– Many of the difficulties that have been identified during the review can be addressed and resolved without amending the Directive. In some cases, where problems are caused by incorrect implementation of the Directive, they must be solved by specific modifications of Member State law. In others, the margins of manoeuvre allowed by the Directive permit closer co-operation among supervisory authorities to achieve the convergence necessary to overcome difficulties arising from practices that diverge too widely from Member State to Member State. In any event, such means are likely to take effect more quickly than would an amendment of the Directive and so should be fully exploited first.

– Where amendments have been proposed by stakeholders, the aim is often the reduction of compliance burdens for data controllers. While this is a legitimate end in itself and indeed one that the Commission espouses, the Commission believes that many of the proposals would also involve a reduction in the level of protection provided for. The Commission believes that any changes that might in due course be considered should aim to maintain the same level of

[14] http://www.lcd.gov.uk/ccpd/dpdamend.htm. The Netherlands adhered to these proposals at a later stage.

protection and must be consistent with the overall framework provided by existing international instruments[15].

Following discussions with the Member States, the Commission notes its view that a modification of the Directive is neither necessary nor desirable at present is shared by a comfortable majority of Member States and also of national supervisory authorities.

The Commission considers that some of the issues that have emerged and which are here only the subject of a preliminary analysis need to be further analysed and may need in due course to be the subject of a proposal to revise the Directive. Such a proposal would benefit from the greater experience of the Directive's implementation which will have been gained in the meantime.

Moreover, as stated above, there is considerable scope for improvement in the implementation of the present Directive which is likely to resolve a number of the difficulties identified during the review, some of them wrongly attributed to the Directive itself. The Commission's attention has been and will continue to be focussed in particular on areas where Community law is clearly being breached and on areas where divergent interpretations and/or practices are causing difficulties in the Internal Market.

The Commission also considers as a priority the harmonious application of the rules relating to the transfer of data to third countries, with a view to facilitating legitimate transfers and avoiding unnecessary barriers or complexities.

3.2. Overall assessment of the implementation of the directive in the Member States. The problem of the divergences between the Member States' legislation.

The Commission's services have made a thorough analysis of the implementation in the fifteen Member States on the basis of the information collected. The co-operation of the Member States and the national supervisory authorities in this regard has been of great help. The initial results of this analysis are contained in this report and in a technical annex that will be published separately, but the process of collection of information and analysis of the implementation in the Member States will need to continue during 2003.

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[15] In the words of Commissioner Bolkestein at the closing session of the Conference on the implementation of the Directive: "There is certainly no such thing as a clean sheet of paper when it comes to making policy in the field of data protection (…) In drafting its report the Commission will … need to bear in mind the broader legal and political framework, in particular the principles of Convention 108 of the Council of Europe"

RESULTS FROM THE ON-LINE QUESTIONNAIRES

Using Inter-Active Policy Making on-line consultation-tool, the Commission placed two questionnaires on its web-site in June and invited data subjects (public consultation) and data controllers (target group) to give their views on various aspects of data protection. By the time the questionnaires were closed, 9156 individuals and 982 data controllers had replied. The full results of the consultations are available at:

http://europa.eu.int/comm/internal_market/privacy/lawreport/consultation_en.htm

The Commission finds the following results to be of particular interest:

- Although the Data Protection Directive incorporates high standards of protection, most individuals (4113 out of 9156 or 44.9%) considered the level of protection a minimum.

- 81% of individuals thought the level of awareness about data protection was insufficient, bad or very bad, whereas only 10.3% thought it was sufficient and only 3.46% thought it was good or very good. Among controllers there was an almost equally negative view on awareness among citizens: Most of the respondents (30%) thought that citizens' awareness about data protection is insufficient whilst only 2.95% thought that the level was very good.

- There is greater acceptance of data protection rules now among businesses. For example, 69.1% of the respondents (data controllers) considered data protection requirements necessary in our society whilst only a 2.64% regarded them as completely unnecessary and needing to be removed.

- A large majority of the data controllers that responded to the questionnaire (62.1%) did not consider that responding to requests from individuals for access to their personal data involved an important effort for their organisation. Indeed, most of the data controllers responding to the questionnaire either did not have figures available or received fewer than 10 requests during the year 2001.

The Commission recognises that these results cannot be considered representative in the way that survey results based on a scientifically selected sample can. The Commission proposes to conduct another survey in 2003, both to test the reliability of the results of the open questionnaire and to establish a yardstick against which to measure the evolution of various views or indicators in the future.

Late implementation

The implementation of a Directive of this kind, that is a Directive leaving a considerable latitude to the Member States, but also requiring them to fill in a significant amount of detail, is undoubtedly a complex task. But the serious delays in implementation that occurred in most Member States is the first and main shortcoming which the Commission has the duty to register as regards the implementation of the Directive which it unequivocally condemns. It has of course taken the appropriate action under Article 226 of the Treaty, as described above.

Free movement of information secured

Despite these delays and gaps in implementation, the Directive has fulfilled its principal objective of removing barriers to the free movement of personal data between the Member States. In fact, the main difficulty prior to the adoption of the Directive arose because, while most Member States had adopted data protection legislation, a small number had not. By 1995, only Italy and Greece did not have such legislation, but these two Member States were among the first to transpose the Directive, thus removing the main difficulty. Since the adoption of the Directive, no case has been drawn to the attention of the Commission in which the transfer of personal data between Member States has been blocked or refused on data protection grounds.

Of course, obstacles to the free circulation of personal data can be more subtle than blatant prohibitions in the national laws or blocking decisions taken by national supervisory authorities: there might for example be cases where an unnecessarily restrictive rule in one Member State limits the internal processing of personal data in that Member State in the first place and, thus the exportation of the same data to other Member States. In other words, while the Commission is broadly satisfied with the impact of the Directive as regards the free movement of information within the Community, further experience with its implementation may produce evidence of problems that need to be tackled[16].

High level of protection

As provided for in Recital 10, the aproximation of the national laws pursued by the Directive must seek to ensure a high level of protection in the Community. The Commission believes that this has been achieved. Indeed the Directive itself sets out some of the highest standards of data protection in the world. However, the results of the on-line survey suggest that the perception of citizens at this regard is different. This paradox requires further reflection. A preliminary analysis would suggest that at least part of the problem is attributable to an incomplete application of the rules (see further section on "enforcement, compliance and awareness")

Other Internal Market policy objectives less well served

The Commission takes a view of the overall policy objectives to be pursued by Internal Market legislation that goes beyond mere free movement. This should provide a level playing field for economic operators in different Member States; help

[16] For example different approaches as regards protection for data of legal persons.

to simplify the regulatory environment in the interests of both good governance and competitiveness; and tend to encourage rather than hinder cross-border activity within the EU.

Judged against these criteria, the divergences that still mark the data protection legislation of the Member States are too great. This was the prevalent message received from the contributors to the review, in particular those representing business interests, who complained that present disparities prevent multinational organisations from developing pan-European policies on data protection. The Commission recalls that the ambition of a Directive is approximation and not complete uniformity and that, in order to respect the subsidiarity principle, the process of approximation should not go further than is necessary. Nevertheless, it thinks that stakeholders are right to demand more convergence in legislation and in the way it is applied by the Member States and the national supervisory authorities in particular.

Some contributors to the review proposed the amendment of the Directive to add more detail or specification to achieve this convergence. The Commission prefers to proceed at least initially by other means. Furthermore, the general nature of this Directive, i.e. the fact that it applies to a large number of sectors and contexts, generally argues against adding more detail or specification.

Divergences in Member States laws call for a range of solutions

Since the divergences between Member States' laws have different causes and different consequences, they also call for a range of different solutions.

It is clear that when a Member State has gone beyond the limits of the Directive or fallen short of its requirements, it creates a divergence that must be remedied by the modification of the Member State law in question. There are certain provisions which leave little or no margin to the Member States and where divergences have nevertheless occurred - see for example "definitions" or closed lists in the Directive such as in Articles 7 (grounds for legitimate processing), 8.1 (sensitive data), 10 (information to data subjects), 13 (exceptions), 26 (exceptions as regards transfers to third countries, etc). This points to non-compliance with Community law. Article 4 (applicable law) has also been badly transposed in a number of cases.

The Commission is of course prepared to use its powers under Article 226 of the Treaty to bring about such changes, but it hopes that it will not be necessary to proceed by way of formal action. Bilateral and multilateral discussions will be held with the Member States with a view to arriving at agreed solutions in line with the Directive.

Other divergences may be the legitimate result of correct implementation by a Member State that has taken a different direction within the margin of manoeuvre allowed by the Directive. For the purposes of this report, the Commission considers the existence of such differences only in so far as they have significant negative consequences in the Internal Market or from the "better regulation" point of view, for example the creation of unjustified administrative burdens for operators.

Summing up:

a) Overall, a large proportion of the divergences detected by the Commission's services cannot be considered as a violation of Community law nor as having a significant negative impact on the Internal Market, but when this is the case, the Commission will do the necessary to remedy the situation;

b) Many of the divergences detected nevertheless do stand in the way of a flexible and simplified regulatory system and are still therefore of concern (see for example the differences in the notification requirements or the conditions for international transfers).

There is a broad spectrum of possible actions to address these, as indicated in the work programme in section 6. The pursuit of these solutions in the immediate future does not mean, however, that the Commission excludes the possibility of appropriate amendment to the Directive subsequently, if the difficulties persist. Closer co-operation among the supervisory authorities of the Member States and a general willingness to reduce the negative impact of divergences are therefore to be seen as one alternative, while amendments to the Directive reducing the amount of choice left to the national legislator and to national supervisory authorities are the other. The Member States and their supervisory authorities will no doubt prefer the first option and it is up to them to show that it can work.

Enforcement, compliance and awareness

Before proceeding to a closer examination of some of the problematic areas of the Directive's implementation, one other general issue deserves attention, which is that of the general level of compliance with data protection law in the EU and the related question of enforcement. Given (or despite) the ubiquitous character of personal data processing, it is hard to obtain accurate or complete information about its compliance with the law. The input which the Commission received in response to its call for contributions did not cast much new light on this issue. Anecdotal evidence, however, combined with various elements of "hard" information available to the Commission[17] suggests the presence of three inter-related phenomena:

– An under-resourced enforcement effort and supervisory authorities with a wide range of tasks, among which enforcement actions have a rather low priority;

– Very patchy compliance by data controllers, no doubt reluctant to undertake changes in their existing practices to comply with what may seem complex and burdensome rules, when the risks of getting caught seem low;

– An apparently low level of knowledge of their rights among data subjects, which may be at the root of the previous phenomenon.

The supervisory authorities themselves in many Member States are also concerned about this, in particular their lack of resources. Resource difficulties may affect

[17] For example the relatively small number of individual complaints received by the Commission itself and the low number of authorisations by national authorities for transfers to third countries notified to the Commission in accordance with Article 26 (3)

independence. Independence in the taking of decisions is a *sine qua non* for the correct functioning of the system.

This aspect requires further investigation, but if these tendencies are confirmed, they are reasons for serious concern and reflections need to be undertaken between the Commission and the Member States and the supervisory authorities to determine their causes and design feasible solutions.

The fact that the three aspects are linked means that addressing one of them successfully can have positive spill-over on the others. More vigorous and effective enforcement will improve compliance with the legislation. Better compliance will result in data controllers providing more and better information to data subjects about the existence of the processing and their rights under the law, with a beneficial effect on the level of awareness about data protection among citizens in general.

The candidate countries

In line with the Copenhagen criteria, all candidate countries are commited to transposing Directive 95/46/EC by the time of accession. To date, all have passed legislation in this field, except for Turkey, where preparation of a Data Protection Act is well under way. In the 10 countries that have signed the Treaties of Accession, the legislation in place incorporates most of the key elements of the Directive. However, further efforts are needed to bring this legislation fully into line with all provisions of the Directive.

In this regard, the establishment of independent data protection supervisory authorities is of utmost importance. The independence of some supervisory authorities is exemplary, whilst in other countries it is clearly insufficient. On the other hand, all the supervisory authorities lack the necessary resources and some also the necessary powers to ensure effective implementation of data protection legislation.

4. THE MAIN FINDINGS OF THE REVIEW IN MORE DETAIL[18]

This section looks more closely at and provides more concrete examples of the main issues which the Commission considers require attention in the light of its review.

4.1. The need to complete the implementation of the Directive

A full implementation of the Directive normally requires (besides the enactment of implementing legislation) a second stage which mainly consists in the review of other legislation that may conflict with the Directive's requirements and/or the specification of certain general rules and the provision of appropriate safeguards where exceptions foreseen by the Directive have been used.

In general terms, this second stage of the implementation has not even started in some Member States and among those that have started, some are not very far advanced. Several national laws make reference to further clarification being issued, for example as regards the application of Article 7 (f) (balance of interest clause) but this has not happened yet.[19]

Another provision where implementation is often incomplete is Article 8 (2) (b). This provision allows Member States to make exceptions from the general rule that sensitive data should not be processed, where such processing is necessary to carry out the obligations and specific rights of the controller in the field of employment law, but only subject to adequate safeguards being put in place. In some Member States, these requirements are met through specific data protection legislation in the employment context, which is either quite comprehensive (eg. Finland) or regulates particular issues (eg. health legislation in Denmark and the Netherlands). In other Member States, the situation is less clear. The provisions containing safeguards have not been adopted by all Member States. Where they exist, they are often unsatisfactory. The situation is similar as regards Article 8 (4) and (5) - the processing of sensitive data for reasons of public interest or with regard to criminal convictions. The absence of safeguards means the required level of protection for individuals is not being met, which should be a matter of concern for the Member States, as it is for the Commission. This will be addressed in particular under Action 1 of the work programme. Furthermore, where personal data are processed in a particular sector or context, such as in employment, this may be addressed through sectoral Community action[20].

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18 Readers should refer to the technical annex for a more complete picture.

19 Several submissions – see for example that from Clifford Chance - highlighted the importance of this provision which adds an important element of flexibility to the conditions of "fairness" of processing. An incomplete or unclear implementation of this provision causes unnecessary rigidity in the regulatory framework.

20 Cf., in this regard, point 1.2 supra.

4.2. The need for a reasonable and flexible interpretation

Many submissions have advocated a reasonable and flexible interpretation of certain provisions of the Directive[21]. A good example is the issue of sensitive data[22]. It is necessary to find an interpretation consistent both with the reinforced protection foreseen for this category of data by the Directive and the realities of daily business, routine processing operations and the effective risks that certain operations pose for the protection of the fundamental rights and freedoms of individuals.[23]

Article 12 of the Directive (right of data subjects to have access to information held about them) is another provision that has prompted calls for a flexible interpretation in relation to the exercise of the right of access and the possibility of refusals. It is argued that meeting access requests concerning data processed in enormous and complex information networks could be extremely difficult and costly for the data controller.

The submission from Austria, Sweden, Finland and the United Kingdom seeks a change in the Directive to make clear that if the access request concerns information extremely difficult to retrieve and clearly excluded from the normal operations of the controller, the data controller may ask the data subject to assist the organisation in searching for his data.[24] The Commission recalls that the possibility of asking for such assistance is already in conformity with the Directive in its present form. The Commission is not convinced that the implementation of this provision of the Directive is in fact posing serious practical problems. In any case, the number of access requests seems to remain low.[25] The Commission considers the interpretations and guidance provided by national supervisory authorities so far to be wholly reasonable.

Article 5 of the Directive states that Member States shall, within the limits of the provisions of Chapter II (Articles 6 to 21), determine more precisely the conditions under which the processing of personal data is lawful. In this respect, the Commission notes the concerns expressed by Sweden in the framework of the ongoing review of their legislation as regards the application of data protection principles to continuous text or sound and image data. The Commission considers that the aim of simplifying the conditions for data processing where such processing is not likely to pose any substantial risks to individual's rights can be better met by making use of the margin of manoeuvre that the Directive provides and in particular of the possibilities allowed by articles 7 (f), 9, and 13.

4.3. Promotion and encouragement of Privacy Enhancing Technologies

The idea of Privacy Enhancing Technologies is to design information and communication systems and technologies in a way that minimises the collection and

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21 The submission of the European Privacy Officers Forum (EPOF) is particularly interesting in this regard, for example on the need for a reasonable interpretation of notions like “anonymous data” or “sensitive data”.

22 The submission of FEDMA, for example, contains some practical examples of the different interpretations of this notion in Member States such as the United Kingdom, France or Portugal.

23 The call for a reasonable interpretation can also be found in the suggested amendment to recital 33 submitted by Austria, Finland, Sweden and the United Kingdom.

24 Such assistance is already foreseen under British and Austrian law.

25 See figures and responses of data controllers to the on-line questionnaire on this issue above

use of personal data and hinders unlawful forms of processing. The Commission considers that the use of appropriate technological measures is an essential complement to legal means and should be an integral part in any efforts to achieve a sufficient level of privacy protection.

Technological products should be in all cases developed in compliance with the applicable data protection rules. But being in compliance is only the first step. The aim should be to have products that are not only privacy-compliant and privacy-friendly but if possible also privacy-enhancing[26].

During the discussions on PETs at the Commission's 2002 conference on the implementation of the Directive, it was pointed out that the use of certain technical tools makes it impossible for controllers to comply with the law. An additional problem that emerged is the difficulty of recognising which products are genuinely PETs. Some participants called for some form of certification or seal based on an independent verification of the product. At present, some systems presenting themselves as PETs are not even privacy-compliant.

The key-issue is therefore not only how to create technologies that are really privacy-enhancing, but how to make sure that these technologies are properly identified and recognised as such by the users. Certification schemes play a crucial role and the Commission will continue to follow developments in this area[27].

The Commission believes that such schemes should indeed be encouraged and further developed. The objective is not just better privacy practices, but also to increase transparency and therefore the trust of users and to give those investing in compliance and even enhanced protection an opportunity to demonstrate their performance in this respect and exploit this to their competitive advantage.

4.4. Comments on some specific provisions

This report only indicates the main findings in each case. Details will be made available in a technical annex to be published separately[28].

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26 See in this sense the conclusions of the document WP 37 of the Article 29 Working Party, November 2000*:"Privacy on the Internet - An integrated EU Approach to On-line Data Protection"*. Privacy-compliant products are products developed in full compliance with the Directive, privacy-friendly products go one step further by introducing some elements that make the privacy aspects more easily-accessible to the users like for instance by providing very user-friendly information to the data subject or very easy ways of exercising their rights. Privacy-enhancing products are those that have been designed in a way that aims at accomplishing the largest possible use of truly anonymous data. http://europa.eu.int/comm/internal_market/privacy/workingroup/wp2000/wpdocs00_en.htm

27 For instance in Canada, where the Federal Government became the first national government to make Privacy Impact Assessments (PIAs) mandatory for all federal departments and agencies for all programmes and services where privacy issues might be inherent. This policy requires agencies to initiate PIAs in the early stages of the design or redesign of a programme or service, so as to influence the development process and make sure that privacy protection is a core consideration. The German Land of Schleswig-Holstein has introduced a certification scheme involving both the public and private sector on similar lines.

28 www.europa.eu.int/comm/privacy

4.4.1. Article 4: Applicable law

This is one of the most important provisions of the Directive from the perspective of the Internal Market and its correct implementation is crucial for the functioning of the system. The implementation of this provision is deficient in several cases with the result that the kind of conflicts of law this Article seeks to avoid could arise. Some Member States will have to amend their legislation in this regard.

The provision was one of the most criticised during the review process. Submissions argued for a country of origin rule that would allow multinational organisations to operate with one set of rules across the EU. Many also argued that the "use of equipment" was not an appropriate or workable criterion for determining the application of EU law to controllers established outside the EU.

As regards the country of origin rule, the Directive already allows for the organisation of processing under a single data controller, which means complying only with the data protection law of the controller's country of establishment. This of course does not apply where a company has chosen to exercise its right of establishment in more than one Member State.

As regards the "use of equipment" the Commission is aware that this criterion may not be easy to operate in practice and that it needs further clarification. Should such clarification not be sufficient to ensure its practical application, it might in due course be necessary to propose an amendment creating a different connection factor in order to determine the applicable law.

The Commission's priority is, however, to secure the correct implementation by the Member States of the existing provision. More experience with its application and more reflection is needed, taking into account technological developments, before any proposal to change Article 4 (1) (c) might be made. Notwithstanding the need for this further reflection, it would be wrong to give the impression that the whole of Article 4 is contested. On the contrary, large areas of its application are uncontested and are the subject of unanimous agreement among all data protection authorities and the Commission.

4.4.2. Articles 6 and 7: Data quality and criteria for legitimate processing

The analysis of national legislation shows that the implementation of these provisions is sometimes unsatisfactory. Article 6 (1)(b) allows further processing for historical, statistical or scientific purposes, but only when appropriate safeguards are in place. Safeguards have not been provided for in all Member States, whilst such further processing is generally authorised. Some Member States have gone beyond or fallen short of the list of grounds for legitimate processing in Article 7 and they will have to amend their legislation. The notion of "unambiguous consent" (Article 7 (a)) in particular, as compared with the notion of "explicit consent" in Article 8, needs further clarification and more uniform interpretation. It is necessary that operators know what constitutes valid consent, in particular in on-line scenarios.

4.4.3. Articles 10 and 11: Provision of information to data subjects

The implementation of Articles 10 and 11 of the Directive showed a number of divergences. To some extent this is the result of incorrect implementation, for

instance when a law stipulates that additional information must always be provided to the data subject, irrespective of the necessity test the Directive foresees, but also stems from divergent interpretation and practice by supervisory authorities. Submissions stressed the difficulties for multinational companies operating on a pan-European level that arise from these divergences[29].

4.4.4. Articles 18 and 19: Notification requirements

Many submissions argue for the need to simplify and approximate the requirements in Member States as regards the notification of processing operations by data controllers. The Commission shares this view, but recalls that the Directive already offers the Member States the possibility to provide for wide exemptions from notification in cases where low risk is involved or when the controller has appointed a data protection official. These exemptions allow for sufficient flexibility while not affecting the level of protection guaranteed. Regrettably, some Member States have not availed themselves of these possibilities. However, the Commission agrees that, in addition to wider use of the existent exemptions, some further simplification would be useful and should be possible without amending the existing Articles.

4.4.5. Articles 25 and 26: The external dimension.

Divergences between Member States laws on the implementation of these two provisions are very broad indeed. The approach adopted by some Member States, where the assessment of the adequacy of protection provided for by the recipient is supposed to be made by the data controller, with very limited control of the data flows by the State or the national supervisory authority, does not seem to meet the requirement placed on Member States by the first paragraph of Article 25 (1)[30].

The approach taken by some other Member States, submitting all transfers to third countries to an administrative authorisation[31], also seems inconsistent with Chapter IV of the Directive, which aims at guaranteeing both adequate protection and flows of personal data to third countries without unnecessary burdens. Notifications to national supervisory authorities may be required under Article 19, but notifications cannot be turned into *de facto* authorisations in those cases where the transfer to a third country is clearly permitted, either because the recipient is a destination providing adequate protection as confirmed in a binding Commission decision, or is a party to the standard contractual clauses approved by the Commission, or because the data controller declares that the transfer benefits from one of the exceptions provided for in Article 26 of the Directive. Whilst the data protection authority may legitimately require the notification of these transfers[32], there is no need to authorise these transfers because they are already authorised by Community law.

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29 See for example the views of the EPOF (European Privacy Officers Forum): http://europa.eu.int/comm/internal_market/privacy/docs/lawreport/paper/epof_en.pdf or the EU Committee of the American Chamber of Commerce: http://europa.eu.int/comm/internal_market/privacy/docs/lawreport/paper/amcham_en.pdf

30 "The Member States shall provide that the transfer to a third country of personal data (….) may take place only if (….) the third country in question ensures an adequate level of protection"

31 Transfers benefiting from the exceptions of Article 26 (1) or even to other Member States or third countries declared adequate by the European Commission need an authorisation in some Member States.

32 To check, for example, that the model contract fully corresponds with the model approved by the Commission or that the recipient is effectively covered by the adequacy decision.

An overly lax attitude in some Member States – in addition to being in contravention of the Directive – risks weakening protection in the EU as a whole, because with the free movement guaranteed by the Directive, data flows are likely to switch to the "least burdensome" point of export. An overly strict approach, on the other hand, would fail to respect the legitimate needs of international trade and the reality of global telecommunications networks and risks creating a gap between law and practice which is damaging for the credibility of the Directive and for Community law in general.

Indeed, international transfers appear to be an area where the lack of enforcement action creates such a gap. National authorities are supposed to notify the Commission when they authorise transfers under Article 26 (2) of the Directive. Since the Directive came into operation in 1998, the Commission has received only a very limited number of such notifications. Although there are other legal transfer routes apart from Article 26 (2), this number is derisory by comparison with what might reasonably be expected. Combined with other evidence pointing in the same direction[33], this suggests that many unauthorised and possibly illegal transfers are being made to destinations or recipients not guaranteeing adequate protection. Yet there is little or no sign of enforcement actions by the supervisory authorities.

Transfers requiring authorisation and notification do of course create a considerable administrative burden, both for data exporters and for supervisory authorities. It is therefore desirable that more use be made of the "block authorisations" provided for in Articles 25(6) and 26(4) of the Directive. These have so far produced only four adequacy findings for third countries (Hungary, Switzerland, Canada, and the US Safe Harbor[34]) and two sets of standard contractual clauses, one for transfers to data controllers in third countries and one for transfers to processors. More work is needed on the simplification of the conditions for international transfers.

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33 The report approved by the Spring Conference of Data Protection Authorities in May 2001 showed that most national supervisory authorities were unable to indicate the number of processing operations that affected international transfer of data. Where figures were available, they were insignificant (600 transfers from France, 1352 from Spain and 150 from Denmark)

34 There is also a Commission decision on adequate protection in Argentina close to finalisation.

5. THE PROCESSING OF SOUND AND IMAGE DATA

During the Directive's preparation, some people were concerned that it might not be able to cope with future technological developments. The extent of such technological developments was uncertain, but there was concern that a text drafted mainly with text processing in mind could encounter difficulties when applied to the processing of sound and image data. For this reason, Article 33 contains a specific reference to sound and image data.

The Commission has based this review on a study carried out by an external contractor to analyse the situation in the Member States and on contributions from the Member States themselves and the national supervisory authorities. The information received shows that the processing of sound and image data falls within the scope of all national laws implementing the Directive and that the application of the Directive to these categories of processing has not been particularly problematic.

In most Member States the same (general) provisions apply to the processing of sound and image data as apply to other personal data. Only two Member States (Germany and Luxembourg) have included specific provisions on the processing of sound and image in their laws implementing the Directive. Three Member States (Denmark, Sweden and Portugal) have special provisions on video surveillance in separate laws. Despite the doubts raised during the negotiation of the Directive, Member States have thus reached the conclusion that the Directive's ambition to be technology-neutral is achieved, at least as regards the processing of sound and image data.

No Member State or other contributor has proposed modifications to the Directive in this regard. The joint proposals tabled by Austria, Finland, Sweden and the United Kingdom express some concern about the ability of the Directive to cope with certain technological developments, but do not contain any concrete proposals directly related to this issue.

One of the workshops of the conference on the implementation of the Directive was entirely devoted to this issue. The main topic was video surveillance, the issue (followed by biometrics) that has received most attention so far from the national supervisory authorities. Participants believed that there has so far been insufficient public debate about the limits that needed to be placed on the use of video surveillance in order to safeguard certain rights and freedoms in a democratic society. The Article 29 Working Party has also devoted considerable energies to this issue and has approved a draft working document which has been published in the data protection web-site of the Commission, inviting comments from interested parties.

There is in addition a number of legal and practical issues resulting from the implementation of the Directive in the Member States as regards sound and image data that create some uncertainty for operators called on to comply with the legislation and for individuals entitled to exercise their data protection rights.

There are for instance uncertainties as regards the definitions of the Directive, for example, to what extent an isolated image or a finger print can be considered personal data in those cases where the data controller is unable or extremely unlikely

to identify an individual; or whether simple monitoring constitutes a processing operation or how to achieve a reasonable interpretation of the concept of sensitive data. The Commission acknowledges that there are answers to all these questions in the national legislation transposing the Directive, but considers it necessary that more guidance is provided. This guidance needs to be realistic and pragmatic if it is to help improve compliance and should as far as possible be co-ordinated between the Member States. The Commission welcomes the Article 29 Working Party's work in this area so far and encourages it to continue to provide useful guidance, with appropriate input from interested parties.

6. WORK PROGRAMME FOR A BETTER IMPLEMENTATION OF THE DATA PROTECTION DIRECTIVE (2003-2004)

The analysis of the implementation in the Member States contained in this report reveals problems which need to be addressed if the Directive is to have its full intended effects. The work plan that follows comprises actions that will take place from the adoption of this report until the end of 2004 and will require the joint efforts of the European Commission, the Member States (including the candidate countries) and their national supervisory authorities and in some cases also those of data controllers' representatives.

A general, serious concern indicated above is that the level of compliance, enforcement and awareness appears not to be at an acceptable level. As a general action point applicable to all initiatives listed below, the Commission will work with the Member States, supervisory authorities and interested parties to determine the causes of and design feasible solutions for this set of problems.

Commission's initiatives

Action 1 : Discussions with Member States and Data Protection Authorities

During 2003 the Commission services will hold bilateral meetings with the Member States with the main purpose of discussing necessary changes to bring national legislation fully in line with the requirements of the Directive. The involvement of the competent data protection authority may be necessary on some issues. The need for more vigorous enforcement may also be a topic in these bilateral discussions. The lack of resources allocated to supervisory authorities should also be discussed.

Such meetings may be supplemented by discussions on the incorrect implementation of the Directive at the "package meetings" that are periodically organised with Member States by the Secretariat General of the Commission and/or DG Internal Market.

Discussions in the Article 29 Working Party and in the Article 31 Committee will enable certain issues affecting a large number of Member States to be tackled on a multilateral basis, it being understood that there can be no question of such discussions leading to a *de facto* amendment of the Directive. In addition to *ad hoc* discussions on specific issues, the Commission proposes that each group devotes one complete meeting to this subject in the course of 2003.

Action 2 : Association of the candidate countries with efforts to achieve a better and more uniform implementation of the Directive

This report has focused almost entirely on the situation in the 15 Member States. Before the work plan has been completed, 10 new Member States will have joined the Union. Representatives of the supervisory authorities of several candidate countries have been attending meetings of the Article 29 Working Party since 2002. From the date of signature of the Treaties of Accession the acceding countries will be invited to all meetings of both the Working Party and the Article 31 Committee. To the extent reasonably possible, bilateral discussions and possibly peer reviews will also be continued up to and beyond accession, in order to achieve the best possible

alignment of the legislation of the new Member States with the Directive and to keep formal infringement procedures to a minimum.

Action 3 : Improving the notification of all legal acts transposing the Directive and notifications of authorisations granted under Article 26(2) of the Directive

The Commission's services, in close co-operation with the Data Protection Authorities and the Member States, will continue with the collection of information about the implementation of the Directive and will in particular identify the areas where there are clear gaps in the implementing measures notified and seek the co-operation of the Member States in filling these gaps as quickly as possible. The Commission will facilitate the exchange of best practice where this might help.

The Commission will use its formal powers under Article 226 of the Treaty if this co-operative approach (6.1, 6.2 and 6.3) fails to produce the necessary results.

The Member States and their supervisory authorities also need to put in place the necessary arrangements to notify (as required by Article 26(3) of the Directive) national authorisations for international transfers granted under Article 26(2) of the Directive. The Commission will discuss this with the Member States and their supervisory authorities and ensure the exchange of best practice.

The Commission will create a new page on its web-site[35] where it will post in a structured form not only all information collected for the preparation of this report, but also information about the work to be carried out under this work plan. It will also invite national supervisory authorities to make available for inclusion in this web-site decisions and recommendations adopted by data protection authorities and significant items of guidance issued by them, with an emphasis on areas where a more even interpretation and application of the law is necessary.

Article 29 Working Party's contribution[36]

The Commission welcomes the Working Party's contributions to achieving a more uniform application of the Directive. It wishes to recall the importance of transparency in this process and encourages the efforts the Working Party is currently undertaking further to enhance the transparency of its work.

Action 4 : Enforcement

The Commission calls on the Article 29 Working Party to hold periodic discussions on the overall question of better enforcement. This should inter alia lead to the exchange and adoption of best practices. The Working Party should also consider the launching of sectoral investigations at EU level and the approximation of standards in this regard. The aim of such joint investigations would be to provide a more accurate picture of the implementation of data protection law in the Community and make agreed recommendations and practical guidance to the sectors concerned with a view to improving compliance in the least burdensome ways possible.

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35 www.europa.eu.int/comm/privacy

36 This list is without prejudice to the general work programme of the Article 29 Working Party, available at http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2003/wp71_en.pdf

Action 5 : Notification and publicising of processing operations

The European Commission shares to a large extent the criticism expressed by data controllers during the review concerning the divergent content of notification obligations placed on data controllers. The Commission recommends a wider use of the exceptions and in particular of the possibility foreseen in Article 18(2) of the Directive, that is the appointment of a data protection officer which creates an exemption from notification requirements.

The Commission calls on the Article 29 Working Party to contribute to a more uniform implementation of the Directive by putting forward proposals for a substantial simplification of the notification requirements in the Member States and for co-operation mechanisms to facilitate notifications by multinational companies with establishments in several Member States. These proposals may need to include proposed amendments to national legislation. The Commission is prepared itself to make proposals if the Working Party is unable to do so within a reasonable period (12 months).

Action 6 : More harmonised information provisions

The Commission shares the view that the present patchwork of varying and overlapping requirements as regards the information that controllers have to provide to data subjects is unnecessarily burdensome for economic operators, without adding to the level of protection.

In so far as information requirements placed on data controllers are inconsistent with the Directive, it is hoped that this can be remedied expeditiously through dialogue with the Member States and corrective legislative action by them. In addition, the Commission calls on the Article 29 Working Party to co-operate in the search for a more uniform interpretation of Article 10.

Action 7 : Simplification of the requirements for international transfers

In parallel to the discussions that are intended to bring about the necessary changes in Member State law to ensure conformity with the Directive, the Commission calls on the Article 29 Working Party to use the last report of the international complaint handling workshop as a basis for further discussions with a view to a substantial approximation of existing practices in the Member States and the simplification of the conditions for international data transfers.

The Commission itself intends to make more extensive use of its powers under Articles 25(6) and 26(4) which provide the best means of simplifying the regulatory framework for economic operators, while ensuring adequate protection for data transferred outside the EU.

With the co-operation of the Article 29 Working Party and the Article 31 Committee, the Commission expects to see progress in four areas:

a) a more extensive use of findings of adequate protection in respect of third countries under Article 25(6), while maintaining of course an even-handed approach *vis-à-vis* third countries in line with the EU's WTO obligations;

b) further decisions on the basis of Article 26(4) so that economic operators have a wider choice of standard contractual clauses, to the extent possible based on clauses submitted by business representatives, for example those submitted by the International Chamber of Commerce and other business associations;

c) the role of binding (intra) corporate rules (e.g. internal rules that bind a given multi-national corporate group doing business in several different jurisdictions, both inside and outside the EU) in providing adequate safeguards for intra-group transfers of personal data;

d) the more uniform interpretation of Article 26(1) of the Directive (permitted exceptions to the adequate protection requirement for transfers to third countries) and the national provisions implementing it.

All this work should be carried out with an appropriate degree of transparency and with periodic input from stakeholders.

Other initiatives

Action 8 : Promotion of Privacy Enhancing Technologies

The Commission is already doing work in the field of privacy-enhancing technologies, especially at the research level, like for instance the RAPID[37] and PISA[38] projects.

It proposes to organise a technical workshop in 2003 in order to increase awareness regarding PETs and to offer an opportunity to discuss in depth the measures that could be taken to promote the development and use of PETs, such as for instance the role that seals, certification systems or PIAs[39] could play in Europe.

It invites the Working Party to continue discussing the issue of PETs and to reflect on possible measures the national supervisory authorities could take in order to promote the use of these technologies at national level.

After the technical workshop, and taking on board the input received, the Commission will make further proposals for the promotion of privacy-enhancing technologies at European level. These proposals will pay special attention to the need to encourage governments and public sector institutions to set a good example by using PETs in their own processing operations, for instance in e-government applications.

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37 Roadmap for Advanced Research in Privacy and Identity Management

38 Privacy-Enhancing Intelligent Software Agents

39 Privacy Impact Assessments

Action 9 : Promotion of self-regulation and European Codes of Conducts

The Commission is disappointed that so few organisations have come forward with sectoral Codes of Conduct for application at Community level. It will keep on encouraging and giving advice on (within the limits imposed by the resources available) draft codes of conduct submitted for the consideration of the Article 29 Working Party[40]. It encourages sectors and interest groups to take a much more pro-active role, as it believes that self-regulation, and in particular codes of conduct should play an important role in the future development of data protection in the EU and outside, not least in order to avoid excessively detailed legislation.

To the same end, the Commission expressed, in its consultation document addressed to the European social partners on personal data protection in the employment context, its strong hope that they will engage in negotiations with a view to concluding a European agreement in this field. The Commission regrets that the social partners did not agree to negotiate on this issue and hopes that the avenue of collective agreements in this field will be further explored.

Action 10 : Awareness raising

The Commission intends to launch a Eurobarometer survey along the lines of the questions contained in the on-line consultation carried out in 2002. It hopes that some data protection authorities will be associated with this initiative and that there will be joint efforts to make data protection issues the subject of public debate. It encourages Member States to devote more resources in awareness raising, in particular via the budgets of the national supervisory authorities.

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40 The Article 29 Working Party is considering at the moment the following submissions: Code of conduct on direct marketing submitted by FEDMA; Code of conduct on the processing of personal data by executive search consultants (head-hunters) submitted by AESC and Code of conduct on pan-European calling line identification submitted by ETP. A previous request from IATA did not fulfil the requirements for a code of conduct under Article 27 of the Directive but received a positive comment from the Article 29 Working on its opinion WP 49 adopted on 13 September 2001. http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2001/wp49en.pdf

7. CONCLUSION

This report constitutes a first step in the analysis of information concerning the implementation of Directive 95/46/EC and the identification of the actions necessary to address the main problems that have emerged. The Commission hopes that this analysis will help governments, data protection authorities and operators to clarify what needs to be done to achieve a better application of the Directive in the EU, with more vigorous enforcement, better compliance and greater awareness of their rights and obligations among data subjects and data controllers.

The Commission expects that, where necessary, Member States will amend their legislation to achieve compliance with the provisions of the Directive and provide supervisory authorities with sufficient resources. The Commission also expects that Member States and supervisory authorities will make all reasonable efforts to create an environment in which data controllers – and not least those operating on a pan-European level and/or international level – can conform with their obligations in a less complex and burdensome way and to avoid imposing requirements that could be dropped without any detrimental effects for the high level of protection guaranteed by the Directive.

The Commission encourages citizens to make use of the rights conferred by the legislation and data controllers to take all necessary steps to guarantee compliance with the legislation. The Commission will closely monitor further technological developments and the results of the work programme contained in this report and make proposals for further follow-up towards the end of 2004, by which time both the Commission and the Member States will have the benefit of considerably more experience than at present with the implementation of the Directive.

31985L0577

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

Official Journal L 372 , 31/12/1985 P. 0031 - 0033
Finnish special edition: Chapter 15 Volume 7 P. 0083
Spanish special edition: Chapter 15 Volume 6 P. 0131
Swedish special edition: Chapter 15 Volume 7 P. 0083
Portuguese special edition Chapter 15 Volume 6 P. 0131

MORE INFO TEXT:

COUNCIL DIRECTIVE of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES, Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof, Having regard to the proposal from the Commission (1), Having regard to the opinion of the European Parliament (2), Having regard to the opinion of the Economic and Social Committee (3), Whereas it is a common form of commercial practice in the Member States for the conclusion of a contract or a unilateral engagement between a trader and consumer to be made away from the business premises of the trader, and whereas such contracts and engagements are the subject of legislation which differs from one Member State to another; Whereas any disparity between such legislation may directly affect the functioning of the common market; whereas it is therefore necessary to approximate laws in this field; Whereas the preliminary programme of the European Economic Community for a consumer protection and information policy (4) provides inter alia, under paragraphs 24 and 25, that appropriate measures be taken to protect consumers against unfair commercial practices in respect of doorstep selling; whereas the second programme of the European Economic Community for a consumer protection and information policy (5) confirmed that the action and priorities defined in the preliminary programme would be pursued; Whereas the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not except; whereas the consumer is often unable to compare the quality and price of the offer with other offers; whereas this surprise element generally exists not only in contracts made at the doorstep but also in other forms of contract concluded by the trader away from his business premises; Whereas the consumer should be given a right of cancellation over a period of at least seven days in order to enable him to assess the obligations arising under the contract; Whereas appropriate measures should be taken to ensure that the consumer is informed in writing of this period for reflection; Whereas the freedom of Member States to maintain or introduce a total or partial prohibition on the conclusion of contracts away from business premises, inasmuch as they consider this to be in the interest of consumers, must not be affected; HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:- during an excursion organized

by the trader away from his business premises, or-during a visit by a trader (i) to the consumer's home or to that of another consumer; (ii)to the consumer's place of work; where the visit does not take place at the express request of the consumer. 2. This Directive shall also apply to contracts for the supply of goods or services other than those concerning which the consumer requested the visit of the trader, provided that when he requested the visit the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities. 3. This Directive shall also apply to contracts in respect of which an offer was made by the consumer under conditions similar to those described in paragraph 1 or paragraph 2 although the consumer was not bound by that offer before its acceptance by the trader. 4. This Directive shall also apply to offers made contractually by the consumer under conditions similar to those described in paragraph 1 or paragraph 2 where the consumer is bound by his offer.

Article 2

For the purposes of this Directive: 'consumer' means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession; 'trader' means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader.

Article 3

1. The Member States may decide that this Directive shall apply only to contracts for which the payment to be made by the consumer exceeds a specified amount. This amount may not exceed 60 ECU.The Council, acting on a proposal from the Commission, shall examine and, if necessary, revise this amount for the first time no later than four years after notification of the Directive and thereafter every two years, taking into account economic and monetary developments in the Community. 2. This Directive shall not apply to:(a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.Contracts for the supply of goods and for their incorporation in immovable property or contracts for repairing immovable property shall fall within the scope of this Directive; b)contracts for the supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by regular roundsmen; (c)contracts for the supply of goods or services, provided that all three of the following conditions are met: (i) the contract is concluded on the basis of a trader's catalogue which the consumer has a proper opportunity of reading in the absence of the trader's representative, (ii)there is intended to be continuity of contact between the trader's representative and the consumer in relation to that or any subsequent transaction, (iii)both the catalogue and the contract clearly inform the consumer of his right to return goods to the supplier within a period of not less than seven days of receipt or otherwise to cancel the contract within that period without obligation of any kind other than to take reasonable care of the goods; (d)insurance contracts; (e)contracts for securities. 3. By way of derogation from Article 1 (2), Member States may refrain from applying this Directive to contracts for the supply of goods or services having a direct connection with the goods or services concerning which the consumer requested the visit of the trader.

Article 4

In the case of transactions within the scope of Article 1, traders shall be required to give consumers written notice of their right of cancellation within the period laid down in Article 5, together with the name and address of a person against whom that right may be exercised. Such notice shall be dated and shall state particulars enabling the contract to be identified. It shall be given to the consumer:(a) in the case of Article 1 (1), at the time of conclusion of the contract; (b)in the case of Article 1 (2), not later than the time of conclusion of the contract; (c)in the case of Article 1 (3) and 1 (4), when the offer is made by the consumer. Member States shall ensure that their national legislation lays down appropriate

consumer protection measures in cases where the information referred to in this Article is not supplied.

Article 5

1. The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. It shall be sufficient if the notice is dispatched before the end of such period. 2. The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract.

Article 6

The consumer may not waive the rights conferred on him by this Directive.

Article 7

If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.

Article 8

This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers.

Article 9

1. Member States shall take the measures necessary to comply with this Directive within 24 months of its notification (1). They shall forthwith inform the Commission thereof. 2. Member States shall ensure that the texts of the main provisions of national law which they adopt in the field covered by this Directive are communicated to the Commission.

Article 10

This Directive is addressed to the Member States.

Done at Brussels, 20 December 1985. For the Council The President R. KRIEPS

(1) OJ No C 22, 29. 1. 1977, p. 6; OJ No C 127, 1. 6. 1978, p. 6.

(2) OJ No C 241, 10. 10. 1977, p. 26.

(3) OJ No C 180, 18. 7. 1977, p. 39.

(4) OJ No C 92, 25. 4. 1975, p. 2.

(5) OJ No C 133, 3. 6. 1981, p. 1.

(1) This Directive was notified to the Member States on 23 December 1985.

European Commission

Directorate General for Health and Consumer Protection

Hearing
Door To door selling – Pyramid selling – Multi Level Marketing

15/16, March 2000 Bruxelles

ANALYSIS OF THE WRITTEN SUBMISSIONS PRIOR TO THE HEARING AND STATEMENTS MADE AT THE HEARING[1]

INDEX

[1] Important! This material is for information purposes only and subject to a disclaimer posted on the website.

I. Amending the "Core" of Directive 85/577/EEC

1. General Comments

While industry as well as consumer representatives generally welcome a modification of Directive 85/577/EEC[2] on Doorstep-Selling, Member State submissions do not see a need for change. They prefer to leave it for the Member States to fill the gaps in the Directive and modernise national laws.

However, most submissions agree with the proposal to adapt the Doorstep Selling Directive 85/577/EEC to Directive 97/7/EC[3] on the protection of consumers with respect to distance contracts. There is a certain preparedness to accept that the envisaged modification of Directive 85/577/EEC is necessary and adaptation to the standards provided by Directive 97/7/EC is the best solution.

The two Directives are based on a similar concept (protection of the consumer in the non-stationary commerce), and the interest of the consumer is comparable in both sales situations. Furthermore, in practice there is often a combination of direct and distance selling strategies.

The Bundesarbeitskammer Austria as well as the Nederlands Ministerie van Economische Zaken disagree with the proposed harmonisation. The situations in distant and direct selling are said to be completely different: In the Doorstep Selling Directive, the aspect of surprise plays an important role as it is usually the direct seller who initiates the business contact. However, in the Distance Selling Directive, the lack of information which is caused by the distance between customer and seller is addressed.

2. Modification /Adaptation / Abolition of certain Exemptions to Scope of Application

The submissions discuss the exceptions to the scope of applications. The submissions from the consumer point of view would prefer to remove all exceptions, while the submissions from industry especially criticise the study for proposing to include financial services in the scope of application.

a) Art. 3 (1): 60 ECU Exemption

There was not much discussion about the exemption for contracts with a value of less than 60 Euro.

However, the Bundeskanzleramt Austria as well as the Bundesarbeitskammer Austria consider the exemption unnecessary, as in practice most of the Member States do not exempt contracts under a certain minimum value per se, but only in combination with other requirements, such as contracts on charity occasions, contracts which are immediately performed or contracts normally not concluded on business premises. The Bundesarbeitskammer considers the limit too high if there are no additional requirements for the exemption. FEDSA underlines that the exception has been proven useful for charity direct

[2] OJ 1985 L 372/31.
[3] OJ 1997 L 144/19.

selling activities. The Europäisches Verbraucherzentrum Kiel considers the exception as not really relevant and favours keeping it. Austria, however, which has no exemptions, considers the limit unnecessary and would like to remove it. The Arbeitskreis refers to the good experience in Germany with this exemption and states that a threshold is necessary below which there would be no withdrawal in order to avoid problems.

b) Art. 3 (2) c): Exemption for Rental Contracts

Two statements deal with the exemption for rental contracts. They refer to the problem of certain time sharing contracts which do not fall within the scope of application of the Time Sharing Directive.

The exemption for time sharing contracts has created problems in practice for the consumer organisations. They seek to have included at least those time sharing contracts which do not fall within the scope of application of the Time Sharing Directive 94/47/EC, e.g. contracts for less than 35 months or the sale of timeshare in canal barges. Only contracts for the purchase and lease of immovable goods should be excluded from the scope of application.

c) Exemption for Catalogues

There is only one comment related to the exemption for catalogue sales.

Due to the confusion as to whether the Doorstep Selling Directive or the Distance Selling Directive applies to catalogue sales, FEDSA recommends removing the exemption. The Doorstep Selling Directive should apply if the direct seller and the consumer are simultaneously physically present at the transaction.

d) Art. 3 (2) (d) + (e): Exemptions for Insurance Contracts and Contracts for Securities

The removal of the exemption for financial services has given rise to particularly strong reactions. The submissions of the financial sector disagree with the removal, while those of the consumer sector support the proposal.

The financial services sector underlines the necessity of the exemption. Life insurance contracts are already regulated at European level in Directive 90/619/EEC, Art. 15 which grants the policy holder a right of withdrawal within the first 15 to 30 days. The submissions especially remark that for certain financial services (short time insurance contracts or special funds) a withdrawal period would be unfair (because the policy holder would be insured on a special occasion and could afterwards withdraw from the contract without having to pay the insurance premium) and not practicable (because of the changes in the investment markets and different prices). FEDMA and the Comité Européen Des Assurances propose to wait for a new Directive for financial services. The Nederlands Ministerie van Economische Zaken as well as the UK-Department of Trade and Industry (DTI) recognise no need to remove the exemption.

On the other hand, the more consumer-orientated submissions favour the removal of the exemption for financial services and regard this as a necessary step towards more effective and more consistent consumer protection. The Centro Europeo Dei Consumatori (CEDC) remarks that insurance policies are mainly sold door-to-door and most consumers are ignorant about what they have been sold. The Centro Europeo Dei Consumatori (CEDC) would prefer a single piece of legislation covering all types of financial products. The Finnish

representative refers to the Finnish law under which the policy holder has the right to terminate the insurance at any time without penalty merely by paying the premium for the period which has been covered by the insurance. This rule applies to all selling methods without any distinction. The Verbraucherzentrum Kiel also favours including financial services in the Doorstep Selling Directive in order to reach a higher level of consumer protection. There is no difference between buying a bar of soap or an insurance contract in their view.

e) Art. 3 (3): Contracts concluded upon special request of the Consumer

The possible removal of this exemption has lead to criticism from the Gesamtverband der Deutschen Versicherungswirtschaft. It regards the exemption as necessary and argues that there is no difference between a customer who concludes a contract in a business premises or requests a visit of the supplier at home. The consumer is even more free of bias if he has the opportunity to conclude a contract in his own home. FEDSA recommends limiting the exemption to those situations where a consumer made an express invitation with the intention of negotiating the purchase of specified goods or services. The UK-Department of Trade and Industry (DTI) underlines that "unsolicited visits" are now defined under the UK law as "visits which may be made on behalf of the trader i.e. by his sales staff, and also subsequent visits following a first unsolicited visit and a visit following an unsolicited telephone call".

3. Adapting Information Requirements to the Level of Directive 97/7/EC

The study proposes to modify the information practice towards consumers in doorstep sales transactions in two ways: first it adapts the idea of Directive 97/7/EC to provide the information twice to the consumer: once prior to the contract, and once after the conclusion of the contract; second it completes the content of the information by reference to Directive 97/7/EC.

a) Need for a "Double Layer" of Prior Information in Door to Door Business

While industry seems to agree with the proposal, statements of Member State representatives reject the adaptation to Directive 97/7/EC as regards prior information.

FEDSA welcomes the proposal to give the information prior to the conclusion of the contract and refers to its Codes of Conduct. Also Psix, a UK Consultancy, regards it as a matter of good practice and considers it not onerous for companies.

The Nederlands Ministerie van Economische Zaken, however, disagrees with the obligation to furnish the information prior to the conclusion of the contract. It points out that the information prior to the conclusion of the doorstep sales contract would overload the consumer and confuse him. The two layer approach is said to be adequate for the situation of distance selling, but unnecessary in a doorstep sales situation. Moreover, it constitutes an additional burden for the companies. The UK-Department of Trade and Industry (DTI) would prefer to see these requirements as part of a self-regulatory regime.

The Centro Europeo Dei Consumatori proposes to give all the information included in Art. 4 and 5 of the Distance Selling Directive. The supplier should have to prove that he has given all this information to the consumer, otherwise the contract would be void. In addition, the

Centro would prefer to have information about equivalent quality and price of the product if the product is not available and a ban on pre-payment within the first ten days.

b) Incorporation of the Information List in Directive 97/7/EC

The necessity to provide the consumer with more information similar to the Distance Selling Directive has been accepted by almost all submissions.

Only the UK-Department of Trade and Industry (DTI) would prefer a self-regulatory approach. The submissions of the Bundeskanzleramt Austria as well as the Bundeskammer für Arbeiter und Angestellte suggest giving all types of information in writing, instead of distinguishing between information which must be given in a form corresponding to the means of contact, and between information which must be provided in a written form.

c) Provision on Protection of Consumers Privacy in Accordance with Data Protection Directive 95//46/EC

A representative from DG Internal Market pointed out that commercial activities necessarily involve the processing of personal data of consumers. The protection of individuals is included in Directive 95/46/EEC which constitutes an obligation to inform the consumer. The new Directive 85/577/EEC could either make a generic reference to the obligations and rights provided for in Directive 95/46/EEC, or go into more detail. The supplier must declare whether the data collected will be processed and for what purposes; if these personal data are to be disclosed to third parties; and if the data collected in context of the contract will be deleted in case of withdrawal from the contract.

4. Art. 5: Right to Withdrawal

a) Right to commence with the "Conclusion of the Contract" or "Delivery of Goods and Services"

In particular, industry criticises the study's proposal to change the beginning of the period of time from the conclusion of the contract to the receipt of the goods or the performance of the services.

They argue that distance and direct selling differ from each other and that the period for distance selling cannot be transferred to direct selling. In the direct selling field, the products are presented at home for the consumer. There is no necessity to postpone the right of withdrawal until the consumer receives the product because - unlike in a distance sale - he has already been shown the products and knows what he will receive.

However, the Centro Europeo Dei Consumatori underlines the problems which occur in practice and which result from the fact that the consumer often is misled by the sales person and has no chance to make up his own mind. If the right of withdrawal expires seven days after the conclusion of the contract and the company does not deliver the product during this time (the cooling-off period), the consumer has no chance to check and verify both the product and the statements of the salesperson. Problems arise especially with medical products, as it is difficult for the consumer to find out whether the product really has the qualities confirmed by the salesperson. Therefore, it is necessary to ensure that this time

period starts only when the consumers actually have the products in their hands, so to speak, and can form a view.

The Bundesarbeitskammer Austria criticises the different starting points for the period which depend on whether goods are delivered or services are performed. It proposes to let the period begin for all kinds of contracts with the receipt of written notification of the information and the written information about the right of withdrawal.

b) Time Limit of 10 Days

The proposed duration of the period of time (ten days) has been criticised by industry as too long and by the consumer organisations as being too short. Only the Bundesarbeitskammer, Pxis and Eurofinas approve the period of ten days. Eurofinas refers to the different periods in direct and distance selling and the problems which result from these differences for companies who offer both direct and distance selling.

Some submissions reject the proposal and propose instead a period of seven calendar days. They prefer a cooling-off period during which it should be possible for the consumer to receive the products (unlike the French law where the suppliers are not allowed to deliver products before the cooling-off period has expired). In practice, the products are often sent out only after the expiry of the time limit. A longer period is not necessary as the products are demonstrated by representatives at home, and the main aspect is not a product guarantee but a reflection period for the consumer. Industry underlines that for many years, the seven day period has been proven to be successful and has not caused any problems. WFDSA refers to the US laws which provide a three-business-day period. This has become law as a reaction to high pressure sales practices. It works very well in the USA because the reason for withdrawal is mainly high pressure. If the customers are pressured to buy, they cancel the contract very quickly. The ICC also advocates leaving the period as 7 days, be it calendar or working days. The companies have got used to this period. They mainly wait for seven days before delivering the products to the consumer to avoid products being sent back once money has been transferred. If the period were longer, the direct selling companies would have a competitive disadvantage vis-á-vis retail outlets where there is no withdrawal or cooling-off period. The reason for the withdrawal is high pressure sales techniques, on the one side, and the possibility to compare goods and prices, on the other side. A seven day period takes both aspects into account. DSA France argues that the seven day cooling-off period is necessary to respond to consumer protection requirements. However, a longer period would often not be in the consumers' interest, because otherwise they would have to wait for the products ordered in direct selling for ten days.

The consumer organisations favour the option of 14 calendar days. This would meet the standards of some Member States in their implementation of the Distance Selling Directive.

The Nederlands Ministerie van Economische Zaken sees no need to adapt the different cancellation periods.

5. Rules on proper Performance and Advance Payments

This proposal has not lead to any discussion. It already seems to be a common standard of business practice.

6. Minimum or Maximum Harmonisation?

The question of minimum or maximum harmonisation for the "traditional aspects" of Directive 85/577/EEC has been answered by the industry almost unanimously in favour of maximum harmonisation. Only the United Kingdom and the Netherlands opt for no further regulation at all.

The industry prefers maximum harmonisation because consumers are protected more effectively by maximum harmonisation. The Internal Market requires unified rules. Minimum harmonisation leaves the Member States the possibility for different regulations and prohibitions. This leads to legal uncertainties. In particular, cross-border activities are adversely affected by different laws. Partial or total bans on direct selling, as in Denmark and Luxembourg, or other difficulties, such as product-related obstacles and restrictive rules (e.g. the strict cooling-off period in France), would be avoided.

France, however, underlines the importance of keeping the minimum harmonisation due to the different levels of consumer protection and divergent national traditions. The cooling-off period in France is considered a very important element of consumer protection, and the French state does not want to change that.

II. Pyramid Selling and Multi Level Marketing

1. Definition of Illegal Pyramid Systems

All submissions agree that a prohibition on pyramid systems is necessary. Problems arise with the proposed definition of pyramid systems put forward by VIEW. This has been opposed as too wide both by the FEDSA and WFEDSA. The "remuneration related to the sales to final consumers" under which any kind of remuneration shall be related exclusively to the sales of products to final consumers seems to present particular difficulties. The consumer organisations mainly agree with the definition.

There also seems to be an understanding that vertical payments (participant and company) for recruitment as well as payments for the initial investment can be considered as illegal.

- One major problem is whether payments related to the purchase volume of a direct seller (*purchase for own consumption or resale*) should be included. Some maintain that the definition could include within its ambit lawful remuneration systems for direct sellers. Many companies, (especially in the insurance or real-estate sectors) pay a commission for purchases of direct sellers (for their own consumption). There seems to be a need for an additional attraction for the newcomers to make the system work. During the Hearing, FEDSA made clear that the essence of a direct selling business is that the business is developing a network for products for which one feels a personal commitment. The persons who join these systems are likely to be, first of all, consumers. Therefore, the FEDSA Codes of Conduct allow remuneration systems where the remuneration is based on the sales of goods and services to consumers (including the purchases made by other direct sellers for their personal consumption or use) and not primarily on inducing other persons to become direct sellers. This is also the position of WFDSA which states that if

eighty or more per cent of compensation is based on sales, one cannot have a pyramid scheme. Pyramid schemes are frauds where ninety nine per cent of the revenue generated is not on sales (but e.g. on inventory loading, training fees, headhunting fees). Pyramid schemes do not even reach five per cent in terms of sales to the ultimate consumer. Pyramid schemes are characterised by the financial risk of loss for those involved in the company and by the fact that money earned by the sales people is not based primarily on the sale of the product to the ultimate consumer. The term "primarily" is used to allow low commissions or incentives as a reward for a successful recruitment from time to time. FEDSA only prohibits systems which require the purchase of a minimum number of goods or inventory loading which is inappropriate (unrealistic sales possibilities, market environment, company's product return and refund policy). Dr. Brammsen and Dr. Leible from the University of Bayreuth, Germany suggest allowing a commission for products purchased for the direct sellers' own consumption if the number of the products is restricted to a "consumable" quantity. DSA UK underlines that pyramid systems demand a clear definition which is based on unlawful recruitment. Such a recruitment offence is a system where somebody is rewarded for getting somebody else to make a payment (in cash or for a considerable amount of stock). If a participant has a contract, a right of cancellation and a buy-back guarantee, and the consumers have a right to return the stocks in a reasonable period of time, and the system has no recruitment offence, then there is no necessity for further legislation.

- Several submissions refer to the *particularities of financial services*. One aspect of the definition is to protect direct sellers from inventory loading or stock-taking. Therefore, the combination between a remuneration (commission) and purchases of a recruited direct seller is included. No direct seller shall be subjected to (not even moral) pressure to buy products and invest in the system. Such a pressure may exist if the upline benefits from the purchase volume of the downline. Direct sellers at lower levels are supposed to be prevented from purchasing products, which they actually do not need or at least do not resell immediately. However, in the financial services sector the direct sellers do not buy "products", and there can never be "stocks".

- BEUC adds several negative aspects of pyramid schemes which the definition should address: investment without buy-back guarantee, risk of market saturation, misleading and deceptive marketing practices, misuse of personal relations, more emphasis on expansion of the system than on sales, remuneration not conditional on sales, focus on profit from recruitment.

2. Criteria for Legally Acceptable MLM Systems

a) Consumer/Direct Seller

The introduction of the term "consumer/direct seller" has caused strong reactions. Generally speaking, submissions from consumer interest groups welcome the definition, while the industry disapproves the introduction of such a new category.

Consumer organisations made the following remarks: The Europäisches Verbraucherzentrum Germany proposes a general protection of small traders. A new definition would then no longer be necessary. Consumer/direct seller and the small trader both need protection. The Austrian submissions favour the integration of persons working full time. Both underline the necessity of such a definition, but criticise it as being too narrow. The Centro Europeo Dei

Consumatori, Italy, generally welcomes special protection for direct sellers. Instead of creating a new status which may lead to confusion, it proposes to introduce a kind of "working contract" concluded between the direct seller and the company. This "working contract" shall underline the importance of the decision to become a direct seller and the change of status from a consumer to a direct seller. BEUC requires the position of the new direct seller to be improved and clarified. The distributor, which is considered as a consumer, should benefit from consumer protection legislation. However, instead of "non-commercial level" the notion of "non-professional level" should be referred to.

Opposing submissions argue that giving a special definition of consumers/direct sellers would be unfair towards other branches, as it applies only to a single sector. Furthermore, the term "consumer" has nothing to do with the status itself but with the contract in question (goods or services for personal consumption). The criterion "working hours" for the consumer/direct seller is rejected because it depends on how much the direct sellers work. Especially in the financial services area, direct sellers are trained and instructed; the consequence is that a clear distinction between the consumer and the direct seller is said to exist.

The French DSA rejects the notion of a consumer/direct seller. Instead of diluting the distinction between direct sellers and consumers, there must be a clear threshold for the consumer to become a direct seller. He must sign a formal contract and receive an adequate training offered by the companies. He must be granted a fourteen day cancellation period.

The DSA UK underlines that the protective measures have to be fit for purpose. The direct sellers must be protected from making an imprudent investment in a fraudulent scheme, but they need not to be protected from a business opportunity. Their investment is modest; they have a contract; the earning proposition is not misleading; it is fair, honest and legal; they have a right to withdrawal for a certain period of time to cancel the contract; and any time thereafter, they can send back any unsold goods and be refunded here.

Even opposing submissions accept the need to protect new direct sellers at an early stage and put some on a comparable footing with consumers. The UK-Department of Trade and Industry (DTI) suggests solving the problem by balancing out regulation and education. There will remain a certain business risk with every new business start. Psix favours the Scandinavian and German approach which protects the prospective participant up to the point that he signs the form to join a sales scheme. After that, it is difficult to treat the participants all in the same way, as there are housewives with few business contacts as well as full time participants who may earn a lot of money. These different types demand different sorts of protection. One helpful model could be the German one which distinguishes between professional agents exercising their main profession and persons operating as a side line. The problem which arises here is that there may be persons working part-time in several different schemes. The ICC proposes to differentiate between the purposes of sales. If a direct seller buys a product for his own personal use, he should enjoy all the protection any other consumer enjoys. If, however, he acts professionally indicating that he is in an existing or future commercial activity, he is not a consumer and should not be treated as such.

b) Information and Transparency

The duty to inform direct sellers in a proper way has not led to discussion in the submissions. It is mainly accepted that transparency is necessary due to the complex structure of the business and the inexperience of direct sellers. Only the United Kingdom does not consider a regulatory intervention necessary.

Transparency is regarded as a very important element. In particular, the commission structure and the marketing plan must be clear and comprehensible. This is accepted and strongly supported by the industry which refers to Codes of Practice. The layman must be informed about the extent of the business and the consequences. However, the DSA UK wants to restrict the right of information to the degree that is fit for purpose. As there is only a very modest investment risk, the degree of information on earning expectations and other details does not need to be very high. The Centro Europeo Dei Consumatori proposes correct information is provided not only about the possible earning, but also about the extent of work, that means how many hours a person has to work in order to earn that sum of money. It is suggested to introduce particular information channels at Eureopean level to stop pyramids, to provide information about the average income and the rights and duties of the self-employed.

WFDSA refers to the difficulties of average figures and numbers in MLM because of the different types of sales persons. Some sales persons join the system just because they like the product and want to buy it at wholesaler discount; others join the company shortly before Christmas to earn some extra Christmas presents money; others work because they want to buy some expensive goods, or they only join the company for social reasons and recognition.

Psix remarks that the obligation to inform the direct sellers about their right in connection with the bankruptcy of the company leads to the difficulty that the bankruptcy laws are not harmonised. As the law of the country of incorporation applies, the rights can vary from country to country.

Only the time of providing the information has been subject of controversy. BEUC underlines the necessity to give the information before the conclusion of the contract, while Psix argues that providing the information prior to the contractual agreement leads to costs for the companies, because they have to develop information sheets which will be given to potential sponsors.

c) Right to Withdrawal

The right to withdrawal has been accepted in all submissions. Several submissions propose, as a common basis for calculation, calendar days instead of working days.

The Centro Europeo Dei Consumatori proposes to grant an unlimited right to withdrawal if the company violates its other duties (prohibition of entry fee, guidelines and controlling of recruiting). The right to withdrawal for the first 14 days is regarded as to short, in particular in view of tax difficulties and the law. The direct sellers should have the opportunity to discuss the matter with a tax advisor. Brammsen/Leible, however, disapprove of the right to withdrawal without any temporary limit in the event that the information is not given to the direct seller. They argue that problems could arise due to the large number of business transactions. Vorwerk underlines that there exist differences in Multi Level Marketing and other direct selling businesses. In classical direct sales, the new representatives do not have to buy anything, not even their demonstration goods. It would be unnecessary to grant them a right to withdrawal.

d) Number of Levels

The limitation of the number of levels is subject to controversy. While consumer organisations favour the proposal, the industry does not perceive a need for limitation.

Consumer organisations consider the, theoretically, unlimited number of levels a danger for the transparency of the system. They regard a limitation as an important mechanism to make the system transparent.

Industry, however, refers to the practical consequences of the proposal. A limitation would prevent direct sellers at lower levels from building their own downlines and becoming sponsors. Their business activities would only consist of making sales without having the opportunity to recruit others. Therefore, it would not be possible for them to leave their own downline and build a new one at a higher level, because the remuneration of the higher levels depends on the sales of the lower levels. They would not agree to lose a level in the upline because that means that they would have to start from the beginning by recruiting and making sales. In highly regulated structures where the task of the upline is clearly defined as training, sponsoring, supervising and instructing the downlines, a limitation could not work. Additionally, it is doubtful whether a limitation of levels guarantees transparency. Transparency is said to be reached by visual or descriptive presentation of the system.

e) Remuneration related to the Sales to Final Consumers

The arguments against this proposal are more or less the same as those against the definition of Pyramid Systems. The remuneration here is exclusively related to sales to final consumers. The AgV, Germany considers this element necessary to distinguish between legal sales network systems and illegal pyramid systems. The direct sellers would not be attracted any longer to make a profit by sales within the systems, thus using their influence to make others purchase goods without any chance to resell them. However, as stated above, the proposal might be changed towards a more liberal approach, which accepts the practice of the remuneration systems to pay commissions for purchases inside the system, allowing for the consumption of the direct sellers up to a certain amount.

Another problem which arises has been mentioned by Psix: The term "remuneration" could also include trade margins. The proposal must therefore be clarified in so far as trade margins are not covered.

f) Buy-Back Guarantee

The buy-back guarantee is generally accepted by all submissions. However, the buy-back guarantee is not said to be relevant for financial services. As there is no sale and resale, a direct seller cannot keep the products which he returns to the company upon leaving the system.

FEDSA proposes to restrict the buy-back guarantee temporarily to products (including promotional material) bought during the preceding twelve months. Industry wants to limit the reimbursement to 90 % of the original price (less remuneration that the seller has already received). They argue that it is difficult to prove whether the value of the products has actually decreased. The proposal could cause misunderstandings as to whether the company has to take back damaged or expired products.

g) Entry Fees / Initial Investment

The consumer-related submissions partly consider this proposal to be not broad enough. Due to their practical experience, problems often arise with useless material and training courses.

They would prefer a general prohibition of entry fees, which includes fees for information material and other equipment. An annual administrative fee would be allowed, however, the Centro Europeo Dei Consumatori Italy wants to limit the fee to 25 Euro. The Bundeskanzleramt while agreeing with the proposal, is, nonetheless, quite sceptical about whether such a rule could prove to be successful in practice.

Industry underlines the importance of training seminars and information material for the newcomer. As the recruits are mainly laymen without any professional experience, it is necessary to instruct them and provide them with the material they need to start their business. The value received by the participant, instead of an arbitrary amount, should serve as a criterion for the propriety of investment in training. FEDSA proposes to supply the information material and offer training seminars either free of charge or at a reasonable price. Discretion in setting administrative fees would be acceptable.

h) Obligation to Make Own Sales

The proposal is rejected by industry, whereas it has not provoked much reaction from consumers. The Bundeskanzleramt Austria regards the obligation as a necessary tool to prevent the development of structures in which some participants (at the higher levels) make a profit exclusively through the sales of other participants (at the lower levels). The AgV, Germany also welcomes the proposal and suggests developing fix limits as in the United Kingdom (50 %).

Citigroup considers this proposal from the aspect of inventory loading. The concern is that one direct seller is being promoted by selling products to a lower level seller and not to a final consumer. As there is no inventory loading in the financial services area, there is no necessity to make "outside" sales. Another argument is that the higher levels have other tasks than sales' activities. It is their task to train, motivate and supervise the system. Psix notes that the proposal would make buying clubs illegal as there are no sales to final consumers. Brammsen/Leible do not consider the proposal useful in order for protecting direct sellers.

i) Recruiting

The way that customers and potential new direct sellers are contacted and recruited is mentioned as a point of concern in several consumer-related submissions. The industry also seems to be prepared to comply with the proposal, at least in principle.

In practice, consumers might feel lured by misleading advertising. Sometimes, the sales methods are aggressive, and there is a severe moral pressure to buy because of the personal relationship between the customer and the direct seller. For these reasons, the protection of the consumer's private sphere is an important issue for consumer organisations. Several submissions demand that the term "privacy" be specified. The International Chamber of Commerce offers a possible solution in its Codes which state: "Any contact should be made in a reasonable manner and during reasonable hours to avoid intrusiveness. A direct seller should discontinue a demonstration or sales presentation upon the consumer's request."

Psix mentions the problem of independence of direct sellers. More control by the company of the direct sellers makes them more dependent and brings into question their self-employed status. However, it is agreed that guidelines with respect to the obligations should be developed by the companies. Brammsen/Leible criticise the proposal as too broad. They also

propose to develop guidelines for companies and controlling measures in order to prevent unfair recruiting practices.

j) Internal Control of the System

There is a general agreement that inventory loading and controlling measures are necessary.

AgV, Germany expressly welcomes the proposal for controlling measures vis-a-vis companies, and to make the delivery of goods dependent on the demonstration of an order form signed by a customer to help restrict inventory loading. Furthermore, the ten consumer rule (The participants have to prove that they have sold the products to at least 10 different final consumers in the previous period of business in order to receive a commission related to their sales) is considered an adequate and effective means to restrict sales within the system.

Psix proposes the 70 % rule established by Amway as an adequate means to prevent inventory loading, but disagrees with the ten consumer rule because it is said to encourage the falsification of retail sales receipts. Psix makes clear that it would cost the companies much time and resources to contact retail consumers and verify that the orders really have been made.

III. Standardisation as a Means of Regulating MLM

1. Preface

The submissions, even if they address standardisation as a means of regulating MLM, appear to suffer from a certain lack of understanding of the New Approach type of regulation and its application to marketing practices. The New Approach has been developed in the field of technical standards and regulations, where the Community has adopted a whole set of directives which all follow the same pattern. Mandatory basic requirements, laid down in directives, provide a framework for the elaboration of non-binding technical standards elaborated by the European standardisation organisations. Those companies who comply with the standards have free access to the European market. A certificate of conformity serves as an entry card. Consumer organisations are represented in the elaboration of technical standards through their experts. Most of the submissions do not seem to fully understand what the New Approach really means and what its adaptation to marketing practices would require.

The obvious need to explain the inner structure of the New Approach and how it could be applied to marketing practices has been, at least, partially met at the Hearing. The whole morning session of the second day was devoted to the question ‘Can standardisation provide a means of regulating MLM? It seems fair to conclude that all participants of the meeting agreed that the Hearing was a useful opportunity to improve the level of information and the understanding of what is behind the idea to transfer New Approach type regulation from the field of technical standards to marketing practices. Such a consensus could not overlook the still existing disagreement on the feasibility of such a regulatory method in the field of marketing practices. However, the Hearing has considerably improved the intellectual environment between all parties concerned, including the Member States. The Commission received cautious backing in its policy to initiate pilot projects on standardising marketing practices. Whether or not standardisation becomes a successful way of regulating marketing practices will largely depend on the outcome of the pilot projects; more specifically on

whether and to what extent counter-arguments and reservations voiced during the Hearing may be overcome.

2. The search for the appropriate regulatory technique: voluntary codes of conduct/binding legislation and New Approach

The major issue of the written submissions as well as the statements during the Hearing was the choice of the appropriate regulatory tools. The appropriateness of New Approach type regulation in the field of marketing practices was voiced by all Member States during the Hearing. Most of them had not provided written submissions prior to the Hearing. Consequently, for them the Hearing was the first opportunity to give an initial reaction, sometimes of a personal nature, sometimes semi-official and sometimes merely covering certain aspects. It has to be recalled, however, that the Member States differ considerably in the degree to which they favour a specific regulatory approach. Here the submissions and statements demonstrate a quite heterogeneous picture which becomes even more disjointed when taken with the positions of industry and consumers.

Several submissions prefer Codes of Conduct to regulation at European level, such as those of the EU Committee of the American Chamber of Commerce in Belgium and the Nederlands Ministerie van Economische Zaken. Industry involved does not regard voluntary codes of conduct as the only means of coming to grips with multi-level marketing. Sometimes there is even a certain willingness to have a closer look at the deficiencies of codes of conduct. Psix criticises the codes of conduct for not being concrete enough in their terminology. A similar argument has been put forward by FEDMA, though rejected by the EU Committee of the American Chamber of Commerce in Belgium. This issue came up again in the Hearing when the UK representative made a strong intervention in favour of codes of conducts, although the UK Office of Fair Trading published a quite critical review of compliance with UK codes of conducts in 1998. However, at present, the UK system is under review to improve the application of codes of conduct. The key issue here will be the elaboration of the so-called core principles as Mr. Berry, UK DSA underlined. If a code meets the core principles, it will gain the support of the UK government and the Office of Fair Trading and be able to carry a sign of approval. This sign of apprroval will attach to material produced by companies. That is the way it should be at the European level. The Spanish representative pointed to Spain's strategy plan which boosts self-regulation and participatory self-regulation. The pros and cons of codes of conducts are subject to a study commissioned by DG Health and Consumer Protection which will be ready by June 2000. The EU Committee of the American Chamber of Commerce in Belgium asked whether the study intends to distinguish between self-regulation and voluntary regulation and whether new regulatory options may emerge.

The written submissions have shown a certain preference for binding regulation rather than for the so-called "New Approach", the argument being that binding provisions are more effective than non-binding marketing standards. This is true for the Bundesarbeitskammer, Austria; Bundeskanzleramt, Austria; Centro Europeo Dei Consumatori; Europäisches Verbraucherzentrum, Germany and also FEDSA in its second statement. During the Hearing the vast majority of the Member States expressed their willingness to have at least a closer look at new forms of combined binding and non-binding regulation as did industry speakers. The most outspoken intervention from here came from WFDSA, which favours combining a prohibition of pyramid selling and industry codes of conducts for MLM. However, WFDSA pointed to new regulatory initiatives in New South Wales granting the Australian DSA quasi judicial power to sue on behalf of the government for violations of the code, even against non-

members. The intervention of Mr. Dailley, from the French DSA, was very much in line with such reasoning. In France an approved contract has been drawn up under the auspices of the French Anti Fraud Ministry (Ministère pour la Répression des Fraudes) and a bipartisan commission monitors the proper application of the rules. Here again the search for new solutions becomes clear, somewhere in between binding and non-binding regulation.

The most important point, however, concerned the feasibility of the "New-Approach" type regulation in the field of marketing practices. Only two of the written submissions had an intensive and more detailed look at a 'New Approach' in marketing practices. BEUC supported the idea of testing New Approach regulation in the field of marketing practices. However, it disagreed that standardisation and the European standardisation institutions were the appropriate bodies to develop marketing practices and standard contracts. PSIX Consulting discussed the possible impact of the New Approach on marketing practices in some detail. Thus, there was clearly occasion in the Hearing to get a fuller view on how the participants see the New Approach type of regulation fit for marketing practices. It has to be emphasised that all participants joined the meeting in order to get a fuller picture of what standardisation could mean and whether or not it could be used to regulate marketing practices. They came relatively open-minded. Member States showed nevertheless a certain reticence regarding a new type of regulation at a level below binding legislation. This attitude is mainly of the Scandinavian countries as well as for the United Kingdom. These are all countries which have a certain tradition in dealing with codes of conducts (in case of the UK) or guidelines developed by the Ombudsmen in the Scandinavian countries, as a means to implement binding legislation.

However, two questions remained pending. The first has already been raised in the written submission of the PSIX Consulting and can be summed up as follows: Although participants consider the option to be sound in theory (except Greece, which explicitly supports the new initiatives), all other Member States, as well as representatives from the direct marketing business, expressed concern that standardisation might be slow in practice, as slow and onerous as law-making, and might therefore end in results which do not extend beyond codes of conducts. The same is true for the amendment of existing legislation and/or standards. At the very least, there was agreement that developing codes of conduct can be as cumbersome and time-consuming as law-making or standards making. However, the representatives from CEN underlined the consensus driven nature of the standardisation process. Where there is consensus on the need to standardise, an agreement could be found within 10 to 12 months. On the other hand, Eurocomerce feared that standardisation might inherit the weakness of the two systems (the threat of a detailed regulation and the weaknesses of soft law). The second question relates to the horizontal nature of the New Approach in regulating marketing practices. In particular, representatives from the direct selling business have raised concern that the New Approach type of regulation in the area of marketing standards is not a sectoral issue. Therefore, they urged the Commission to consider much broader consultation with cross-sectoral bodies and bodies which represent other sectors: EU Committee of the American Chamber of Commerce in Belgium and WFDSA, respectively.

These questions revolve around the 'why' or 'why not' of a New Approach type of regulation in the field of marketing practices. Once this threshold is passed, the following factors should be monitored: who might be in charge of the standardisation; whether it should be the standardisation bodies or similar but competent national bodies, such as the Consumer Ombudsmen or the Office of Fair Trading; and once the main responsibilities have been clarified, who else should participate in standardisation ? There were no statements in the written submissions on the appropriate body for standardisation. In view of the reluctance of

the Scandinavian countries which trust in their Ombudsman system, Dr. Hoffmann, DG SANCO, raised the question whether the Ombudsman could be the national representative for standardisation within CEN. CEN confirmed that this was indeed possible.

Standardisation integrates all parties concerned, including consumers. The role of consumer organisations had not really been considered in any of the submissions. Only Psix consulting and FEDSA in its second statements mentioned the role of consumer organisations; however, they opposed any extended participation. Again, there was an urgent need to consider more closely the role of consumers in standardisation. Dr. Hoffmann, DG SANCO made clear that from an organisational point of view it is not a democratic process by which codes of conduct are established, thereby drawing a direct line to consumer participation in standards making. Mr. Dailley, DSA France, however, reported from the French process of code making where consumers are directly involved, at least in the field of direct selling and a similar situation seems to exist in Spain, as FEDMA underlined. Outside these two interventions, quite a number of representatives of the direct selling business expressed concern about an extension of the consumers' participation as requested by Prof. Micklitz. Mr. De Jongh, CEN, referred to ANEC, the consumer representative organisation which participates on a daily basis in all CEN structures. There was a certain reluctance as to whether and to what extent consumer organisations may endanger the consensus driven process and slow down standardisation or similar forms of private rule making.

Two further issues on the transferability of New Approach type regulation came up in the course of the Hearing: the presumption of conformity and judicial review. FEDSA had already underlined the need to specify the presumption of conformity in its written submission. For EU Committee of the American Chamber of Commerce in Belgium, standardisation is only one means to demonstrate compliance and that there are other means to demonstrate legality. Standardisation may achieve harmonisation only in respect to the scope of the marketing standards themselves. It will not achieve a presumption of legality for a company doing business or a marketing practice, in and of itself. It is entirely conceivable that an illegitimate scheme seeks to comply with marketing standards. Dr. Rosso, Centro Europeao Dei Consumatori, made the same point though from a different angle. Her point was cross-border enforcement, in the event the supplier does not comply with the marketing standards. Dr. Hoffmann, DG SANCO and Prof. Micklitz referred to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests as a means to improve cross-border enforcement. However, there were quite a number of statements referring to the need for guaranteeing effective judicial review. There existed some uncertainty of how such a system of judicial control would look like.

3. Minimum binding legislation and maximum New Approach type regulation combined

There is only one submission which deals expressly with the harmonisation of Multi Level Marketing by way of combining traditional and new legislatory approaches. Brammsen/Leible opt for a maximum harmonisation like Directive 86/653/EEC on Self Employed Commercial Agents due to the uniformity of the market conditions and the equal chances for competition in the EC. However, they suggest combining self-regulation with binding minimum harmonisation rules. The Community rules would be the minimum regulation; an expert commission from representatives of all branches concerned would develop further rules which would be binding for the companies. National regulations going beyond these standards would not be applicable if a company observes the standards developed by the expert commission.

Again the question of whether there should be minimum or maximum harmonisation was more fully discussed during the Hearing. The direct selling business argued strongly in favour of maximum harmonisation. The issue arose, once Ms. Lattelma from the Ministry of Justice in Finland expressed her concern about whether marketing is the kind of phenomenon which is truly international or whether marketing has to take into account some national features which are based on national traditions and cultural heritage. Dr. Hoffmann, DG SANCO, referred instead to the growing international character of marketing, however, admitted that national particularities might call for a waiver, a well-known means of standardisation, as Mr. Schultz from CEN explained. Mr. K. Bressler, International Chamber of Commerce found it horrific to imagine the existence of 15 or - at a later stage after the EC enlargement - 25 national codes all developed on the basis of mandatory requirements and all providing for a different set of rules. Dr. Hoffmann, DG SANCO explained that national marketing standards shall not become the rule. The pilot projects which should be initiated by DG SANCO and put into the hands of AFNOR, BSI and DIN should be seen as an exploratory exercise. For further standardisation, CEN should be given a mandate to elaborate a European standard on marketing.

Annex I – Agenda of the Hearing

Annex II – List of organisations participating at the Hearing

ANNEX I

HEARING

DOOR TO DOOR SELLING - PYRAMID SELLING -

MULTI LEVEL MARKETING

Centre de Conférences A. Borschette

36, rue Froissart - Brussels

15 + 16 March 2000

A G E N D A

AGENDA

15 MARCH - WEDNESDAY
Morning Session

Chairman : Dr Dieter Hoffmann - Head of Unit - DG Health and Consumer Protection

9.30 (1) **Welcome + Introduction**

9.45 - 10.10 (2) **Presentations by Industries concerned**

10.10 - 10.50 (3) **Amending the "core" of Directive 85/577/EEC**

Modification /Adaptation/ Abolition of certain exemptions to scope of application

- Article 3(1) - Lift 60 ECU Exemption ?
- Article 3(2)(a) - Lift exemption for rental contracts ?
- Article 3(2)(c) - Lift exemption for catalogues ?
- Article 3(2) d + (e) - Lift exemption for insurance contracts and contracts for securities ?

10.50 - 12.00 Adapting information requirements to the level of Directive 97/7/EC

- Is there a need for a "double layer" of (prior) information in door to door business - Compare Art. 4 of 85/577/EEC with Articles. 4 & 5 of Directive 97/7/EC
- Regarding the information list in Directive 97/7/EC Article 4 (and possibly Article5)
  - should this list be incorporated into Directive 85/577/EEC together with a provision on protection of consumers privacy in accordance with the Data Protection Directive 95/46/EC ?

- Right of Withdrawal - Article 5
  - Should this start with "conclusion of the contract" or with "delivery of goods and services" ?
  - Should there be a sector/Community wide time limit of 10 days (without taking into account working days, holidays etc.) ?

12.00-12.30 Rules on proper performance and advance payments
(possible alignment with Articles 7 & 8 of Directive 97/7/EC))

- LUNCH BREAK -

Afternoon Session

Chairman : Dr. Dieter Hoffmann

(4) **How to approach the grey area between "Pyramid Selling" and "Multi Level Marketing**"

14.30 - 16.00 Definition of illegal pyramid selling - detailed comments, on the definition suggested in the study (alternative proposals in writing from participants are welcome)

16.00 - 17.30 Criteria for legally acceptable MLM systems

- proper information for candidates
- right to withdrawal after signing up
- number of distribution levels
- remuneration only related to sale of goods
- "buy-back" guarantees
- entry fees
- internal control of the system

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16 MARCH - THURSDAY
Morning Session

Chairman : Dr. Dieter Hoffmann

10.00- 13.00 (5) **Does standardisation provide a means of regulating MLM?**

- How might essential requirements be defined ?
- Who cold establish the standards (existing standardisation bodies - new agencies) ?
- Which stakeholders might be involved ?

- END OF HEARING -

Annex II

LIST OF PARTICIPANTS

1) European Commission :

   - DG Health + Consumer Protection
   - DG Comptetition
   - DG Internal Market
   - DG Employment
   - DG Enterprise

2) Institut für Europäisches Wirtschafts- und Verbraucherrecht – VIEW

3) European Committee for Standardisation « CEN »

4) Europäisches Verbraucherzentrum – Kiel

5) Danish National Consumer Agency

6) Instituto Nacional del Consumo – Spain

7) Consumer Agency – Finland

8) Centro Europeo dei Consumatori – Bolzano

9) DG du Commerce et de la Concurrence – Portugal

10) Instituto do Consumidor – Portugal

11) Swedish Consumer Agency

12) Federation of European Direct Selling Association « FEDSA »

13) Vorwerk + Co – Germany

14) International Chamber of Commerce « ICC »

15) German Direct Selling Association

16) French Direct Selling Association

17) UK Direct Selling Association

18) World Federation of Direct Selling Association «WFDSA »

19) Federal Chancellery – Austria

20) Federal Ministry of Justice – Austria

21) Ministry of Economic Affairs – Belgium

22) Ministère des Finances – Direction Consommation – France

23) Ministry of Justice – Finland

24) Ministry of Development (Secretary General of Commerce) – Greece

25) Ministero Industria – Pres. Cons. - Dipart. Politiche Comunitarie - Italy

26) Ministère des Classes Moyennes – Luxembourg

27) Ministerie van Economische Zaken – Netherlands

28) Department of Trade and Industry – United Kingdom « DTI »

29) Permanent Representation of Greece to EC

30) Permanent Representation of Ireland to EU

31) Comité européen des Assurances

32) Fédération bancaire de l'UE

33) European Cosmetic Toiletry + Perfumery Association « COLIPA »

34) Federation of European Direct Marketing « FEDMA »

35) Gesemtverband der Deutschen Vesicherungswirtschaft

36) EU Committee of American Chamber of Commerce

37) EUROCOMMERCE

38) European Association of Directory Publishers

39) EUROFINAS LEASEUROPE

40) BIPAR – International Federation of Insurance Intermediaries

41) Citigroup

42) DIN Deutsches Institut für Normung

43) University of Bamberg – Germany

END

31997L0007

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent

Official Journal L 144 , 04/06/1997 P. 0019 - 0027

MORE INFO TEXT:

DIRECTIVE 97/7/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 1997 on the protection of consumers in respect of distance contracts

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3), in the light of the joint text approved by the Conciliation Committee on 27 November 1996,

(1) Whereas, in connection with the attainment of the aims of the internal market, measures must be taken for the gradual consolidation of that market;

(2) Whereas the free movement of goods and services affects not only the business sector but also private individuals; whereas it means that consumers should be able to have access to the goods and services of another Member State on the same terms as the population of that State;

(3) Whereas, for consumers, cross-border distance selling could be one of the main tangible results of the completion of the internal market, as noted, inter alia, in the communication from the Commission to the Council entitled 'Towards a single market in distribution`; whereas it is essential to the smooth operation of the internal market for consumers to be able to have dealings with a business outside their country, even if it has a subsidiary in the consumer's country of residence;

(4) Whereas the introduction of new technologies is increasing the number of ways for consumers to obtain information about offers anywhere in the Community and to place orders; whereas some Member States have already taken different or diverging measures to protect consumers in respect of distance selling, which has had a detrimental effect on competition between businesses in the internal market; whereas it is therefore necessary to introduce at Community level a minimum set of common rules in this area;

(5) Whereas paragraphs 18 and 19 of the Annex to the Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy (4) point to the need to protect the purchasers of goods or services from demands for payment for unsolicited goods and from high-pressure selling methods;

(6) Whereas paragraph 33 of the communication from the Commission to the Council entitled 'A new impetus for consumer protection policy`, which was approved by the Council resolution of 23 June 1986 (5), states that the Commission will submit proposals regarding the use of new information

technologies enabling consumers to place orders with suppliers from their homes;
(7) Whereas the Council resolution of 9 November 1989 on future priorities for relaunching consumer protection policy (6) calls upon the Commission to give priority to the areas referred to in the Annex to that resolution; whereas that Annex refers to new technologies involving teleshopping; whereas the Commission has responded to that resolution by adopting a three-year action plan for consumer protection policy in the European Economic Community (1990-1992); whereas that plan provides for the adoption of a Directive;
(8) Whereas the languages used for distance contracts are a matter for the Member States;
(9) Whereas contracts negotiated at a distance involve the use of one or more means of distance communication; whereas the various means of communication are used as part of an organized distance sales or service-provision scheme not involving the simultaneous presence of the supplier and the consumer; whereas the constant development of those means of communication does not allow an exhaustive list to be compiled but does require principles to be defined which are valid even for those which are not as yet in widespread use;
(10) Whereas the same transaction comprising successive operations or a series of separate operations over a period of time may give rise to different legal descriptions depending on the law of the Member States; whereas the provisions of this Directive cannot be applied differently according to the law of the Member States, subject to their recourse to Article 14; whereas, to that end, there is therefore reason to consider that there must at least be compliance with the provisions of this Directive at the time of the first of a series of successive operations or the first of a series of separate operations over a period of time which may be considered as forming a whole, whether that operation or series of operations are the subject of a single contract or successive, separate contracts;
(11) Whereas the use of means of distance communication must not lead to a reduction in the information provided to the consumer; whereas the information that is required to be sent to the consumer should therefore be determined, whatever the means of communication used; whereas the information supplied must also comply with the other relevant Community rules, in particular those in Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (7); whereas, if exceptions are made to the obligation to provide information, it is up to the consumer, on a discretionary basis, to request certain basic information such as the identity of the supplier, the main characteristics of the goods or services and their price;
(12) Whereas in the case of communication by telephone it is appropriate that the consumer receive enough information at the beginning of the conversation to decide whether or not to continue;
(13) Whereas information disseminated by certain electronic technologies is often ephemeral in nature insofar as it is not received on a permanent medium; whereas the consumer must therefore receive written notice in good time of the information necessary for proper performance of the contract;
(14) Whereas the consumer is not able actually to see the product or ascertain the nature of the service provided before concluding the contract; whereas provision should be made, unless otherwise specified in this Directive, for a right of withdrawal from the contract; whereas, if this right is to be more than formal, the costs, if any, borne by the consumer when exercising the right of withdrawal must be limited to the direct costs for returning the goods; whereas this right of withdrawal shall be without prejudice to the consumer's rights under national laws, with particular regard to the receipt of damaged products and services or of products and services not corresponding to the description given in the offer of such products or services; whereas it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal;
(15) Whereas it is also necessary to prescribe a time limit for performance of the

contract if this is not specified at the time of ordering;
(16) Whereas the promotional technique involving the dispatch of a product or the provision of a service to the consumer in return for payment without a prior request from, or the explicit agreement of, the consumer cannot be permitted, unless a substitute product or service is involved;
(17) Whereas the principles set out in Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 apply; whereas the consumer's right to privacy, particularly as regards freedom from certain particularly intrusive means of communication, should be recognized; whereas specific limits on the use of such means should therefore be stipulated; whereas Member States should take appropriate measures to protect effectively those consumers, who do not wish to be contacted through certain means of communication, against such contacts, without prejudice to the particular safeguards available to the consumer under Community legislation concerning the protection of personal data and privacy;
(18) Whereas it is important for the minimum binding rules contained in this Directive to be supplemented where appropriate by voluntary arrangements among the traders concerned, in line with Commission recommendation 92/295/EEC of 7 April 1992 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (8);
(19) Whereas in the interest of optimum consumer protection it is important for consumers to be satisfactorily informed of the provisions of this Directive and of codes of practice that may exist in this field;
(20) Whereas non-compliance with this Directive may harm not only consumers but also competitors; whereas provisions may therefore be laid down enabling public bodies or their representatives, or consumer organizations which, under national legislation, have a legitimate interest in consumer protection, or professional organizations which have a legitimate interest in taking action, to monitor the application thereof;
(21) Whereas it is important, with a view to consumer protection, to address the question of cross-border complaints as soon as this is feasible; whereas the Commission published on 14 February 1996 a plan of action on consumer access to justice and the settlement of consumer disputes in the internal market; whereas that plan of action includes specific initiatives to promote out-of-court procedures; whereas objective criteria (Annex II) are suggested to ensure the reliability of those procedures and provision is made for the use of standardized claims forms (Annex III);
(22) Whereas in the use of new technologies the consumer is not in control of the means of communication used; whereas it is therefore necessary to provide that the burden of proof may be on the supplier;
(23) Whereas there is a risk that, in certain cases, the consumer may be deprived of protection under this Directive through the designation of the law of a non-member country as the law applicable to the contract; whereas provisions should therefore be included in this Directive to avert that risk;
(24) Whereas a Member State may ban, in the general interest, the marketing on its territory of certain goods and services through distance contracts; whereas that ban must comply with Community rules; whereas there is already provision for such bans, notably with regard to medicinal products, under Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (9) and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (10),
HAVE ADOPTED THIS DIRECTIVE:

Article 1

Object
The object of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning distance contracts between consumers and suppliers.

Article 2

Definitions
For the purposes of this Directive:
(1) 'distance contract` means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded;
(2) 'consumer` means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
(3) 'supplier` means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity;
(4) 'means of distance communication` means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties. An indicative list of the means covered by this Directive is contained in Annex I;
(5) 'operator of a means of communication` means any public or private natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers.

Article 3

Exemptions
1. This Directive shall not apply to contracts:
- relating to financial services, a non-exhaustive list of which is given in Annex II,
- concluded by means of automatic vending machines or automated commercial premises,
- concluded with telecommunications operators through the use of public payphones,
- concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental,
- concluded at an auction.
2. Articles 4, 5, 6 and 7 (1) shall not apply:
- to contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace by regular roundsmen,
- to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period; exceptionally, in the case of outdoor leisure events, the supplier can reserve the right not to apply Article 7 (2) in specific circumstances.

Article 4

Prior information
1. In good time prior to the conclusion of any distance contract, the consumer shall be provided with the following information:
(a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
(b) the main characteristics of the goods or services;

(c) the price of the goods or services including all taxes;
(d) delivery costs, where appropriate;
(e) the arrangements for payment, delivery or performance;
(f) the existence of a right of withdrawal, except in the cases referred to in Article 6 (3);
(g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
(h) the period for which the offer or the price remains valid;
(i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.
2. The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.
3. Moreover, in the case of telephone communications, the identity of the supplier and the commercial purpose of the call shall be made explicitly clear at the beginning of any conversation with the consumer.

Article 5

Written confirmation of information
1. The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4 (1) (a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him.
In any event the following must be provided:
- written information on the conditions and procedures for exercising the right of withdrawal, within the meaning of Article 6, including the cases referred to in the first indent of Article 6 (3),
- the geographical address of the place of business of the supplier to which the consumer may address any complaints,
- information on after-sales services and guarantees which exist,
- the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.
2. Paragraph 1 shall not apply to services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address any complaints.

Article 6

Right of withdrawal
1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.
The period for exercise of this right shall begin:
- in the case of goods, from the day of receipt by the consumer where the obligations laid down in Article 5 have been fulfilled,

- in the case of services, from the day of conclusion of the contract or from the day on which the obligations laid down in Article 5 were fulfilled if they are fulfilled after conclusion of the contract, provided that this period does not exceed the three-month period referred to in the following subparagraph.
If the supplier has failed to fulfil the obligations laid down in Article 5, the period shall be three months. The period shall begin:
- in the case of goods, from the day of receipt by the consumer,
- in the case of services, from the day of conclusion of the contract.
If the information referred to in Article 5 is supplied within this three-month period, the seven working day period referred to in the first subparagraph shall begin as from that moment.
2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days.
3. Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal provided for in paragraph 1 in respect of contracts:
- for the provision of services if performance has begun, with the consumer's agreement, before the end of the seven working day period referred to in paragraph 1,
- for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier,
- for the supply of goods made to the consumer's specifications or clearly personalized or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly,
- for the supply of audio or video recordings or computer software which were unsealed by the consumer,
- for the supply of newspapers, periodicals and magazines,
- for gaming and lottery services.
4. The Member States shall make provision in their legislation to ensure that:
- if the price of goods or services is fully or partly covered by credit granted by the supplier, or
- if that price is fully or partly covered by credit granted to the consumer by a third party on the basis of an agreement between the third party and the supplier,
the credit agreement shall be cancelled, without any penalty, if the consumer exercises his right to withdraw from the contract in accordance with paragraph 1. Member States shall determine the detailed rules for cancellation of the credit agreement.

Article 7

Performance
1. Unless the parties have agreed otherwise, the supplier must execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier.
2. Where a supplier fails to perform his side of the contract on the grounds that the goods or services ordered are unavailable, the consumer must be informed of this situation and must be able to obtain a refund of any sums he has paid as soon as possible and in any case within 30 days.
3. Nevertheless, Member States may lay down that the supplier may provide the consumer with goods or services of equivalent quality and price provided that this possibility was provided for prior to the conclusion of the contract or in the contract. The consumer shall be informed of this possibility in a clear and comprehensible manner. The cost of returning the goods following exercise of the right of withdrawal shall, in this case, be borne by the supplier, and the consumer

must be informed of this. In such cases the supply of goods or services may not be deemed to constitute inertia selling within the meaning of Article 9.

Article 8

Payment by card
Member States shall ensure that appropriate measures exist to allow a consumer:
- to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive,
- in the event of fraudulent use, to be recredited with the sums paid or have them returned.

Article 9

Inertia selling
Member States shall take the measures necessary to:
- prohibit the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment,
- exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.

Article 10

Restrictions on the use of certain means of distance communication
1. Use by a supplier of the following means requires the prior consent of the consumer:
- automated calling system without human intervention (automatic calling machine),
- facsimile machine (fax).
2. Member States shall ensure that means of distance communication, other than those referred to in paragraph 1, which allow individual communications may be used only where there is no clear objection from the consumer.

Article 11

Judicial or administrative redress
1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:
(a) public bodies or their representatives;
(b) consumer organizations having a legitimate interest in protecting consumers;
(c) professional organizations having a legitimate interest in acting.
3. (a) Member States may stipulate that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent can be placed on the supplier.
(b) Member States shall take the measures needed to ensure that suppliers and operators of means of communication, where they are able to do so, cease practices which do not comply with measures adopted pursuant to this Directive.
4. Member States may provide for voluntary supervision by self-regulatory bodies of compliance with the provisions of this Directive and recourse to such bodies for the settlement of disputes to be added to the means which Member States must provided to ensure compliance with the provisions of this Directive.

Article 12

Binding nature
1. The consumer may not waive the rights conferred on him by the transposition of this Directive into national law.
2. Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.

Article 13

Community rules
1. The provisions of this Directive shall apply insofar as there are no particular provisions in rules of Community law governing certain types of distance contracts in their entirety.
2. Where specific Community rules contain provisions governing only certain aspects of the supply of goods or provision of services, those provisions, rather than the provisions of this Directive, shall apply to these specific aspects of the distance contracts.

Article 14

Minimal clause
Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection. Such provisions shall, where appropriate, include a ban, in the general interest, on the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts, with due regard for the Treaty.

Article 15

Implementation
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than three years after it enters into force. They shall forthwith inform the Commission thereof.
2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The procedure for such reference shall be laid down by Member States.
3. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive.
4. No later than four years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and the Council on the implementation of this Directive, accompanied if appropriate by a proposal for the revision thereof.

Article 16

Consumer information
Member States shall take appropriate measures to inform the consumer of the national law transposing this Directive and shall encourage, where appropriate, professional organizations to inform consumers of their codes of practice.

Article 17

Complaints systems
The Commission shall study the feasibility of establishing effective means to deal with consumers' complaints in respect of distance selling. Within two years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and the Council on the results of the studies, accompanied if appropriate by proposals.

Article 18
This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 19
This Directive is addressed to the Member States.

Done at Brussels, 20 May 1997.
For the European Parliament
The President
J.M. GIL-ROBLES
For the Council
The President
J. VAN AARTSEN

(1) OJ No C 156, 23. 6. 1992, p. 14 and OJ No C 308, 15. 11. 1993, p. 18.
(2) OJ No C 19, 25. 1. 1993, p. 111.
(3) Opinion of the European Parliament of 26 May 1993 (OJ No C 176, 28. 6. 1993, p. 95), Council common position of 29 June 1995 (OJ No C 288, 30. 10. 1995, p. 1) and Decision of the European Parliament of 13 December 1995 (OJ No C 17, 22. 1. 1996, p. 51). Decision of the European Parliament of 16 January 1997 and Council Decision of 20 January 1997.
(4) OJ No C 92, 25. 4. 1975, p. 1.
(5) OJ No C 167, 5. 7. 1986, p. 1.
(6) OJ No C 294, 22. 11. 1989, p. 1.
(7) OJ No L 250, 19. 9. 1984, p. 17.
(8) OJ No L 156, 10. 6. 1992, p. 21.
(9) OJ No L 298, 17. 10. 1989, p. 23.
(10) OJ No L 113, 30. 4. 1992, p. 13.

ANNEX I

Means of communication covered by Article 2 (4)
- Unaddressed printed matter
- Addressed printed matter
- Standard letter
- Press advertising with order form
- Catalogue
- Telephone with human intervention
- Telephone without human intervention (automatic calling machine, audiotext)
- Radio
- Videophone (telephone with screen)
- Videotex (microcomputer and television screen) with keyboard or touch screen
- Electronic mail
- Facsimile machine (fax)
- Television (teleshopping).

ANNEX II

Financial services within the meaning of Article 3 (1)
- Investment services
- Insurance and reinsurance operations
- Banking services
- Operations relating to dealings in futures or options.

Such services include in particular:
- investment services referred to in the Annex to Directive 93/22/EEC (1); services of collective investment undertakings,
- services covered by the activities subject to mutual recognition referred to in the Annex to Directive 89/646/EEC (2);
- operations covered by the insurance and reinsurance activities referred to in:
- Article 1 of Directive 73/239/EEC (3),
- the Annex to Directive 79/267/EEC (4),
- Directive 64/225/EEC (5),
- Directives 92/49/EEC (6) and 92/96/EEC (7).

(1) OJ No L 141, 11. 6. 1993, p. 27.
(2) OJ No L 386, 30. 12. 1989, p. 1. Directive as amended by Directive 92/30/EEC (OJ No L 110, 28. 4. 1992, p. 52).
(3) OJ No L 228, 16. 8. 1973, p. 3. Directive as last amended by Directive 92/49/EEC (OJ No L 228, 11. 8. 1992, p. 1).
(4) OJ No L 63, 13. 3. 1979, p. 1. Directive as last amended by Directive 90/619/EEC (OJ No L 330, 29. 11. 1990, p. 50).
(5) OJ No 56, 4. 4. 1964, p. 878/64. Directive as amended by the 1973 Act of Accession.
(6) OJ No L 228, 11. 8. 1992, p. 1.
(7) OJ No L 360, 9. 12. 1992, p. 1.

Statement by the Council and the Parliament re Article 6 (1)
The Council and the Parliament note that the Commission will examine the possibility and desirability of harmonizing the method of calculating the cooling-off period under existing consumer-protection legislation, notably Directive 85/577/EEC of 20 December 1985 on the protection of consumers in respect of contracts negotiated away from commercial establishments ('door-to-door sales`) (1).
(1) OJ No L 372, 31. 12. 1985, p. 31.

Statement by the Commission re Article 3 (1), first indent
The Commission recognizes the importance of protecting consumers in respect of distance contracts concerning financial services and has published a Green Paper entitled 'Financial services: meeting consumers' expectations`. In the light of reactions to the Green Paper the Commission will examine ways of incorporating consumer protection into the policy on financial services and the possible legislative implications and, if need be, will submit appropriate proposals.

31992H0295

92/295/EEC: Commission Recommendation of 7 April 1992 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling)

Official Journal L 156 , 10/06/1992 P. 0021 - 0022

MORE INFO TEXT:

COMMISSION RECOMMENDATION of 7 April 1992 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling) (92/295/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Whereas measures must be taken for the gradual establishment of the internal market, and cross-frontier distance selling may be one of the main tangible signs for consumers of completion of the market;

Whereas it has been decided to set out in the form of a Directive a basic set of minimum consumer protection rules which are necessary for the proper functioning of the market; whereas one of the reasons for this initiative is concern to avoid fragmentation of the national legislation;

Whereas these mandatory basic rules should be supplemented by voluntary self-regulatory arrangements in the form of codes of practice;

Whereas firms engaging in transactions by means of contracts negotiated at a distance make use of certain particular methods of sales promotion; whereas these methods give rise to special problems as a result of the means of communication used; whereas it is thus particularly necessary to ensure that the consumer is sufficiently informed;

Whereas payment in advance may pose a problem of financial security for the consumer; whereas such risk is particularly high where the supplier in question can be identified and located only with difficulty; whereas it is essential to give the consumer the assurance that he will be reimbursed in case of non-execution of the contract;

Whereas a firm which subscribes to a code informs its customers of the fact; whereas the consumer must therefore be able to acquaint himself with the content of this code and must know what to do if he thinks it has not been complied with;

Whereas the Commission will in due course evaluate the putting into effect of this recommendation; whereas it will consider at that time whether other measures appear necessary,

HEREBY RECOMMENDS: That the trade associations of suppliers:

1. should adopt codes of practice, with the particular aim of stating precisely, for the sectors concerned and means of communication used, the minimum rules contained in the Directive on 'contracts negotiated at a distance';
2. should include the points listed in the Annex in such codes;
3. should ensure that their members comply with the codes;
4. should inform the Commission, one year after the publication of the Directive in the Official Journal of the European Communities, of the content of the codes and the response by their members. Done at Brussels, 7 April 1992. For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

Points which could be covered by codes of practice for contracts negotiated at a distance:

- Dissemination of solicitations for custom: means to enable consumers not to receive solicitations if they have made it clear that they do not wish to do so.
- Presentation: ethical principles to be respected in all solicitations for custom, especially as regards respect for human dignity and religious or political beliefs.
- Sales promotion: provisions covering sales promotion techniques (reductions, rebates, gifts, lotteries and competitions) to ensure that the principles of fair competition are respected and in particular that the consumer receives clear information.
- Financial security: arrangements to ensure the reimbursement of payments made by consumers at the time of placing an order.
- Right of withdrawal: if the consumer chooses to make use of the right of withdrawal, a period within which payments already made will be reimbursed.
- Knowledge of the code: information for consumers on the existence of the code, its content and the results of its application.

I

(Acts whose publication is obligatory)

DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 8 June 2000

on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

(2) The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

(3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.

(4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [4], a high level of Community integration is achieved.

(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

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(1) OJ C 30, 5.2.1999, p. 4.
(2) OJ C 169, 16.6.1999, p. 36.
(3) Opinion of the European Parliament of 6 May 1999 (OJ C 279, 1.10.1999, p. 389), Council common position of 28 February 2000 (OJ C 128, 8.5.2000, p. 32) and Decision of the European Parliament of 4 May 2000 (not yet published in the Official Journal).
(4) OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

(6) In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

(7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

(8) The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

(10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

(11) This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1] and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [2] form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; that same Community acquis, which is fully applicable to information society services, also embraces in particular Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising [3], Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [4], Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [5], Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [6], Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer production in the indication of prices of products offered to consumers [7], Council Directive 92/59/EEC of 29 June 1992 on general product safety [8], Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis [9], Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [10], Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products [11], Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [12], the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products [13]; this Directive

(1) OJ L 95, 21.4.1993, p. 29.
(2) OJ L 144, 4.6.1999, p. 19.
(3) OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).
(4) OJ L 42, 12.2.1987, p. 48. Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 17).
(5) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).
(6) OJ L 158, 23.6.1990, p. 59.
(7) OJ L 80, 18.3.1998, p. 27.
(8) OJ L 228, 11.8.1992, p. 24.
(9) OJ L 280, 29.10.1994, p. 83.
(10) OJ L 166, 11.6.1998, p. 51. Directive as amended by Directive 1999/44/EC (OJ L 171, 7.7.1999, p. 12).
(11) OJ L 210, 7.8.1985, p. 29. Directive as amended by Directive 1999/34/EC (OJ L 141, 4.6.1999, p. 20).
(12) OJ L 171, 7.7.1999, p. 12.
(13) OJ L 113, 30.4.1992, p. 13.

should be without prejudice to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1] adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by the abovementioned Directives and in particular Directive 97/7/EC.

(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded form the scope of this Directive.

(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [2] and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [3] which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services [4] and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [5]; this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an

[1] OJ L 213, 30.7.1998, p. 9.
[2] OJ L 281, 23.11.1995, p. 31.
[3] OJ L 24, 30.1.1998, p. 1.
[4] OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).
[5] OJ L 320, 28.11.1998, p. 54.

employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) The definition of 'recipient of a service' covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

(22) Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of information society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of information society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.

(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.

(27) This Directive, together with the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creating of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances of restricting the freedom to provide information society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors.

(28) The Member States' obligation not to subject access to the activity of an information society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1] consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification service.

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by recipient of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, by Directive 97/7/EC and by Directive 97/66/EC; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.

(31) Member States which allow the sending of unsolicited commercial communications by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.

(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [2]; the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

(35) This Directive does not affect Member States' possibility of maintaining or establishing general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.

(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.

[1] OJ L 15, 21.1.1998, p. 14.

[2] OJ L 13, 19.1.2000, p. 12.

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of information society services.

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for 'mere conduit' and for 'caching' when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.

(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

(51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to information society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of information society services by ensuring a high level of consumer protection.

(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

(56) As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

(59) Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

(61) If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible.

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.

(63) The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its resolution of 19 January 1999 on the consumer dimension of the information society [1], stressed that the protection of consumers deserved special attention in this field; the Commission will examine the degree to which existing consumer protection rules provide insufficient protection in the context of the information society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

— the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

— the representation of a client and defence of his interests before the courts,

— gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) 'information society services': services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

[1] OJ C 23, 28.1.1999, p. 1.

(b) 'service provider': any natural or legal person providing an information society service;

(c) 'established service provider': a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

(d) 'recipient of the service': any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

(e) 'consumer': any natural person who is acting for purposes which are outside his or her trade, business or profession;

(f) 'commercial communication': any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:

— information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

— communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;

(g) 'regulated profession': any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three-years' duration [1] or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [2];

(h) 'coordinated field': requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

— the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

— the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

— requirements applicable to goods as such,

— requirements applicable to the delivery of goods,

— requirements applicable to services not provided by electronic means.

Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

— public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

— the protection of public health,

[1] OJ L 19, 24.1.1989, p. 16.
[2] OJ L 209, 24.7.1992, p. 25. Directive as last amended by Commission Directive 97/38/EC (OJ L 184, 12.7.1997, p. 31).

— public security, including the safeguarding of national security and defence,

— the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

— asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

— notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services [1].

Article 5

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:

— any professional body or similar institution with which the service provider is registered,

— the professional title and the Member State where it has been granted,

— a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [2].

(1) OJ L 117, 7.5.1997, p. 15.
(2) OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7

Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8

Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9

Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;

(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11

Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

— the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,

— the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers

Article 12

'Mere conduit'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

'Caching'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

CHAPTER III

IMPLEMENTATION

Article 16

Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 17

Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18

Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. The Annex to Directive 98/27/EC shall be supplemented as follows:

'11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).'

Article 19

Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20

Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.

CHAPTER IV

FINAL PROVISIONS

Article 21

Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, 'notice and take down' procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 22

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 23

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Luxemburg, 8 june 2000.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	G. d'OLIVEIRA MARTINS

ANNEX

DEROGATIONS FROM ARTICLE 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

— copyright, neighbouring rights, rights referred to in Directive 87/54/EEC [1] and Directive 96/9/EC [2] as well as industrial property rights,

— the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC [3],

— Article 44(2) of Directive 85/611/EEC [4],

— Article 30 and Title IV of Directive 92/49/EEC [5], Title IV of Directive 92/96/EEC [6], Articles 7 and 8 of Directive 88/357/EEC [7] and Article 4 of Directive 90/619/EEC [8],

— the freedom of the parties to choose the law applicable to their contract,

— contractual obligations concerning consumer contacts,

— formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,

— the permissibility of unsolicited commercial communications by electronic mail.

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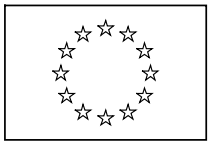
[1] OJ L 24, 27.1.1987, p. 36.
[2] OJ L 77, 27.3.1996, p. 20.
[3] Not yet published in the Official Journal.
[4] OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7).
[5] OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 95/26/EC.
[6] OJ L 360, 9.12.1992, p. 2. Directive as last amended by Directive 95/26/EC.
[7] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 92/49/EC.
[8] OJ L 330, 29.11.1990, p. 50. Directive as last amended by Directive 92/96/EC.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.11.2003
COM(2003) 702 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

TABLE OF CONTENTS

1. INTRODUCTION

This report provides the first assessment of the transposition and application of Directive 2000/31/EC on electronic commerce[1] ("the Directive") and its impact. It is based both on the Commission's experience and on feedback received from Member States, industry, professional and consumer associations and other interested parties of their experience with the Directive. In view of the short period of time since the adoption and transposition of the Directive, such experience is necessarily limited. However, it shows that the Directive has had a substantial and positive effect on e-commerce within Europe. Together with the Directive on transparency for information society services[2], which establishes a mechanism allowing the Commission to assess draft national legislation as to its compatibility with Community law, it creates a straightforward Internal Market framework which allows e-commerce to grow across national borders.

Work at European level aiming to promote the development of e-commerce started at an early stage with the Commission's 1997 Communication "A European Initiative in Electronic Commerce"[3]. This set a clear objective of creating a coherent European legal framework for e-commerce by the year 2000.

Its importance was underlined by the 2000 Lisbon European Council, which set a new strategic goal for the European Union for the next decade: to become the most competitive and dynamic knowledge-based economy in the world. The Lisbon Council underlined that both citizens and business must have access to inexpensive, world-class communications infrastructure and a wide range of services and that realising Europe's full e-potential depended on creating the right conditions for e-commerce and the internet to flourish.

The Directive, which was adopted soon after the Lisbon Council, is fully in line with this objective. It removes obstacles to cross-border online services in the Internal Market and provides legal certainty to business and citizens alike. In so doing it enhances the competitiveness of European service providers, and stimulates innovation and job creation. It also contributes to the free flow of information and freedom of expression in the European Union.

The Directive provides a light and flexible legal framework for e-commerce and addresses only those elements which are strictly necessary in order to ensure the proper functioning of the Internal Market in e-commerce. It is drafted in a technologically neutral way to avoid the need to adapt the legal framework constantly to new developments.[4] It covers a wide variety

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1 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1.

2 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21.7.1998, p. 37 as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ L 217, 5.8.1998, p. 18. On 13.2.2003 the Commission adopted a report to the European Parliament and the Council which specifically evaluates the application of Directive 98/34/EC in the field of Information Society Services (COM(2003)69). The report underlines the benefits of the procedure, confirming the value of this Directive as an effective internal-market tool in this new economic field.

3 COM(97) 157 final, 16.4.1997.

4 For instance, technological applications (WAP or PDA-sets) enabling the content to be accessed by a specific device do not constitute "modification of information" within the meaning of Article 12, but merely "technical specification of content".

of services provided online (so-called "information society services") ranging from online newspapers and specialised news services (such as business or financial information), online selling of various products (books, computer hardware and software, pharmaceuticals, etc.) to the online provision of financial services (online banking, online investment). The latter are of particular importance as they are particularly suitable for cross-border delivery, which the Commission has recognized in its Communication on E-commerce and Financial Services[5]. The Directive applies horizontally across all areas of law which touch on the provision of information society services, regardless of whether it is a matter of public, private, or criminal law. Furthermore, it applies equally both to business-to-business (B2B) and business-to-consumer (B2C) e-commerce.

The cornerstone of the Directive is the Internal Market clause which creates the legal certainty and clarity needed for information society service providers to be able to offer their services throughout the entire Community. The provisions on the liability of intermediaries create legal certainty for intermediary service providers and thus help to ensure the provision of basic intermediary services in the internet. At the same time, the Directive's provisions on information and transparency requirements, its rules on commercial communications, and the basic principles regarding electronic contracts provide for high standards in the conduct of online business in all Member States, thus also increasing consumer confidence.

Due to the fact that the Directive was one of the first legal instruments which approached a broad range of legal issues related to several aspects of the development of e-commerce and which provided a coherent set of legal rules for e-commerce as such, it has attracted a considerable amount of attention amongst regulators at international level and is a model for national, regional, or global regulatory initiatives[6].

In parallel with the putting into place of the legal framework, work continues at European level with the aim of stimulating the development of e-business and e-government. In particular, the Commission set out a coherent strategy in its eEurope Action Plan, which was adopted in 2002 in order to continue with the realisation of the goals set by the Lisbon Council.[7]

2. ECONOMIC AND TECHNOLOGICAL DEVELOPMENTS IN E-COMMERCE

Despite the downturn that affected the e-economy, e-commerce is steadily increasing in the European Union. Gradually, online success stories are emerging, for example online market-places, business-to-business (B2B) platforms, and online finance. Development in the use of the internet has been rapid. There are estimated to be already 185 million European internet users.[8] Since the adoption of the Directive, growth in internet penetration in EU households has moved from 18% in 2000 to 43% in November 2002. Internet penetration in businesses is naturally much higher. Even amongst small enterprises (0-49 employees), by 2002, 84% had

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5 COM(2001) 66 final, 7.2.2001.

6 UNCITRAL refers to the Directive in its on-going work on electronic contracts, cf. most recently the report on the 41st session of the Working Group on e-commerce at http://www.uncitral.org/en-index.htm; Mercosur is in regular dialogue with the Commission on legal issues relating to e-commerce.

7 On research and development, see also Information Society Technologies 2003-04 Work Programme of the European Commission, available at http://www.cordis.lu/ist.

8 Source: Interactive Advertising Bureau UK, 2002, http://www.iabuk.net. This is estimated to grow to 190 million by the end of this year by eMarketer, http://www.europemedia.net.

access to the internet. Approximately 70% of EU companies have their own website.[9] More than two-thirds of SMEs use the internet as a business tool. The internet is a key factor for them to increase their competitiveness and to create new products and services.

Since the adoption of the Directive, the potential of e-commerce has, in addition, been growing due to the technological development of broadband and multiplatform access i.e. the possibility of connecting to the internet via other means than a PC, such as digital TV and third generation mobile phones.[10] These developments are opening up a large variety of new opportunities for online services. New services, applications and content will create new markets and provide the means for increasing productivity and hence growth and employment throughout the economy. They will also provide both citizens and business with more convenient access to information and communication tools.[11]

Currently e-commerce represents only about 1-2% of retail sales in the EU, but the prospects for growth are promising: for instance, online Christmas shopping in 2002 saw an increase of 86% over the previous year. At present only about 12% of enterprises are selling online with tourism, financial services, publishing and software being the leading sectors, but their online purchasing has developed much faster.[12] However, according to estimates, B2C e-commerce is expected to increase from €10 billion in 2000 to €70 billion in 2003.[13] It is estimated that 54% of European internet users will shop online by 2006.[14]

In addition, online advertising is a fast growing sector. It has been predicted that growth in online advertising spending will outpace growth in total media spending in 2003.[15] Total spending on advertising grew about 2% in 2002, but online advertising has been growing about ten times faster.[16] Given the number of flexible forms which online advertising can take[17], and the relative speed with which marketers can modify the elements used in an online advertising campaign, marketers have been quick to utilise the various online advertising techniques available and to innovate in order to best suit the needs of potential customers, creating a more interactive marketing process.[18] Indeed, the internet has become a powerful tool for consumers to obtain information and compare offers in an efficient and user-friendly way, i.e., to make "pre-sale searches" enabling consumers to rapidly obtain information

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9 The European e-Business Report 2002/2003 edition, the Business W@tch of the European Commission, either at www.europa.eu.int/comm/enterprise/ict/policy/watch/index.htm or at www.ebusiness-watch.org.

10 Communication of the European Commission "Towards the Full Roll-Out of Mobile Communications", COM(2002) 301 final, 11.6.2002.

11 eEurope 2005: An information society for all, COM(2002) 263 final, 28.5.2002.

12 eBusiness W@tch (reference above). In the UK and Germany, for instance, more than 50% of enterprises say they already use e-procurement.

13 European Information Technology Observatory, http://www.eito.org.

14 Interactive Advertising Bureau UK, 2002, http://www.iabuk.net.

15 eMarketer's Media Spending Outlook white paper, 2002.

16 In France and the UK record levels for online advertising have been noted in the second half of 2002, with a 52% increase in the UK compared with 2001 and a doubling of its size in France from 153 million euros in 2001 to 309 million euros in 2002, see "Europe's marketers switch to on-line", Interactive Advertising Bureau UK, June 2003.

17 E.g. banner ads, pop-up ads, keyword searches.

18 For example, once a contact has been made with a customer (and his consent given), businesses are able to tailor product offers to individual customer requirements allowing for personal 'one to one' offers by e-mail. The gradual switch from the use of pop-up ads to more user-friendly keyword-search related ads reflects the development of user-friendly advertising techniques.

concerning the range and characteristics of products and services available both throughout Europe and globally.[19]

The competitiveness of EU service providers has recently been substantially improved in e-commerce by the entry into force of the Directive relating to VAT on digital services on 1 July 2003[20], which eliminated competitive disadvantages suffered by EU service providers. The rules on electronic VAT compliance such as e-registration, e-filing and e-invoicing were also modernised.

3. TRANSPOSITION OF THE DIRECTIVE

3.1. Transposition timetable

The deadline for Member States to transpose the Directive into national law was 17 January 2002, 18 months after the entry into force of the Directive on 17 July 2000. The Council and the European Parliament accepted a relatively short transposition period having agreed that setting up a legal framework for e-commerce was a matter of priority.

There were, however, some delays in transposition, due mainly to the horizontal nature of the Directive, which affects a large variety of legal issues[21]. So far 12 Member States[22] have brought into force implementing legislation. In the remaining 3 Member States[23], work on the transposition of the Directive is well advanced. The Annex to this Report contains a list of national measures transposing the Directive.[24]

3.2. Characteristics of transposition

In general, national transpositions have closely followed the form and content of the Directive[25]. Member States, with the exception of the Netherlands, decided to transpose the Directive by a horizontal e-commerce law in order to create as clear and user-friendly a national framework as possible. Germany transposed the Directive by modifying its

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19 Online advertising, websites, e-mails, and search engine marketing have a distinct impact on the process of purchasing products even where the product is not sold on-line, see DoubleClick, Touchpoints: Effective Marketing Sequences in the Interactive Media Age, March 2003, http://www.doubleclick.com/us/knowledge/documents/research/dc_touchpoints_0303.pdf.
Sound statistics on the magnitude of the use of internet for pre-sale research is still lacking, however, surveys indicate that the figures are significant, see Research by the Interactive Advertising Bureau UK on the reach of interactive media around Europe.

20 Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services, OJ L 128, 15.5.2002, p. 41. See also Council Regulation (EC) 792/2002, OJ L 128, 15.5.2002, p. 1.

21 These reasons came out in bilateral contacts with the Member States during the transposition. Many Member States, for instance, needed time to ensure wide national consultations of interested parties.

22 Belgium, Denmark, Germany, Greece, Spain, Ireland, Italy, Luxembourg, Austria, Finland, Sweden, United Kingdom. Of those, three Member States (Germany, Luxembourg, and Austria) transposed the Directive by the deadline of 17 January 2002.

23 France, Netherlands, and Portugal.

24 In addition, the three EEA-countries, Iceland, Liechtenstein and Norway (Norway with the exception of the liability provisions, which will be separately implemented) have passed the implementing legislation. For accession and candidate countries, see section 5.2.

25 As regards France, the Netherlands and Portugal, this comparison and other references in this report have been done on the basis of their draft laws, as the final laws were not yet available.

Teleservices Act.[26] The United Kingdom transposed the Directive in two parts: the general aspects and the financial services aspects. Belgium separated the main parts of the Directive and the Article 3(4)-(6) procedure into two separate laws for constitutional reasons.

In most Member States attention at the transposition stage was focused on the Internal Market clause and the provisions concerning liability of intermediary service providers. In addition, the correct transposition of the Directive has required a number of Member States to screen and modify existing national laws, for instance in order to remove obstacles to electronic contracting[27]. Some Member States included certain additional elements not covered by the Directive in their national laws: the liability of providers of hyperlinks and search engines[28], notice and take down procedures for illegal content[29], registration requirements for information society service providers[30], filtering[31], data retention[32], cryptology[33], and additional rules on electronic contracting. Some Member States also included within the scope of their national e-commerce law matters excluded from the scope of application of the Directive, such as online gambling.[34]

Throughout the transposition procedure the Commission services were in close cooperation with all Member States to provide them with assistance in ensuring the correct transposition of the Directive. Moreover, the large majority of the Member States notified their draft laws under the transparency procedure laid down in Directive 98/34/EC[35], since those drafts contained other rules affecting information society services, thus going beyond the mere transposition of the Directive. Both the close bilateral contacts with Member States and the notification procedure gave the Commission services an opportunity to thoroughly analyse and comment on the draft laws prior to their final adoption. This appeared to be a successful means of improving the quality of national transpositions.

3.3. Follow-up to transposition

According to the Commission's preliminary evaluation, transposition of the Directive is, in general, satisfactory. Nevertheless, analysis of the final laws as adopted by the Member States will need to continue in 2004. The preliminary analysis indicates that one or two adopted laws contain problems related, in particular, to the transposition of the provisions concerning the liability of internet intermediaries. Before taking any formal steps, the Commission services intend to launch a dialogue with the Member States concerned to discuss the different options for solving these problems.

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26 Germany was the only Member State which had already set up a horizontal legal framework at the national level prior to the adoption of the Directive, by virtue of the Teleservices Act (Teledienstegesetz vom 22. Juli 1997).

27 Consistent with Article 9.

28 Spain, Austria, and Portugal (see the liability section below for further details).

29 Finland has a copyright-specific notice and take down procedure laid down by law (as does EEA-country Iceland).

30 Spain and Portugal.

31 France.

32 Spain.

33 France and Luxembourg.

34 E.g., Spain, Austria, Luxembourg, and EEA-country Liechtenstein excluded gambling from the scope of the Internal Market principle only, with the effect that other parts of the national transposing measures apply fully to the provision of online gambling services.

35 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, p. 37, as modified by Directive 98/48/EC, OJ L 217, 5.8.1998, p. 18.

4. APPLICATION OF THE DIRECTIVE

4.1. Internal Market

The borderless nature of e-commerce required that the legal framework put in place for its operation had to provide legal certainty to both business and consumers. This legal certainty is brought about, along with other flanking measures, by the core feature of the Directive, the Internal Market clause.

This provision takes the form of two complementary features: each Member State must ensure that a provider of information society services established on its territory complies with the national provisions applicable in that Member State which fall within the "coordinated field"[36], even when he provides services in another Member State; in turn, Member States may not, for reasons falling within the co-ordinated field, restrict the freedom to provide information society services from another Member State.

The Internal Market clause is subject to some limited derogations which are set out in the Annex to the Directive. There is also a case by case derogation to the Internal Market clause which Member States may use to take measures, such as sanctions or injunctions, to restrict the provision of a particular online service from another Member State where there is a need to protect certain identified interests, e.g. consumers.[37] Any measures taken by a Member State relying on this provision are subject to strict conditions under Article 3(4)-(6).

Contrary to the expectations of some Member States that they would have frequent need to use this derogation, to date this has not been the case. The Commission has received only 5 formal notifications, all coming from the same Member State and all dealing with essentially the same problem (i.e. the fraudulent use of premium rate numbers), two of which made use of the 'emergency' procedure provided for by Article 3(5).[38] In May 2003, the Commission issued a Communication on the application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive[39] providing guidance on the application of this case by case derogation in the area of financial services. This guidance followed expressions of concern by a number of Member States regarding a full application of the Internal Market clause to financial services pending closer convergence in certain financial services areas. The Communication explains in what limited circumstances[40] a Member State which considers that consumers on its territory should be protected against a particular online financial service, may take measures against that particular incoming financial service following notification to

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36 I.e., requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them, Art. 2(h).

37 The Article 3(4)-(6) derogation.

38 In a further case, the authorities of a Member State successfully took action to enforce their law transposing the Directive against a service provider established on their territory as a result of being requested to take appropriate action under national law by the authorities of another Member State. This action was taken pursuant to the co-operation obligation provided for by Article 3(4)(b), with the result that the problem was resolved without the Member State of destination needing to take any measures against the service provider.

39 Communication from the Commission to the Council, the European Parliament and the European Central Bank. Application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive, COM(2003) 259 final, 14.5.2003.

40 These circumstances are the same as for other information society services.

the Commission. However, to date there have been no notifications from Member States concerning the provision of financial services.[41]

4.2. Establishment and information requirements

Since Article 4(1) prohibits Member States from making the taking up and pursuit of the activity of an information society service provider subject to prior authorisation (or any other requirement having equivalent effect), no authorisation scheme exists in any of the Member States. Those Member States which had considered introducing such schemes in relation to all or some information society services refrained from doing so and in some cases abolished existing authorisation requirements. This has ensured that establishing as an information society service provider in a Member State is easy and not subject to bureaucratic hurdles.

By contrast, Article 5 ensures transparency and better information regarding a service provider's identity and place of establishment. It requires, amongst other things, that the name of the service provider, his geographic address, details permitting his rapid contact, and relevant entries in trade or similar registers, are provided. This Article has been transposed almost literally by most of the Member States and the EEA countries.

There seems to be a certain lack of awareness regarding these information requirements amongst internet operators in the EU. However, information society service providers in general responded promptly and positively when shortcomings in the fulfilment of the Directive's information requirements were pointed out to them.[42] Member States will need to increase awareness of these requirements in order to make sure that businesses adapt their websites accordingly.

4.3. Commercial communications

The ability of a firm to advertise its services or products on the internet has several important effects: it not only provides an excellent medium for firms of any size to make themselves known and provides a major source of revenue for many information society service providers, but importantly, also constitutes an excellent source of information for consumers.

The Directive supplements existing Directives in the field of consumer protection[43] by, for example, adding to the transparency requirements in Community law with which online

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41 In his report to the European Parliament on the Commission Communication on e-commerce and Financial services (COM(2001) 66 final, 7.2.2001), Christopher Huhne stressed the importance of a full application of the internal market clause to the area of financial services, given that area's particular suitability for cross border delivery, and also stressed the opportunities and benefits brought by the application of the Internal Market principle to e-commerce in Europe.

42 Results of a sampling of websites carried out by VZBV (Verbraucherzentrale Bundesverband - German association of consumer organisations) between October 2002 and February 2003, see http://www.vzbv.de/home/start/index.php?page=themen&bereichs_id=5&themen_id=20&mit_id=164&task=mit.
See also a study carried out by the European Consumer Centres, "Realities of the European online marketplace", available at http://www.iia.ie/downloads/eec_report.pdf, with a focus on the implementation of the information requirements pursuant to Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19.

43 E.g., Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1999, p. 19; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, OJ L 271, 9.10.2002, p. 16; Directive 84/450/EEC

commercial communications, including discounts, promotional offers, competitions and games, must comply. These requirements[44] provide additional protection to consumers and enhance their confidence in e-commerce. This will be further complemented by the proposed Regulation on Sales Promotions[45], the proposed Directive on Unfair Commercial Practices[46] and the proposed Regulation on Enforcement Cooperation[47]; In addition, the requirement to clearly identify commercial communications set out in Article 6(a) of the Directive is similar to the one applicable to broadcasting in Article 10(1) of the Television Without Frontiers Directive[48]. Virtually all Member States have transposed Article 6(a) quasi literally.[49]

The Directive left open to Member States the possibility of allowing or prohibiting unsolicited commercial communications via e-mail by information society service providers established on their territory and limited itself to requiring such unsolicited commercial communications to be clearly identified.

However, unsolicited commercial communications have increasingly become a problem for consumers and business alike. Therefore, the issue of unsolicited commercial communications via e-mail has now been dealt with at Community level by Directive 2002/58/EC on Privacy and Electronic Communications[50], which allows the sending of unsolicited commercial communications via e-mail only after prior consent by the recipient, when the recipient is a natural person, or, within an established commercial relationship. The Commission has, in addition, launched work on complementary measures, in particular as regards technical and international aspects of unsolicited commercial communications.[51] In the latter case, the Commission is focusing its efforts on international co-operation to fight unsolicited commercial communications, as most originate from outside the EU.

4.4. Regulated professions

The Directive obliges Member States to ensure that members of regulated professions may use commercial communications online, subject to compliance with professional rules in particular relating to the independence, honour and dignity of the profession. This means that members of regulated professions may provide information to clients via websites, which was

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of 10 September 1984 concerning misleading and comparative advertising, OJ L 250, 19.9.1984, p. 17, as amended by Directive 97/55/EC of the European Parliament and of the Council, OJ L 290, 23.10.1997, p. 18; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

44 see Articles 5 and 6.

45 COM(2001) 546 final, 2.10.2001, amended proposal COM(2002) 585 final, 25.10.2002.

46 COM(2003) 356 final, 18.6.2003.

47 COM(2003) 443 final, 18.7.2003.

48 Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23, amended by Directive 97/36/EC, OJ L 202, 30.7.1997, p. 60, and currently under review. http://europa.eu.int/comm/avpolicy/regul/twf/newint_en.htm.

49 Two Member States, France and Spain, have added an obligation to mention the word "publicity" in commercial communications

50 Directive 2002/58/EC of the European parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, p. 37. Article 7(2) of the Directive on electronic commerce, which applies to natural persons only, is now to be interpreted in the light of Directive 2002/58.

51 For more information see http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1015|0|RAPID&lg=EN&display=.

previously not possible in a number of Member States.[52] Legislation transposing the Directive in many Member States explicitly sets down the principle that online advertising is permitted for the regulated professions under the conditions set out at Article 8(1)[53].

Associations representing regulated professions at a European level have responded positively to the call launched by the Directive to develop codes of conduct relating to the use of commercial communications. The accountancy profession[54], lawyers[55], the doctors[56], pharmacists[57], and real estate agents[58] have established codes of conduct at a European level specifically designed to deal with online commercial communications. Some codes exclusively address online commercial communications, others cover a wider range of web-based services. A common thread to all codes is the emphasis on the obligation to provide accurate and truthful information and to refrain from advertising which is 'over commercial' so as to preserve the dignity and honourability of the profession.

4.5. Electronic contracting

The Directive contains three provisions on electronic contracts, the most important of which being the obligation on Member States to ensure that their legal system allows for contracts to be concluded electronically, see Article 9(1). This provision, in effect, required Member States to screen their national legislation to eliminate provisions which might hinder the electronic conclusion of contracts. Many Member States have introduced into their legislation a horizontal provision stipulating that contracts concluded by electronic means have the same legal validity as contracts concluded by more "traditional" means.[59] In particular, as regards requirements in national law according to which contracts have to be concluded "in writing", Member States' transposition legislation clearly states that electronic contracts fulfil such requirement.[60]

The provisions in the Directive are complemented by Directive 1999/93 on Electronic Signatures[61], which aims at ensuring the legal recognition of electronic signatures, thereby allowing for functional equivalence in the conclusion of contracts between traditional paper documentation and electronic communications. Essentially, Article 5(1) of Directive 1999/93 gives a "qualified electronic signature" attached to electronic data the same status as a hand-

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52 For a general overview on Member States' rules on advertising by regulated professions see the study undertaken by the Institut für höhere Studien, Wien for DG Competition, "Economic impact of regulation in the field of liberal professions in different Member States", available at http://europa.eu.int/comm/competition/publications/publications/#liberal.

53 Belgium, Greece, Ireland, Italy, Austria, and Portugal in its present draft.

54 Model Code of Conduct Governing On-line Commercial Communications by Member Bodies of the Federation des Expert Comptables Europeens (FEE) and their members, available at http://www.fee.be/secretariat/PDFs/Code%20of%20Conduct%20E-Commerce.pdf.

55 Electronic Communication and the Internet, available at http://www.ccbe.org/doc/En/e_com_en.pdf.

56 European Good Practice Guide for publicity relating to physicians' professional practice on the Net, available at http://www.cpme.be/adopted/CPME_AD_Brd_160302_6_EN_fr.pdf.

57 Les indications du GPUE concernant les services pharmaceutiques en ligne, available at http://www.pgeu.org/webdata/docs/01.06.20F%20PGEU11%20code%20de%20conduit.pdf.

58 Code of conduct for real estate professionals in the field of e-commerce, available at http://www.cepi.be.

59 Belgium, Germany, Spain, France, Luxemburg, Finland.

60 Moreover, the Directive has brought about changes in the national interpretation of 'in-writing' requirements, for instance in Germany as regards insurance contracts and the obligation that prior information be given in writing.

61 Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12.

written signature on a paper document. Article 5(2) of Directive 1999/93 provides that an electronic signature may not be denied legal effect and may not be considered inadmissible as evidence in legal proceedings solely on the ground that it is in electronic form or that it is not a "qualified" electronic signature.

Furthermore, Articles 10 and 11 of the Directive, concerning information to be provided about the electronic conclusion of contracts and the requirement to confirm receipt of an order are transposed almost literally in national legislation. Feedback from the Member States indicates that after some phasing in and initial difficulties, information society service providers quickly adapted their websites to comply with those requirements.[62]

Three Member States have included rules in their transposition legislation dealing with the actual moment of the conclusion of a contract.[63] In the other Member States this issue is governed by general contract law. So far, no case law has come to the attention of the Commission indicating difficulties created by the general contract law rules in determining the moment of conclusion of an electronic contract.

4.6. Liability of internet intermediaries

Articles 12-14 establish precisely defined limitations on the liability of internet intermediaries providing services consisting of mere conduit, caching and hosting. The limitations on liability in the Directive apply to certain clearly delimited activities carried out by internet intermediaries, rather than to categories of service providers or types of information.[64] The limitations on liability provided for by the Directive are established in a horizontal manner, meaning that they cover liability, both civil and criminal, for all types of illegal activities initiated by third parties.

The Directive does not affect the liability of the person who is at the source of the content nor does it affect the liability of intermediaries in cases which are not covered by the limitations defined in the Directive. Furthermore, the Directive does not affect the possibility of a national court or administrative authority to require a service provider to terminate or prevent an infringement.[65] These questions are subject to the national law of the Member States.

The limitations on the liability of intermediaries in the Directive were considered indispensable to ensuring both the provision of basic services which safeguard the continued

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62 A sampling of e-commerce websites taken in April 2002 in one Member State showed that already four out of five websites complied with the information requirements imposed by the national legislation although it only had been in force for two months. A sampling in another Member State between October 2002 and February 2003 revealed certain deficiencies in the information provided and in the availability of technical means to correct input errors. However, the service providers who were made aware of problems in their web appearance promptly reacted to adapt their websites to the legal requirements, see http://www.vzbv.de/home/start/index.php?page=themen&bereichs_id=5&themen_id=20&mit_id=164&task=mit.

63 France, Luxemburg and Portugal (the latter clarifying that the acknowledgement of receipt does not necessarily determine the moment of conclusion of the contract).

64 In particular, the limitation on liability for hosting in Article 14 covers different scenarios in which third party content is stored, apart from the hosting of web-sites, for example, also bulletin boards or 'chat-rooms'.

65 Nevertheless, a scenario in which large scale use is made of injunctions as part of a general policy to fight against illegal content rather than being used against a specific infringement, may raise certain concerns. For example, in 2002, the authorities of North Rhine-Westphalia ordered around 90 internet access providers to block access to a number of specified sites.

free flow of information in the network and the provision of a framework which allows the internet and e-commerce to develop. Different approaches in the legislation and case law emerging from Member States and the resulting legal uncertainty for cross-border activities gave rise to the risk of obstacles to the free provision of cross-border services. However, Community-level action was limited to what was deemed necessary to prevent such a risk materialising.[66]

Articles 12-14 provide, in a harmonised manner, for situations in which the intermediaries mentioned in these Articles cannot be held liable and Member States may not create additional conditions to be satisfied before an intermediary service provider can benefit from a limitation on liability. It appears that the Member States have, in general, transposed Articles 12-14 correctly. Many Member States opted to transpose Articles 12-14 quasi literally.[67]

In addition to the matters dealt with by Articles 12-14, some Member States[68] decided to provide for limitations on the liability of providers of hyperlinks and search engines.[69] This was motivated by the wish to create incentives for investment and innovation and enhance the development of e-commerce by providing additional legal clarity for service providers. Whilst it was not considered necessary to cover hyperlinks and search engines in the Directive, the Commission has encouraged Member States to further develop legal security for internet intermediaries. It is encouraging that recent case-law in the Member States recognizes the importance of linking and search engines to the functioning of the internet. In general, this case-law appears to be in line with the Internal Market objective to ensure the provision of basic intermediary services, which promotes the development of the internet and e-commerce. Consequently, this case-law does not appear to give rise to any Internal Market concerns[70].

In a few cases[71] national courts have already interpreted the Directive. However, in these cases, the national implementing measures of the Directive had not yet been adopted in the States concerned.

There is still very little practical experience on the application of Articles 12-14, but the feedback received so far from the Member States and interested parties has, in general, been positive. The approach taken in the Directive appears to have wide reaching support among stakeholders. In any case the Commission will, in accordance with Article 21, continue to

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66 These conclusions were based on careful analysis of existing rules and emerging case law, including a study on "Existing rules in Member States governing liability for information society services" commissioned by the Commission from Deloitte & Touche in 1998.

67 So far, the Commission services have identified, on a preliminary basis, 1-2 cases, in which the Member States appear not to have implemented correctly the limitations on liability, but the analysis of these cases continues.

68 Spain, Austria and EEA-State Liechtenstein and Portugal in its draft law.

69 Spain and Portugal have opted for the model of Article 14 both for search engines and hyperlinks, whereas Austria and Liechtenstein have opted for the model of Article 12 for search engines and of Article 14 for hyperlinks.

70 For example in France TGI Paris, référé, 12 mai 2003, Lorie c/M. G.S. et SA Wanadoo Portails, in Germany in the case Verlagsgruppe Handeslblatt v. Paperboy, aus dem Bundesgerichtshof (BGH), Urteil vom 17. Juli 2003 – I ZR 259/00.

71 Cases Deutsche Bahn v. XS4ALL, judgement by Gerechtshof te Amsterdam (Court of Appeals), 762/02 SKG, of 7.11.2002, and Deutsche Bahn v. Indymedia, judgement by Rechtbank Amsterdam (District Court), KG 02/1073, of 20.6.2002, in the Netherlands (judgements available at http://www.rechtspraak.nl); and Case Public Prosecutor v. Tele2 in the EEA-country Norway, judgement by Borgarting Lagmannsrett (Court of Appeals), 02-02539 M/01, of 27.6.2003. Tele2 was acquitted when the public prosecutor dropped charges against it.

monitor and rigorously analyse any new developments, including national legislation, case-law and administrative practices related to intermediary liability and will examine any future need to adapt the present framework in the light of these developments, for instance the need of additional limitations on liability for other activities such as the provision of hyperlinks and search engines.[72]

Article 15 prevents Member States from imposing on internet intermediaries, with respect to activities covered by Articles 12-14, a general obligation to monitor the information which they transmit or store or a general obligation to actively seek out facts or circumstances indicating illegal activities. This is important, as general monitoring of millions of sites and web pages would, in practical terms, be impossible and would result in disproportionate burdens on intermediaries and higher costs of access to basic services for users.[73] However, Article 15 does not prevent public authorities in the Member States from imposing a monitoring obligation in a specific, clearly defined individual case.

4.7. Notice and take down procedures

The conditions under which a hosting provider is exempted from liability, as set out at Article 14(1)(b) constitute the basis for the development of notice and take down procedures for illegal and harmful information[74] by stake-holders. Article 14 applies horizontally to all types of information. At the time when the Directive was adopted, it was decided that notice and take down procedures should not be regulated in the Directive itself. Instead Article 16 and Recital 40 expressly encourage self-regulation in this field.[75]

This approach has also been followed by the Member States in their national laws transposing the Directive. Out of those Member States which have transposed the Directive, only Finland has included a legal provision setting out a notice and take down procedure concerning copyright infringements only.[76] All the other Member States have left this issue to self-regulation[77].

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72 The approach of the Member States who opted to legislate on the hyperlinks and search engines does not seem to give rise to a risk of fragmentation of the Internal Market. The Commission is, however, actively following work in Member States relating to liability issues such as the fundamental work carried out by "Le Forum des droits sur l'Internet" in France, which has published recommendations on hyperlinks called "Hyperliens: Statut Juridique", published 3.3.2003, and "Quelle responsabilité pour les créateurs d'hyperliens vers des contenus illicites, published 23.10.2003, both available at http://www.foruminternet.org/recommandations/.

73 In this context, it is important to note that the reports and studies on the effectiveness of blocking and filtering applications appear to indicate that there is not yet any technology which could not be circumvented and provide full effectiveness in blocking or filtering illegal and harmful information whilst at the same time avoiding blocking entirely legal information resulting in violations of freedom of speech.

74 Mechanisms run by interested parties aimed at identifying illegal information hosted on the network and at facilitating its rapid removal.

75 The European Parliament, when adopting the Directive in 2000, invited the Commission to encourage the establishment of efficient notice and take down procedures by interested parties. European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council Directive on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market, 4.5.2000, OJ C 041, 7.2.2001, p. 38.

76 Amongst the EEA countries, Iceland has also set out a statutory notice and take down procedure.

77 Belgium has set up a horizontal co-regulatory procedure: Cooperation Protocol between the Belgian administration and the Belgian Association of internet Service Providers, http://www.ispa.be/en/c040201.html

In accordance with Article 21(2), which requires the Commission to analyse the need for proposals concerning notice and take down procedures, the Commission has actively encouraged stakeholders to develop notice and take down procedures and has systematically collected and analysed information about emerging procedures.[78] The Commission has participated in European and international fora where notice and take down procedures have been discussed: in particular, in the Global Business Dialogue[79], in the workshops organised by the European Parliamentarians Internet Group (e-Ping)[80], and in the Rights Watch Project[81]. It has also encouraged Member States to actively work with stakeholders and has cooperated with the Spanish presidency, which held discussions with Member States in the information society working group of the Council.

The Council Recommendation on the protection of minors and human dignity[82] adopted in 1998 is the first legal instrument at EU level concerning the content of audiovisual and information services made available on the internet. The Recommendation offers guidelines for the development of national self-regulation regarding the protection of minors and human dignity. In particular, it requests internet service providers to develop codes of good conduct so as to better apply current legislation.[83]

The Commission has also been working, in the context of its Safer Internet Action Plan, to combat illegal and harmful content on global networks.[84] Directive 2001/29/EC on copyright

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78 Different procedures have been analysed and several companies and organisations have been consulted in the Member States, e.g., the Complainants Bureau for Discrimination on the Internet in the Netherlands; XS4ALL (The Netherlands); Telefónica (Spain); Nokia (Finland); Telia (Sweden), BT online (UK); Internet Watch Foundation (UK); eBay; The European Internet Services Association (Euroispa); The European Federation for the Interactive Software Industry; and the Motion Pictures Association of America.

79 Work in the Global Business Dialogue (GBDe) has been followed closely by the Commission through contact with the principal companies involved. The GBDe issued a Recommendation in September 2000 on a specific model for a notice and take down procedure for intellectual property rights. With the encouragement of the Commission the GBDe created in 2002 a task force on Combating Harmful Internet Content with the purpose of addressing notice and take down for other harmful content. This task force issued a Recommendation on October 2002 containing suggestions address to internet intermediaries and to the public authorities on how to develop "processes for dealing with harmful content in the internet", http://www.gbde.org.

80 Http://www.eping.org.

81 The Rights Watch Project is a research project financed by the Commission through its 5th Framework Program for Research. The project was created in order to set up a fully functioning pilot that would facilitate a pan European self regulatory procedure for the removal of material infringing intellectual property rights. It has been the only initiative so far at European level on notice and take-down. Representatives from the Commission have been present all along the negotiations of the project and, in particular, by participating in the two fora that the project has held, where internet service providers, right holders and users associations were represented, http://www.rightswatch.com.

82 Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity (98/560/EC), OJ L 270, 7.10.1998, p. 48.

83 The implementation of the Recommendation was evaluated for the first time in 2000/2001.The report on the application of this Recommendation published in 2001 (COM(2001)106 final) showed that the application of the Recommendation was already then overall quite satisfactory. The Commission is working on a second report on the implementation of the Recommendation, whose adoption is foreseen at the end of 2003 on the basis of a questionnaire, which was sent to both the Member States and the acceding States. The objective of the new report is to establish what progress has been made in comparison to the situation in 2000, when the data was collected for the first application report.

84 Safer Internet Action Plan, OJ L 33, 6.2.1999, p. 1, and its follow-up , Decision No 1151/2003/EC of 16 June 2003, OJ L 162, 1.7.2003, p.1.

and related rights[85] requires Member States to ensure that rightholders are in a position to apply for injunctions, under certain conditions, against intermediaries whose services are used by a third party to infringe a copyright or related right. The Commission also presented a proposal on the enforcement of intellectual property rights, which, amongst other issues, provides for appropriate remedies with respect to internet-related infringements of intellectual property, including injunctive relief.[86]

Intermediary service providers have, themselves, in cooperation with national authorities as well as with other stakeholders, such as IP rightholders, been active in fighting against illegal activity on the internet, whilst also seeking to ensure a balance between the legitimate interests of users, other interested parties, and the freedom of speech. In this regard, intermediary service providers have been instrumental in the production of national codes of conduct for internet service providers[87], some of which have also been notified to the Commission[88].

Analysis of work on notice and take down procedures shows that though a consensus is still some way off, agreement would appear to have been reached among stake holders as regards the essential elements which should be taken into consideration. Although some further work among stake holders seems to be necessary to clarify a number of outstanding issues, the Commission at this stage does not see any need for a legislative initiative.

4.8. Codes of conduct and out-of-court dispute settlement

The Directive calls on trade, professional, and consumer associations to contribute to developing a reliable and flexible framework for e-commerce by drawing up codes of conduct. Very often such codes are associated with what are termed 'trustmark schemes' or 'labels'.[89] Several associations have established sector specific codes and trustmark schemes at European level[90] and many more codes exist at a national level[91]. However, it appears that

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85 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10

86 Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, COM(2003) 46 final, 30.1.2003. Article 2 of the proposed Directive states that it shall not affect Directive 2000/31/EC.

87 EuroISPA's members' codes of conduct, available at http://www.euroispa.org.

88 For example the Code of Practice and Ethics by the Internet Service Providers Association of Ireland, http://www.ispai.ie.

89 BEUC, the European Consumer Organisation, and UNICE, the European Industry and Employer's association, reached an agreement on principles for such trustmark schemes which takes up many of the requirements set out in the Directive and deals with codes of conduct regarding information to be provided, procedures for placing of orders, and the like. The agreement can be found at: http://212.3.246.118/1/PEDMMGECEFLNDAPDCIBCDIKLPDBY9DAWW69LTE4Q/UNICE/docs/DLS/2002-03813-E.pdf.
The European Commission had initiated and financed work to develop a horizontal European trustmark scheme incorporating a code of conduct, called "Webtrader", a project co-financed by DG Enterprise from 2000 until February 2003, see http://europa.eu.int/comm/enterprise/ict/policy/webtrader.htm. However, no agreement on a horizontal, cross-sectorial code could be reached between the participants.

90 E.g., for the insurance sector: http://www.cea.assur.org/cea/publ/download/article149.pdf;
for direct marketing: http://www.fedma.org/img/db/Code_of_conduct_for_e-commerce.pdf; and for e-commerce retailers: http://www.euro-label.com/euro-label/ControllerServlet.

91 E.g., "Chamber-Trust + Web-Trader" in Belgium (http://194.78.225.199/fr/index.html); "TrustedShops" in Germany (http://www.trustedshops.de/de/home); "l@belsite" in France (http://www.labelsite.org); "e-commerce Gütezeichen" in Austria (http://www.guetezeichen.at); "bbbonline" in the UK (http://www.bbbonline.org).

after an initial boom in the establishment of trustmarks and labels immediately following adoption of the Directive in 2000 and 2001, activity in this area slowed down.[92] The Commission therefore appeals to business and consumer organisations as well as to Member States to continue to actively support and promote initiatives in this area.

In B2B e-commerce, the Commission has already established an expert group to promote the elaboration of codes of conduct in B2B internet trading platforms. The expert group has prepared a report with a checklist for the assessment of such codes.[93]

The increase in opportunities and geographical reach brought about by e-commerce also gives rise to a risk of cross border disputes between trading partners. It is in such cases crucial that access to rapid and flexible out-of-court dispute resolution schemes exists. For this reason, the Directive both obliges Member States to allow for the development of out-of-court dispute settlement mechanisms by electronic means and encourages the development of such schemes. In recent years a wealth of out of court dispute resolution initiatives, often in connection with codes of conduct, has appeared.[94] The Commission has supported the development of such schemes and continues to do so.[95]

4.9. National e-commerce contact points

Pursuant to Article 19, since transposition of the Directive the Commission has worked actively together with the Member States to ensure the setting up of national contact points for e-commerce. These contact points will improve the cooperation between the Member States (Article 19(2) regarding contact points for cooperation between the Member States) and ensure that consumers and business have access to general information on e-commerce issues relevant to the application of the Directive and details of authorities and other bodies providing further information and assistance, (Article 19(4) regarding contact points for consumers and business). A list of these contact points and contact details are available on the e-commerce website of the Internal Market Directorate General.[96]

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92 This might also be a direct consequence of the general downturn in the e-economy.

93 Report of the Expert Group on B2B Internet trading platforms. Final Report (http://europa.eu.int/comm/enterprise/ict/policy/b2b/wshop/fin-report.pdf). To further promote the work of the expert group, the Commission will prepare a Communication on fair trade in B2B.

94 See, e.g., the overview by the Centre for Socio-Legal Studies at Oxford University, established with funding from the European Commission under the Internet Action Plan at http://www.selfregulation.info/cocon/coc-reviss03-dwc-020510.htm. See also more generally on ADR the Commission's Green paper on alternative dispute resolution in civil and commercial law, COM(2002) 196 final, 19.4.2002, at http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf.

95 ECODIR, for instance, is a pilot project carried out by a consortium of university partners and financed by the Commission. Until June 2003 it has provided an easily accessible online system for the resolution of disputes between consumers and e-commerce businesses. It is now in the process of being evaluated with a view to its continuation. See http://www.ecodir.org/about_us/index.htm. The IST project (IST-2000-25464) "E-Arbitration" (Electronic Arbitration Tribunal) provides an alternative dispute resolution system for SMEs. It defines the technological requirements, the necessary infrastructure and the regulatory framework for establishing and coordinating an internationally distributed Arbitration Tribunal using networked computers and intelligent multi-agent systems as their primary means of communication. Project URL: httm://www.e-global.es/arbitration/
With the initiatives EEJ NET and FIN-Net, although not limited to e-commerce, the Commission, together with Member States, has established out-of-court complaints networks to help business and consumers resolve disputes in the Internal Market quickly and efficiently. More information can be found at EEJ-Net's website http://www.eejnet.org and at FIN-Net's website http://finnet.jrc.it.

96 http://europa.eu.int/comm/internal_market/en/ecommerce/index.htm.

5. INTERNATIONAL ASPECTS

5.1. International developments in e-commerce

Due to the very nature of e-commerce and the internet, which do not recognise national frontiers, there is an obvious need for the development of some framework at international level. In this context some of the solutions adopted in the Directive, such as the limitations on liability for internet intermediaries, can serve as a model. The Commission has actively worked to raise awareness of the EU's approach and feedback received has been very positive.[97]

The economic downturn experienced in recent years in the area of e-commerce and the "new economy" has obviously had repercussions on a global scale and led to a stagnation in discussions. With the recent recovery of e-commerce a revived interest in international dialogue and cooperation can be expected. The Commission will continue and, where possible, increase its involvement in various multilateral and bilateral fora and will work towards a global e-business friendly environment.

Among the international fora in which the Commission is present are the World Trade Organization's work programme on e-commerce[98], the Organisation for Economic Co-operation and Development's (OECD) work on broadband issues and consumer protection in cross-border commerce, particularly as regards the internet[99], the Council of Europe's work on information and cooperation on information society issues[100], as well as its work on cybercrime, impact of the new technologies on human rights, conditional access services, and data protection[101], the G8's work on safety and security on the internet and the World Intellectual Property Organisation's (WIPO) work on the protection of intellectual property rights on the internet[102]. Work on electronic contracts is furthermore carried out by the United Nations Commission on International Trade Law (UNCITRAL)[103]. Moreover, the

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97 An example of successful "model character" of the Directive is the South African Electronic Communications and Transactions Act 25 of 2002, which closely follows the Directive as regards intermediary liability (Articles 12-15), Government Gazette of the Republic of South Africa, Vol. 446, Cape Town, 2 August 2002, No. 23708.

98 In 1998, the WTO had already developed a Work Programme on Electronic Commerce (available at http://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm), although the follow-up to the Programme did not fulfil all the expectations it had raised. At present, specific e-commerce issues are discussed at 'dedicated meetings' of the General Council, focusing on the question of how to classify electronic deliveries. The European Commission along with the EU Member States and many other WTO members promotes the view that electronic deliveries constitute services and thus come under the existing GATS regime.

99 See http://www.oecd.org, topic "Electronic commerce".

100 On 4.10.2001 the Council of Europe adopted the Convention 180 on information and legal cooperation on Information Society services, modelled on Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ L 217, 5.8.1998, p. 18, its definition of information society services being exactly the one provided in the Directive. The Commission has formally proposed to the EU Council to adhere to the Convention on behalf of the EU, COM(2003) 398 final, 7.7.2003.

101 See http://www.coe.int, of particular interest is the Convention on Cybercrime, ETS no. 185, which is available at http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm.

102 See http://ecommerce.wipo.int/primer/index.html.

103 See http://www.uncitral.org. UNCITRAL has already done fundamental work in e-commerce by adopting, in 1996, a Model Law on Electronic Commerce with Guide to Enactment and in 2001 a Model Law on Electronic Signatures, which are frequently referred to in international contexts.

Commission is actively involved in cooperation in the context of the Asia-Europe Meeting[104] Trade Facilitation Action Plan on e-commerce[105]. This involves recommendations on e-commerce regulation adopted in September 2002.[106]

The importance of non-governmental fora such as the Global Business Dialogue in e-commerce (GBDe), Transatlantic Consumer Dialogue (TACD), and Transatlantic Business Dialogue (TABD) in e-commerce should not be underestimated.[107] These fora issue recommendations to governments and develop standards for business on issues such as intermediary liability (GBDe[108]), consumer protection in e-commerce (TACD[109]) and digital trade (TABD[110]). Such initiatives are of particular importance in the quickly evolving and innovative area of e-commerce as they can address the latest developments with greater rapidity and flexibility than governmental fora.

Finally, the Commission is involved in a number of bilateral regulatory dialogues on e-commerce related to information society issues, in order to promote the Directive's regulatory approach and to work towards consistency at international level. These bilateral dialogues include the EU/US Information Society Dialogue, the cooperation with Canada in the context of Canada-EU Trade and Investment Sub-Committee (TISC), including an e-commerce work plan in 1999, the EU-Japan dialogue, the EU-Mercosur regulatory dialogue and the dialogue with the Mediterranean countries.

5.2. Enlargement

A number of accession countries have already transposed the Directive[111], although in some cases only partially. Out of the three[112] candidate countries only Romania has transposed the Directive. The Commission is actively working with the remaining countries to ensure transposition in due course.

6. EVALUATING THE BENEFITS OF THE DIRECTIVE

Given the lack of experience with the Directive it is difficult to evaluate its impact. When doing so, it is important to note that information society services are not limited to the mere buying and selling of products and services online. They also comprise online commercial communications, online information and entertainment, provision of internet access services, e-mail, search engines, etc. So far, the only complaints which the Commission services have received from companies engaged in cross-border online activities concern matters excluded from the scope of application of the Directive or from the application of the Internal Market clause, such as online gambling[113]. This seems to indicate that the Directive has otherwise

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104 Grouping the EU and 10 Asian ASEM countries.

105 http://www.ktm.fi/eng/news/asem2002ecom/.

106 http://www.congrex.fi/asem2002ecom/

107 http://www.gbde.org, http://www.tacd.org, and http://www.tabd.org.

108 Paris recommendation on liability, 13.9.1999, Miami Model IPR-specific notice and take down procedure, 26.10.2000.

109 In particular doc. no ECOM-27-02 "Resolution on children and e-commerce" and doc no. Internet-20-02 "Resolution on protecting consumers from fraud and serious deception across borders".

110 Report of the TABD meeting in Chicago in 2002, http://www.tabd.org/recommendations/Chicago02.pdf.

111 Lithuania, Hungary, Malta, Poland, Slovenia.

112 Bulgaria, Romania, Turkey.

113 Service providers established in one Member State offering online sports betting are required by other Member States to bar access by their citizen's to those online services.

succeeded in providing an adequate legal framework for information society services in the Internal Market.

The Directive appears to have been successful in reducing court proceedings and hence legal uncertainty, in particular as regards liability of internet intermediaries. Emerging disparities in Member States' case-law was one of the driving forces, which lead the Commission to propose the Directive. After the adoption of the Directive, no such case-law has come to the attention of the Commission. Together with the guarantee that internet intermediaries should not be subject to burdensome and costly monitoring obligations, this seems to have contributed to ensuring low-cost provision of basic intermediary services.

When evaluating the effects of the Directive, there are certain indicators which are of particular interest and which have not yet been used in the present measurements of internet usage and online activities, which are often wrongly limited to online sales. For instance, the percentage of internet users searching for online information prior to offline sales, the number of cross-border online information searches as a percentage of total online information searches, productivity gains resulting from lower information search costs in the B2B field, and expenditure by enterprises on online advertising.

The completion of the transposition of the Directive in all the Member States is expected by the end of 2003, two years after the deadline of January 2002 set in the Directive. This will allow evaluation of the impact of the Directive in more detail, in line with the above-mentioned indicators in the second report on the application of the Directive due in 2005.

7. ACTION PLAN FOR THE FOLLOW-UP OF THE DIRECTIVE

7.1. Ensure the correct application of the Directive

The Commission will continue to closely monitor application of the Directive in the Member States, including follow-up and analysis of any relevant case-law, administrative decisions and complaints from citizens and business. Bilateral contacts, which were successfully used during the transposition of the Directive, will be maintained with the Member States, including Accession and Candidate Countries, to address specific problems and ensure continuous exchange of information. The notification procedure pursuant to Directive 98/34/EC[114], which was instrumental in ensuring the correct and consistent transposition of the Directive, will be an important tool in ensuring coherence between the Directive and new national legislative initiatives which affect information society services.

7.2. Enhance administrative cooperation between Member States

After assisting in the setting-up of contact points for administrative cooperation between the Member States, the Commission will focus on ensuring the practical functioning of administrative cooperation and the continuous exchange of information between both the Commission and the Member States and between the Member States themselves.

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[114] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ L 217, 5.8.1998, p. 18.

7.3. Raise information and awareness with business and citizens

After ensuring that Member States have nominated contact points for business and citizens pursuant to Article 19(4), the Commission will focus on enhancing close links and a continuous flow of information between national contact points and business and citizens, in particular, including information on administrative and judicial decisions and cases of out of court dispute resolution. In this context, special attention will be given to the correct application of the information requirements provided by the Directive and to the dissemination of information concerning applicable codes of conduct and their enforcement.

The Commission is already funding the establishment and operation of an online information system, managed by a European network of Euro Info Centres, to raise awareness among SME's on the legal aspects of e-business and to collect feedback on the practical problems enterprises are facing when doing business electronically (ELEAS project).[115] This information system will be extended to the Accession and Candidate countries and will become operational in early 2004.

7.4. Monitor policy developments and identify areas for additional action

In a number of Member States new regulatory initiatives are under way in areas such as online gambling, including online sports betting, e-pharmacies, or the protection of minors. This gives rise to the risk of regulatory fragmentation and/or distortions of competition. The Commission will closely monitor these policy developments in order to identify possible needs for Community action, which will be considered in the second report on the Directive in 2005.

As far as online gambling is concerned, which is currently outside of the scope of the Directive and, in relation to which, the Commission has received a number of complaints concerning cross-border activities[116], the Commission will initiate the appropriate action to deal with these complaints and, in addition, launch a study to provide the information required to examine the need for and scope of a possible new Community initiative. Furthermore, with respect to insurance, which is currently outside of the scope of the Internal Market clause of the Directive, the Commission has launched work with Member States and interested parties in order to explore possible ways of bringing certain insurance activities in line with the Internal Market clause.

The Commission continues to monitor closely technological developments relevant to information society services in order to ensure that the regulatory framework provides the best possible environment for further development of e-commerce.

7.5. Strengthen international cooperation and regulatory dialogue

Given the cross-border nature of e-commerce and the resulting need for international solutions, the Commission will strengthen its regulatory dialogue with major trading partners and its presence in international fora. Particular attention will be given to the creation of coherent rules at international level on subjects such as liability of internet intermediaries,

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115 http://ebusinesslex.net

116 Regarding Denmark, Germany, Italy, and the Netherlands, where authorities demanded online gambling service providers from other Member States to block access to their websites for citizens living in those states.

including notice and take down procedures for illegal content, electronic contracts, information requirements, and the promotion of out of court dispute resolution.

8. CONCLUSIONS

With the new legal framework for e-commerce created by the Directive being in the process of being put into place in all Member States, it is now necessary to collect information and gain experience on how the new framework works in practice.

To this end, the Commission has launched an open consultation on legal problems in e-business with a view to collecting feedback and practical experience from the market and to identifying remaining practical barriers or new legal problems encountered by enterprises when doing e-business.[117]

The analysis to date has not shown a need to adapt the Directive as yet and, given the lack of practical experience, a revision of the Directive would in any event be premature. However, e-commerce is a quickly evolving area, in which legal, technical, and economic developments need to be constantly monitored and analysed.

This report is a first stage in a continuous process to ensure that Europe stays in the frontline of development and provides the best possible environment for e-commerce with a maximum level of legal certainty both for business and consumers whilst ensuring a minimum of burdens for business and Member States.

The Commission trusts that this report will be of assistance to Member States in ensuring the correct application of the Directive and to citizens and business in informing them of the opportunities and safeguards provided by the new legal framework. The Commission welcomes feedback on the findings of this report in view of its task of ensuring continuous monitoring of the application of the Directive. [118]

The results of the Action Plan in this report will be made public. It will form the basis for the second report on the application of the Directive due in 2005, which will also address possible needs for adaptation of the Directive.

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117 http://europe.eu.int/yourvoice/consultations/index_en.htm. The consultation was open until 10 November 2003. The Commission services will analyse the results of the consultation in a Commission staff working document by January/February 2004 and will discuss them with all relevant stakeholders at a high-level conference to be organised in April 2004, as foreseen in the e-Europe 2005 Action Plan.

118 http://europa.eu.int/comm/internal_market/en/ecommerce/index.htm.

ANNEX

TRANSPOSITION OF DIRECTIVE 2000/31/EC

1. Member States:

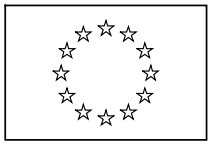
Belgique/ België	Loi sur certains aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution – 11 mars 2003/Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappif als bedoeld in artikel 77 van de Grondwet – 11 maart 2003 Loi sur certains aspects juridiques des services de la société de l'information – 11 mars 2003/Wet betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij – 11 maart 2003 Moniteur belge du 17.3.2003 p. 12960 et 12963. http://www.moniteur.be/index_fr.htm http://www.moniteur.be/index_nl.htm
Danmark	Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel; LOV nr 227 af 22/04/2002 (Gældende) http://www.retsinfo.dk/_GETDOC_/ACCN/A20020022730-REGL
Deutschland	Gezetz über rechtliche Rahmenbedingungen für den Elektronischen Geschäftsverkehr (Elektronischer Geschäftsverkehr-Gesetz (EGG) Bundesgesetzblatt (BGBl) 2001 Teil I Nr. 70 vom 20. Dezember 2001, S. 3721 http://www.iid.de/iukdg/EGG/index.html Mediendienste-Staatsvertrag in der Fassung des sechsten Rundfunkänderungsstaatsvertrags in Kraft seit 1. Juli 2002, u.a. im Gesetz- und Verordnungsblatt für das Land Rheinland-Pfalz vom 12. Juni 2002, S. 255
Ελλάδα	ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ'ΑΡΙΘ. 131 Προσαρμογή στην Οδηγία 2000/31 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου σχετικά με ορισμένες νομικές πτυχές των υπηρεσιών της κοινωνίας της πληροφορίας, ιδίως του ηλεκτρονικού εμπορίου, στην εσωτερική αγορά. (Οδηγία για το ηλεκτρονικό εμπόριο). Αρ. Φύλλου 116, 16 Μαΐου 2003, σελ. 1747 [Presidential Decree n°. 131 transposing Directive 2000/31 of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) Official Journal n° 116 of 16 May 2003, p. 1747]

España	Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico BOE n° 166, 12.7.2002, p. 25388 http://www.setsi.mcyt.es
France	Transposition not yet completed. Draft law notified to the Commission under the Transparency Directive (Directive 98/34). Notification n° 2003/0127 available on the Commission's web-site http://www.europa.eu.int/comm/enterprise/tris
Ireland	European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68/2003 of 24.2.2003) http://www.entemp.ie/ecd/ebusinfo.htm
Italia	Decreto legislativo 9/04/2003, n. 70 Supplemento ordinario alla Gazzetta Ufficiale della Repubblica Italiana – Serie Generale – n. 87 del 14/04/2003 http://www.senato.it/parlam/leggi/deleghe/03070dl.htm
Luxembourg	Loi du 14 août 2000 relative au commerce électronique modifiant le code civil, le nouveau code de procédure civile, le code de commerce, le code pénal et transposant la directive 1999/93 relative à un cadre communautaire pour les signatures électroniques, la directive relative à certains aspects juridiques des services de la société de l'information, certaines dispositions de la directive 97/7/CEE concernant la vente à distance des biens et des services autres que les services financiers Memorial, Journal Officiel du Grand-Duché de Luxembourg, A – N° 96 du 8 septembre 2000, p. 2176 http://www.etat.lu/memorial/memorial/a/2000/a0960809.pdf
Nederland	Transposition not yet completed.
Österreich	152. Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt (E-Commerce-Gesetz – ECG) und das Signaturgesetz sowie die Zivilprozessordnung geändert werden Bundesgesetzblatt 2001 vom 21. Dezember 2001, Teil I S. 1977. http://bgbl.wzo.at

Portugal	Transposition not yet completed. Draft law notified to the Commission under the Transparency Directive (Directive 98/34). Notification n° 2003/0134 available on the Commission's web-site http://www.europa.eu.int/comm/enterprise/tris
Suomi/Finland	Laki N:o 458 tietoyhteiskunnan palvelujen tarjoamisesta, 5.6.2002. Suomen Säädöskokoelma N:o 458, 11.6.2002, p. 3039. http://www.finlex.fi/pdf/sk/02/vihko072.pdf In addition, Finland amended three other acts as part of the transposition. These (Suomen Säädöskokoelma Nos. 459-61) are also available via the enclosed link.
Sverige	Lag om elektronisk handel och andra informationssamhällets tjänster av den 6 juni 2002; SFS 2002:562 av den 14 juni 2002 Electronic version accessible via http://www.regeringen.se, but a direct link is not available.
United Kingdom	The Electronic Commerce (EC Directive) Regulations 2002 SI n° 2013 of 21.8.2002 http://www.legislation.hmso.gov.uk/si/si2002/20022013.htm For separate implementation in financial services sector: http://www.hm-treasury.gov.uk/Documents/Financial_Services/Regulating_Financial_Services/fin_rsf_edirec.cfm?

2. Countries belonging to the European Economic Area:

Island	Lög um rafræn viðskipti og aðra rafræna þjónustu 2002 nr. 30 16. apríl. Lagasafn. Uppfært til október 2002. Útgáfa 127B. Prenta í tveimur dálkum. (Act No 30/2002 on Electronic Commerce and other Electronic Service) http://www.althingi.is/lagas/127b/2002030.html
Liechstenstein	Gesetz vom 16. April 2003 über den elektronischen Geschäftsverkehr (E-Commerce-Gesetz; ECG) Liechtensteinisches Landesgesetzblatt 2003, Nr. 133 am 12. Juni 2003
Norge	*L*ov 2003-05-23 nr 35: Lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven) Publisert: I 2003 hefte 7. *http://www.lovdata.no/all/hl-20030523-035.html*



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN CENTRAL BANK

APPLICATION TO FINANCIAL SERVICES OF ARTICLE 3(4) TO (6) OF THE ELECTRONIC COMMERCE DIRECTIVE

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN CENTRAL BANK

APPLICATION TO FINANCIAL SERVICES OF ARTICLE 3(4) TO (6) OF THE ELECTRONIC COMMERCE DIRECTIVE

1. INTRODUCTION

The purpose of this communication is to describe the mechanisms introduced in the specific area of financial services by Article 3(4) to (6) of the Electronic Commerce Directive.[1]

In the case of financial services, the communication is justified by the fact that, since the adoption of the Electronic Commerce Directive and, in particular, during the negotiations on the Directive on the distance selling of financial services, a number of Member States have expressed misgivings regarding full application of the "internal market" clause in the area of financial services. They have taken the view that, pending closer convergence in certain areas (such as the rules of conduct for investment services or non-harmonised funds), they should still be able to impose some of their rules on input services provided electronically despite the existence of the Electronic Commerce Directive. A transitional period of this kind, which would have been tantamount to an albeit temporary derogation from the Directive, was rejected by the Commission and by a majority of the Member States.

The Commission had stressed at the time that Article 3(4), (5) and (6) of the Electronic Commerce Directive provides sufficient safeguards for Member States wishing to take measures on a case-by-case basis against a service provider that is prejudicing one of the objectives of general interest specified in Article 3(4)(a)(i) of the Directive or presenting a serious risk of prejudice to such an objective.

This communication sets out to provide assistance to Member States who may wish to avail themselves of these mechanisms. In no way does it constitute an interpretative document. Nor does it systematically cover all the aspects of Article 3(4) to (6) of the Directive, addressing only those aspects where the Commission has noted that there is a need for some explanation and assistance.

This communication does not impose any legal obligation on Member States. It does not prejudge the position that the Commission might decide to take on the same matters if developments, including Court rulings, were to lead it to revise some of the views expressed here.

Together with the Member States, the Commission will also continue to identify the areas in which closer convergence of national rules might be necessary. In this connection, it will examine the harmonisation needs in certain sectors where it transpired that national rules still diverged, creating potential problems for the free movement of services and consumer protection (e.g. in the case of certain non-harmonised investment funds).

The Commission is aware of the fact that not all the rulings referred to in this Communication are related to the area of financial services and that none refer to disputes concerning electronic commerce. Nevertheless, on the basis that the Court of Justice regularly works

[1] European Parliament and Council Directive 2000/31/EC of 8 June 2000 (OJ L 178, 17.7.2000, p. 1).

according to analogies and strictly speaking has no “sectoral” case law, the Commission is of the opinion that it is both possible and accurate to base the following analysis on existing case law.

However it certainly cannot be ruled out that the Court will develop case law in the specific area of E-Commerce. Such case law could confirm or contradict existing case law. This risk is inherent in the current exercise.

2. ANALYSIS OF ARTICLE 3(4) TO (6)

The Electronic Commerce Directive stipulates that each Member State must ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

It also stipulates that Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State

- However, it lays down certain derogations.

First, the annex to the Directive contains a number of derogations from the "internal market" clause. These derogations reproduce a number of the provisions laid down in the Directives on insurance,[2] advertising in the case of UCITS[3] and the issue of electronic money by institutions not in possession of a European passport.[4]

Second, there are a number of other general derogations that could be particularly relevant to financial services. They relate to the freedom of the parties to choose the law applicable to their contract, the contractual obligations set out in contracts concluded with consumers, etc.

Lastly, Article 3(4), (5) and (6) of the Directive allows Member States to take measures such as sanctions or injunctions that may restrict the provision of on-line services from other Member States. These measures are subject to strict conditions.

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2 Article 30 and Title IV of Directive 92/49/EEC (OJ L 311, 14.11.1997, p. 42), Title IV of Directive 92/96/EEC (OJ L 311, 14.11.1997, p. 43), Articles 7 and 8 of Directive 88/357/EEC (OJ L 172, 4.7.1988, p. 1) and Article 4 of Directive 90/619/EEC (OJ L 330, 29.11.1990, pp. 50-61).

3 Article 44(2) of Directive 85/611/EEC (OJ L 375, 31.12.1985, pp. 3-18).

4 Institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC (OJ L 275, 27.10.2000, pp. 39-43).

The relevant provisions of the Directive read as follows:

"4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

- the protection of public health,

- public security, including the safeguarding of national security and defence,

- the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question."

2.1. ANALYSIS OF ARTICLE 3(4)

2.1.1. Areas covered by Article 3(4)

Article 3(4) does not cover all the reasons identified by the Court in the context of Articles 49 and 28 of the Treaty as justifying a restriction on the ground of defending the general interest. Except for the grounds stipulated in Article 46 of the Treaty (public policy, public security and public health), it identifies only one of the objectives that could, according to the Court, justify infringements of the free movement of services. This objective is the protection of consumers, including investors.

The exhaustive nature of this list means that some of the objectives recognised by the Court as being in the general interest, such as protecting the good reputation of the financial sector,[5] cannot provide justification for measures taken under Article 34, except in cases where such measures are purportedly designed to protect the consumer.

2.1.2. Concept of "given information society service"

A "given" service is taken to mean here that the Member State of destination may not, under Article 3(4), take general measures in respect of a category of financial services such as investment funds or loans.

To be covered by Article 3(4), the measure must, therefore, be taken on a case-by-case basis against a specific financial service provided by a given operator.

For example, it could be a measure such as a warning or a penalty payment taken by a country of destination against a bank proposing from its place of establishment in another EU country non-harmonised investment services to residents of that country. Such measures could, for instance, be taken on the ground that the bank was not complying with certain rules of conduct designed to protect consumers in the country of destination.

However, a Member State could not, on the basis of Article 3(4), decide that its entire legislation on, say, non-harmonised investment funds was applicable in a general and horizontal fashion to all services accessible to its residents.

2.1.3. Protection of "public policy"

The reasons given in the paragraph of the Directive concerning public policy are intended as examples.

In the area of financial services, it is highly unlikely on the face of it that such services can prejudice public policy, in the Community meaning of the term. This concept must be viewed in the light of the Court of Justice's relevant case law, which states that it must be interpreted in a very restrictive manner.[6]

The Court has, for example, consistently held that economic objectives cannot constitute grounds of public policy within the meaning of Article 46 of the Treaty.[7]

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5 Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

6 Case C-348/96 *Calfa* [1999] ECR I-11.

7 Case 352/85 *Bond van Adverteerders* [1988] ECR 2085.

For the Court, *"recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society."*[8]

With the exception of services provided illegally in the context of the financing of criminal activities (including terrorism) and money laundering, it is difficult to see which financial services could meet this judicial condition of a "serious threat affecting one of the fundamental interests of society".

2.1.4. Protection of consumers, including investors

The Electronic Commerce Directive defines a consumer as *"any natural person who is acting for purposes which are outside his or her trade, business or profession"*.

It is thus clear from the text that a legal person cannot be regarded as a "consumer" within the meaning of the Directive.

By contrast, investors are not defined. However, it is clear from the wording of Article 3(4) that only "investors" caught by the definition of "consumer" are concerned. Any measure concerning, for example, investors who were legal persons or individuals acting within their profession would not be covered by Article 3(4).[9]

The Court has ruled that both insurance[10] and banking[11] are particularly sensitive sectors from the point of view of consumer protection.

2.1.5. Concept of "serious and grave" risk

The measures must be taken against a given service that effectively prejudices one of the objectives spelt out or presents a serious and grave risk of so doing.

This wording allows the Member State in which the service is provided to take not only punitive but also preventive measures where there is a serious and grave risk to those objectives.

2.1.6. Notification conditions

There are three notification conditions:

– the Member State taking the measures must have asked the Member State in which the provider is established to take measures;

– the latter must not have taken any measures or any measures it did take have been inadequate;

– the Member State taking the measures must have notified the Commission and the Member State in which the provider is established of its intention to take such measures.

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8 Case 30/77 *Bouchereau* [1977] ECR 1999.

9 Joined Cases C-541/99 and C-542/99 *Idealservice* [2001] ECR I-9049.

10 Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

11 Case C-222/95 *Parodi* [1997] ECR I-3899.

These three conditions are perfectly clear.

The first condition requires the Member State in which the provider is established to have been informed and put in a position to resolve the problem at its own level. The second condition is that, in the view of the Member State of destination, it has not done this adequately. The third condition requires prior notification of the Commission in order for it to be able to exercise the powers enjoyed by it under paragraph 6 and of the Member State of origin. The Directive does not specify any precise deadline by which the Member State of the provider must act following the notification received from the Member State in which the service is provided. However, Article 19(3) of the Directive stipulates that Member States must, "*as quickly as possible*", provide the assistance and information requested by other Member States or by the Commission.

It is also clear from Article 3(4)(b) of the Directive that the notification requirement in no way deprives the Member State in question of the right to institute court proceedings, including preliminary proceedings, and to carry out acts in the framework of a criminal investigation.

Lastly, it should be pointed out that the dialogue with the Member State in which the provider is established and notification of the Commission are matters for the State's central administration and not, for example, the courts.

2.1.7. Consequences of a lack of notification

If the Commission and the Member State of origin have not been notified in advance, the Commission could initiate proceedings against the Member State taking the measure for failure to comply with its obligations. In addition, since they are sufficiently precise and unconditional, the provisions of the Directive requiring Member States to give notification could presumably be relied upon before a national court. Accordingly, a bank could bring a matter before a national court on the ground that the measures taken against it in a Member State on the basis of Article 3(4) were not notified in advance.

2.2. ANALYSIS OF ARTICLE 3(6)

Article 3(6) requires the Commission to examine the compatibility of measures notified under paragraph 4.

It is important to note that this examination does not have suspensory effect in that the Member State of destination may take the proposed measures without awaiting the result of the Commission's examination.

In conducting this examination, the Commission will base itself on the conditions set out in paragraph 4 and on the Court of Justice's case law.

The Court has consistently held that:

"National measures liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."[12]

On the basis of this case law, the Commission will therefore apply a number of tests in order to ascertain the conformity of a notified measure.

2.2.1. General-interest test

It is essential that the measure taken falls within one of the areas expressly referred to in Article 3(4); we have seen that these are fewer than the objectives recognised as being in the general interest by the Court.

2.2.2. Non-discrimination test

The Court has consistently defined discrimination as:

"the application of different rules to comparable situations or the application of the same rule to different situations"[13].

Account will need to be taken here of the objective circumstances in order to determine whether there is actual discrimination.[14]

Such discriminatory measures are nowadays not very often to be found in national rules governing financial services but there can be no ruling out the possibility that some still exist. For example, if a penalty imposed on a non-established financial service provider were more severe than a penalty imposed in identical circumstances on an established provider, this would be tantamount to discrimination.

In accordance with the Court's case law and subject to its being proportionate, the discriminatory measure could be justified only on the grounds specified in Article 46 of the Treaty (public policy, public safety, public health).[15]

2.2.3. Non-duplication test

The Commission will examine the legal arrangements in the country of origin to determine whether there is duplication between the proposed measures and, say, the protection offered in the country of origin and the checks carried out there. If this were to be the case, it could be concluded that the objective of general interest pursued by the country of destination was already met by the rules in force in the provider's country of establishment. Similarly, the Commission will examine whether the measures taken by the country of establishment are inadequate within the meaning of Article 3(4)(b).

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12 Case C-55/94 *Gebhard* [1995] ECR I-4165.
13 Case C-107/94 *Asscher* [1996] ECR I-3089.
14 Case C-224/00 *Commission* v *Italy* (not yet published).
15 Case C-17/92 *Federación de Distribuidores Cinematográficos* [1993] ECR I-2239.

One illustration of this criterion can be found in the judgment of 9 March 2000, in which the Court ruled as follows:

"By requiring all undertakings to fulfil the same conditions for obtaining prior authorisation or approval, the Belgian legislation makes it impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established."[16]

This ruling could be particularly useful in that the Commission has come to realise that some Member States continue to apply prior authorisation procedures in certain areas in particular.

The Court has also ruled that Member States *"must have mutual trust in each other as far as controls carried out on their respective territories are concerned"*[17].

For example, if the country of destination imposes its own rules of conduct on an investment service provided to one of its residents, the Commission will examine whether the rules of conduct in force in the country of origin are not equivalent to those on which the country of destination intends to rely.

2.2.4. Proportionality test

This test has two components. The measures must be suitable for achieving the objective pursued (suitability test) and they must not go beyond what is necessary to obtain that objective (test of substitution by less restrictive measures).

2.2.4.1. Suitability of the measure to the objective pursued

Even if a measure taken by a Member State is described as being in defence of an objective of general interest, it may be open to question whether the measure is really necessary to protect that interest. There may be cases in which, objectively, the measure is not necessary or is not suited to protecting that interest.

The Court of Justice has, in a number of judgments, held that a given rule invoked by a Member State with an avowed aim of protecting the consumer was not, in the final analysis, suited to providing this protection.

For example, the Court has taken the view that, since the provision of information is a principal requirement with regard to consumer protection, a Member State that imposes rules which, in the final analysis, restrict the access of consumers to certain items of information cannot rely on consumer protection to justify them.[18]

The Court thus examines closely whether the measure referred to it actually benefits the consumer[19] and whether the Member State taking it does not underestimate the consumer's ability to make a judgment in the matter.[20] It has recourse here to the term "average

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16 Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221.
17 Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115.
18 Case C-362/88 *GB-INNO-BM* [1990] ECR I-667.
19 Case C-240/95 *Schmit* [1996] ECR I-3179.
20 Case C-470/93 *Mars* [1995] ECR I-1923.

consumer",[21] taking into account *"the presumed expectations of an average customer who is reasonably well-informed and reasonably observant and circumspect"*.[22]

The Court thus checks in particular whether, under the pretext of consumer protection, some measures do not in fact pursue objectives aimed at protecting the domestic market.

It also examines the nature of the services in question and the corresponding need for protection. For example, in the area of banking services, it has held that:

"…a distinction according to the nature of the banking activity in question and the risk incurred by the person for whom the service is intended. Thus, the conclusion of a contract for a mortgage loan presents the consumer with risks that differ from those associated with the lodging of funds with a credit institution. Furthermore, the need to protect the borrower will vary according to the nature of the mortgage loans, and there may be cases where, precisely because of the nature of the loan granted and the status of the borrower, there is no need to protect the latter by the application of the mandatory rules of his national law." [23]

The Commission could, therefore, be guided by the same considerations when faced with the task of examining the proportionality of a notified measure.

2.2.4.2. Possibility of substitution by less restrictive measures

Existence of less restrictive measures

In determining the proportionality of a given measure, the Commission will ascertain whether the measure does not go beyond what is necessary or whether there are less restrictive ways of achieving the objective of general interest being pursued or measures that are less restrictive in their effect on intra-Community trade.[24]

The Court has, for example, ruled that, instead of preventing the broadcasting and retransmission of broadcasts by a television company, a Member State could achieve the objective of protecting a general interest by taking specific measures solely against the advertiser that is the source of a given advertisement broadcast by that company and that provides its services from another Member State.[25]

In addition, in a recent case concerning the taxes imposed on satellite dishes by Belgian municipalities, the Court had the opportunity to apply the "substitution" principle, ruling that:

"there are methods other than the tax in question in the main proceedings, less restrictive of the freedom to provide services, which could achieve an objective such as the protection of the urban environment, for instance the adoption of requirements concerning the size of the dishes, their position and the way in which they are fixed to the building or its surroundings or the use of communal dishes."[26]

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21 Case C-220/98 *Estée Lauder* [2000] ECR I-117.

22 Case C-210/96 *Gut Springenheide Gmbh* [1998] ECR I-4657.

23 Case C-222/95 *Parodi* [1997] ECR I-3899.

24 Case C-368/95 *Familiapress* [1997] ECR I-3689.

25 Joined Cases C-34/95 *Konsumentombudsmannen (KO)* v *De Agostini (Svenska) Förlag AB* and C-35/95 and C-36/95 *TV-Shop i Sverige AB* [1997] ECR I-3843.

26 Case C-17/00 *De Coster* [2001] ECR I-9445.

Although it concerns an area not directly related to the matters covered by this communication, this last example illustrates particularly well the approach that is taken by the Court, and the Commission could, therefore, be guided by the same considerations when making its assessment under Article 3(6).

In *Ambry*,[27] the Court held that the requirement on travel agencies to lodge a security with a financial institution situated on the national territory was disproportionate since the requirement that funds must be available for immediate payment *"can normally be met adequately even where the guarantor is established in another Member State"*.

This example, which, while not relating to a problem associated with the on-line provision of financial services, is of particular interest since it concerns investment services and is one of the cases in which the Court has applied the substitution test in a particularly thorough fashion, viz. the *SIM* case, in which the Court ruled:

"While the obligation to have the registered office in Italy facilitates the supervision and control of the operators in the market, such an obligation is not the only means of making sure that they comply with the rules for pursuing the activity of dealer in transferable securities laid down by the Italian legislature and of imposing effective sanctions on dealers who breach those rules."[28]

Situation in the other Member States

As part of this examination, the Commission could look at the legislation in force in the other Member States in order to determine whether less restrictive measures suited to ensuring consumer protection exist.[29]

However, it must be borne in mind that this exercise is limited in scope in so far as the Court has ruled that *"the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law"*[30]

and that:

"… the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide."[31]

Accordingly, the situation obtaining in the other Member States is of interest when it comes to identifying and proposing different, less restrictive measures. However, the existence in another Member State of a less restrictive measure does not in itself provide proof of any disproportionality. Although the situation in the other Member States could not be ignored, the arrangements in force in the Member State of destination must be assessed intrinsically in the light of the objectives pursued by that Member State.

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27 Case C-410/96 *Ambry* [1998] ECR I-7875.
28 Case C-94/101 *Commission* v *Italy* [1996] ECR I-2691.
29 Case C-126/91 *Yves Rocher* [1993] ECR I-2361.
30 Case C-384/93 *Alpine Investments, loc. cit.*
31 Case C-124/97 *Läärä* [1999] ECR I-6067.

Specific nature of electronic commerce

Lastly, account could be taken of the fact that the measures are taken against services provided at a distance electronically. The Court has ruled that:

"[…] a restriction is all the less permissible where, as in the main proceedings, and unlike the situation governed by the third paragraph of Article 60 [now Article 50] *of the Treaty, the service is supplied without its being necessary for the person providing it to visit the territory of the Member State where it is provided."*[32]

On the basis of this ruling a measure could theoretically be deemed proportionate as regards its application to providers visiting in person the territory of the country of destination but disproportionate in the case of a service provided at a distance. On the basis of this case law, the Commission might require a Member State to take due account of the way in which the service is provided and, where appropriate, might regard as less permissible any restriction applicable to on-line services.

Considerable care should, of course, be taken when extending this ruling by analogy to electronic commerce. In the situation leading up to the ruling in *Säger* referred to above, the client could not at any time have failed to know that he was dealing with a provider established in another Member State.

2.2.5. Commission decision

In accordance with Article 3(6), if it comes to the conclusion on the basis of the tests that the measure is incompatible with Community law, the Commission will ask the Member State concerned to refrain from taking the proposed measures or urgently to put an end to them.

It should be pointed out that the Commission's examination does not have suspensory effect and does not, therefore, prevent the Member State from taking the proposed measures.

Even if the Commission's examination is not subject to precise deadlines, action should be taken "in the shortest possible time", as provided for in the Directive.

If the Commission decides that the measure is compatible with Community law, the Member State concerned will be able to pursue (or begin, if it has not yet done so as a precaution) implementation of the measures against the Community undertaking in question.

At any event, the position that the Commission might have to defend in a given case is without prejudice to what the Court of Justice might decide.

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[32] Case C-76/90 *Säger* [1991] ECR I-4221.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

RECOMMENDATION OF THE OECD COUNCIL CONCERNING GUIDELINES FOR CONSUMER PROTECTION IN THE CONTEXT OF ELECTRONIC COMMERCE

Consumer laws, policies and practices limit fraudulent, misleading and unfair commercial conduct. Such protections are indispensable in building consumer confidence and establishing a more balanced relationship between businesses and consumers in commercial transactions.

The inherently international nature of the digital networks and computer technologies that comprise the electronic marketplace requires a global approach to consumer protection as part of a transparent and predictable legal and self-regulatory framework for electronic commerce. The global network environment challenges the abilities of each country or jurisdiction to adequately address issues related to consumer protection in the context of electronic commerce. Disparate national policies may impede the growth of electronic commerce, and as such, these consumer protection issues may be addressed most effectively through international consultation and co-operation. OECD Member governments have recognised that internationally co-ordinated approaches may be needed to exchange information and establish a general understanding about how to address these issues.

Governments are challenged to help facilitate social development and economic growth based on emerging network technologies, and to provide their citizens with effective and transparent consumer protection for electronic commerce. A variety of consumer protection laws exist that govern business practices. Many OECD Member countries have begun to review existing consumer protection laws and practices to determine whether or not changes need to be made to accommodate the unique aspects of electronic commerce. Member countries are also examining ways in which self-regulatory efforts can assist in providing effective and fair protection for consumers in that context. Reaching these objectives requires insight and input from throughout civil society, and all of these initiatives should be undertaken as part of a global co-operative effort among governments, business, consumers and their representatives.

In April of 1998, the OECD Committee on Consumer Policy began to develop a set of general guidelines to protect consumers participating in electronic commerce without erecting barriers to trade. These guidelines represent a recommendation to governments, businesses, consumers, and their representatives as to the core characteristics of effective consumer protection for electronic commerce. However, nothing contained herein should restrict any party from exceeding these guidelines nor preclude Member countries from retaining or adopting more stringent provisions to protect consumers online. In particular, the purpose of the guidelines is to provide both a framework and a set of principles to assist:

i) Governments in reviewing, formulating and implementing consumer and law enforcement policies, practices, and regulations if necessary for effective consumer protection in the context of electronic commerce;

ii) Business associations, consumer groups and self-regulatory bodies, by providing guidance as to the core characteristics of effective consumer protection that should be considered in reviewing, formulating, and implementing self-regulatory schemes in the context of electronic commerce; and

iii) Individual businesses and consumers engaged in electronic commerce, by providing clear guidance as to the core characteristics of information disclosure and fair business practices that businesses should provide and consumers should expect in the context of electronic commerce.

In light of the above, the Council,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the Ministerial Declaration on Consumer Protection in the Context of Electronic Commerce of 8-9 October 1998 [C(98)177 (Annex 2)];

Having regard to the Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data of 23 September 1980 [C(80)58(Final)], and the Ministerial Declaration on the Protection of Privacy on Global Networks of 8-9 October 1998 [C(98)177 (Annex 1)];

Having regard to the Ministerial Declaration on Authentication for Electronic Commerce of 8-9 October 1998 [(C98)177 (Annex 3)];

Having regard to the Recommendation of the Council concerning Guidelines for the Security of Information Systems of 26-27 November 1992 [C(92)188/FINAL)], and the OECD Recommendation concerning Guidelines on Cryptography Policy of 27 March 1997 [C(97)62/FINAL] ;

Recognising that electronic commerce may offer consumers new and substantial benefits, including convenience, access to a wide range of goods and services, and the ability to gather and compare information about such goods and services;

Recognising that certain special characteristics of electronic commerce, such as the ease and speed with which businesses and consumers can communicate about goods and services and engage in cross-border transactions, may create commercial situations which are unfamiliar to consumers and which may put their interests at risk, it is increasingly important for consumers and businesses to be informed and aware of their rights and obligations in the electronic marketplace;

Recognising that rules regarding applicable law and jurisdiction in the consumer context could have implications for a broad range of issues in electronic commerce, just as rules regarding applicable law and jurisdiction in other contexts could have implications for consumer protection;

Recognising that consumer confidence in electronic commerce is enhanced by the continued development of transparent and effective consumer protection mechanisms that limit the presence of fraudulent, misleading or unfair commercial conduct online;

Considering that electronic commerce should be open and accessible to all consumers; and

Considering that governments, businesses, consumers and their representatives should devote special attention to the development of effective cross-border redress systems.

RECOMMENDS THAT MEMBER COUNTRIES:

Take the necessary steps to implement the relevant sections of the Guidelines contained in the Annex attached to this Recommendation;

Widely disseminate the Guidelines to all relevant governmental departments and agencies, to business sectors involved in electronic commerce, to consumer representatives, to the media, to educational institutions, and to other relevant public interest groups;

Encourage businesses, consumers, and their representatives to take an active role in promoting the implementation of the Guidelines at the international, national, and local levels;

Encourage governments, businesses, consumers and their representatives to participate in and consider the recommendations of ongoing examinations of rules regarding applicable law and jurisdiction;

Invite non-member countries to take account of the terms of this Recommendation in reviewing their consumer policies, initiatives and regulations;

Consult, co-operate, and facilitate information sharing among themselves and non-member countries, businesses, consumers, and their representatives, at both national and international levels, in providing effective consumer protection in the context of electronic commerce in accordance with the Guidelines;

Implement the Guidelines in a manner that encourages the development of new business models and technology applications that benefit consumers; and encourage consumers to take advantage of all tools available to strengthen their position as buyers; and

INSTRUCTS the Committee on Consumer Policy to exchange information on progress and experiences with respect to the implementation of this Recommendation, review that information and report to the Council in 2002, or sooner, and, as appropriate, thereafter.

ANNEX

GUIDELINES

PART ONE
SCOPE

These Guidelines apply only to business-to-consumer electronic commerce and not to business-to-business transactions.

PART TWO
GENERAL PRINCIPLES

I. TRANSPARENT AND EFFECTIVE PROTECTION

Consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce.

Governments, businesses, consumers, and their representatives should work together to achieve such protection and determine what changes may be necessary to address the special circumstances of electronic commerce.

II. FAIR BUSINESS, ADVERTISING AND MARKETING PRACTICES

Businesses engaged in electronic commerce should pay due regard to the interests of consumers and act in accordance with fair business, advertising and marketing practices.

Businesses should not make any representation, or omission, or engage in any practice that is likely to be deceptive, misleading, fraudulent or unfair.

Businesses selling, promoting or marketing goods or services to consumers should not engage in practices that are likely to cause unreasonable risk of harm to consumers.

Whenever businesses make information available about themselves or the goods or services they provide, they should present such information in a clear, conspicuous, accurate and easily accessible manner.

Businesses should comply with any representations they make regarding policies or practices relating to their transactions with consumers.

Businesses should take into account the global nature of electronic commerce and, wherever possible, should consider the various regulatory characteristics of the markets they target.

Businesses should not exploit the special characteristics of electronic commerce to hide their true identity or location, or to avoid compliance with consumer protection standards and/or enforcement mechanisms.

Businesses should not use unfair contract terms.

Advertising and marketing should be clearly identifiable as such.

Advertising and marketing should identify the business on whose behalf the marketing or advertising is being conducted where failure to do so would be deceptive.

Businesses should be able to substantiate any express or implied representations as long as the representations are maintained, and for a reasonable time thereafter.

Businesses should develop and implement effective and easy-to-use procedures that allow consumers to choose whether or not they wish to receive unsolicited commercial e-mail messages.

Where consumers have indicated that they do not want to receive unsolicited commercial e-mail messages, such choice should be respected.

In a number of countries, unsolicited commercial e-mail is subject to specific legal or self-regulatory requirements.

Businesses should take special care in advertising or marketing that is targeted to children, the elderly, the seriously ill, and others who may not have the capacity to fully understand the information with which they are presented.

III. ONLINE DISCLOSURES

A. INFORMATION ABOUT THE BUSINESS

Businesses engaged in electronic commerce with consumers should provide accurate, clear and easily accessible information about themselves sufficient to allow, at a minimum:

i) Identification of the business - including the legal name of the business and the name under which the business trades; the principal geographic address for the business; e-mail address or other electronic means of contact, or telephone number; and, where applicable, an address for registration purposes and any relevant government registration or license numbers;
ii) Prompt, easy and effective consumer communication with the business;
iii) Appropriate and effective resolution of disputes;
iv) Service of legal process; and
v) Location of the business and its principals by law enforcement and regulatory officials

Where a business publicises its membership in any relevant self-regulatory scheme, business association, dispute resolution organisation or other certification body, the business should provide consumers with appropriate contact details and an easy method of verifying that membership and of accessing the relevant codes and practices of the certification body.

B. INFORMATION ABOUT THE GOODS OR SERVICES

Businesses engaged in electronic commerce with consumers should provide accurate and easily accessible information describing the goods or services offered; sufficient to enable consumers to make an informed decision about whether to enter into the transaction and in a manner that makes it possible for consumers to maintain an adequate record of such information.

C. INFORMATION ABOUT THE TRANSACTION

Businesses engaged in electronic commerce should provide sufficient information about the terms, conditions and costs associated with a transaction to enable consumers to make an informed decision about whether to enter into the transaction.

Such information should be clear, accurate, easily accessible, and provided in manner that gives consumers an adequate opportunity for review before entering into the transaction.

Where more than one language is available to conduct a transaction, businesses should make available in those same languages all information necessary for consumers to make an informed decision about the transaction.

Businesses should provide consumers with a clear and full text of the relevant terms and conditions of the transaction in a manner that makes it possible for consumers to access and maintain an adequate record of such information.

Where applicable and appropriate given the transaction, such information should include the following:

i) an itemisation of total costs collected and/or imposed by the business;
ii) notice of the existence of other routinely applicable costs to the consumer that are not collected and/or imposed by the business;
iii) terms of delivery or performance;
iv) terms, conditions, and methods of payment;
v) restrictions, limitations or conditions of purchase, such as parental/guardian approval requirements, geographic or time restrictions;
vi) instructions for proper use including safety and health care warnings;
vii) information relating to available after-sales service
viii) details of and conditions related to withdrawal, termination, return, exchange, cancellation and/or refund policy information; and
ix) available warranties and guarantees.

All information that refers to costs should indicate the applicable currency.

IV. CONFIRMATION PROCESS

To avoid ambiguity concerning the consumer's intent to make a purchase, the consumer should be able, before concluding the purchase, to identify precisely the goods or services he or she wishes to purchase; identify and correct any errors or modify the order; express an informed and deliberate consent to the purchase; and retain a complete and accurate record of the transaction.

The consumer should be able to cancel the transaction before concluding the purchase.

V. PAYMENT

Consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford.

Limitations of liability for unauthorised or fraudulent use of payment systems, and chargeback mechanisms offer powerful tools to enhance consumer confidence and their development and use should be encouraged in the context of electronic commerce.

VI. DISPUTE RESOLUTION AND REDRESS

A. APPLICABLE LAW AND JURISDICTION

Business-to-consumer cross-border transactions, whether carried out electronically or otherwise, are subject to the existing framework on applicable law and jurisdiction.

Electronic commerce poses challenges to this existing framework. Therefore, consideration should be given to whether the existing framework for applicable law and jurisdiction should be modified, or applied differently, to ensure effective and transparent consumer protection in the context of the continued growth of electronic commerce.

In considering whether to modify the existing framework, governments should seek to ensure that the framework provides fairness to consumers and business, facilitates electronic commerce, results in consumers having a level of protection not less than that afforded in other forms of commerce, and provides consumers with meaningful access to fair and timely dispute resolution and redress without undue cost or burden.

B. ALTERNATIVE DISPUTE RESOLUTION AND REDRESS

Consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden.

Businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions.

i) Businesses and consumer representatives should continue to establish fair, effective and transparent internal mechanisms to address and respond to consumer complaints and difficulties in a fair and timely manner and without undue cost or burden to the consumer. Consumers should be encouraged to take advantage of such mechanisms.

ii) Businesses and consumer representatives should continue to establish co-operative self-regulatory programs to address consumer complaints and to assist consumers in resolving disputes arising from business-to-consumer electronic commerce.

iii) Businesses, consumer representatives and governments should work together to continue to provide consumers with the option of alternative dispute resolution mechanisms that provide effective resolution of the dispute in a fair and timely manner and without undue cost or burden to the consumer.

iv) In implementing the above, businesses, consumer representatives and governments should employ information technologies innovatively and use them to enhance consumer awareness and freedom of choice.

In addition, further study is required to meet the objectives of Section VI at an international level.

VII. PRIVACY

Business-to-consumer electronic commerce should be conducted in accordance with the recognised privacy principles set out in the OECD Guidelines Governing the Protection of Privacy and Transborder Flow of Personal Data (1980), and taking into account the OECD Ministerial Declaration on the Protection of Privacy on Global Networks (1998), to provide appropriate and effective protection for consumers.

VIII. EDUCATION AND AWARENESS

Governments, business and consumer representatives should work together to educate consumers about electronic commerce, to foster informed decision-making by consumers participating in electronic commerce, and to increase business and consumer awareness of the consumer protection framework that applies to their online activities.

Governments, business, the media, educational institutions and consumer representatives should make use of all effective means to educate consumers and businesses, including innovative techniques made possible by global networks.

Governments, consumer representatives and businesses should work together to provide information to consumers and businesses globally about relevant consumer protection laws and remedies in an easily accessible and understandable form.

PART THREE
IMPLEMENTATION

To achieve the purpose of this Recommendation, Member countries should at the national and international level, and in co-operation with businesses, consumers and their representatives:

a) review and, if necessary, promote self-regulatory practices and/or adopt and adapt laws and practices to make such laws and practices applicable to electronic commerce, having in mind the principles of technology and media neutrality;

b) encourage continued private sector leadership that includes the participation of consumer representatives in the development of effective self-regulatory mechanisms that contain specific, substantive rules for dispute resolution and compliance mechanisms;

c) encourage continued private sector leadership in the development of technology as a tool to protect and empower consumers;

d) promote the existence, purpose and contents of the Guidelines as widely as possible and encourage their use; and

e) facilitate consumers' ability to both access consumer education information and advice and to file complaints related to electronic commerce.

PART FOUR
GLOBAL CO-OPERATION

In order to provide effective consumer protection in the context of global electronic commerce Member countries should:

Facilitate communication, co-operation, and, where appropriate the development and enforcement of joint initiatives at the international level among businesses, consumer representatives and governments.

Through their judicial, regulatory, and law enforcement authorities co-operate at the international level, as appropriate, through information exchange, co-ordination, communication, and joint action to combat cross-border fraudulent, misleading and unfair commercial conduct.

Make use of existing international networks and enter into bilateral and/or multilateral agreements or other arrangements as necessary and appropriate, to accomplish such co-operation.

Work toward building consensus, both at the national and international levels, on core consumer protections to further the goals of enhancing consumer confidence, ensuring predictability for businesses, and protecting consumers.

Co-operate and work toward developing agreements or other arrangements for the mutual recognition and enforcement of judgments resulting from disputes between consumers and businesses, and judgments resulting from law enforcement actions taken to combat fraudulent, misleading or unfair commercial conduct.

31993L0013

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Official Journal L 095 , 21/04/1993 P. 0029 - 0034
Finnish special edition: Chapter 15 Volume 12 P. 0169
Swedish special edition: Chapter 15 Volume 12 P. 0169

MORE INFO TEXT:

COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 A thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas it is necessary to adopt measures with the aim of progressively establishing the internal market before 31 December 1992; whereas the internal market comprises an area without internal frontiers in which goods, persons, services and capital move freely;

Whereas the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States;

Whereas, in particular, the laws of Member States relating to unfair terms in consumer contracts show marked divergences;

Whereas it is the responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms;

Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State;

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts;

Whereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers;

Whereas the two Community programmes for a consumer protection and information policy (4) underlined the importance of safeguarding consumers in the matter of unfair terms of contract; whereas this protection ought to be provided by laws and regulations which are either harmonized at Community level or adopted directly at that level;

Whereas in accordance with the principle laid down under the heading 'Protection of the economic interests of the consumers', as stated in those programmes:

'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts';
Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all contracts concluded between sellers or suppliers and consumers; whereas as a result inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from this Directive;
Whereas the consumer must receive equal protection under contracts concluded by word of mouth and written contracts regardless, in the latter case, of whether the terms of the contract are contained in one or more documents;
Whereas, however, as they now stand, national laws allow only partial harmonization to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive;
Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording 'mandatory statutory or regulatory provisions' in Article 1 (2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;
Whereas Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature;
Whereas it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms;
Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;
Whereas, for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws;
Whereas the nature of goods or services should have an influence on assessing the unfairness of contractual terms;
Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these

restrictions are taken into account in calculating the premium paid by the consumer;
Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;
Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions;
Whereas there is a risk that, in certain cases, the consumer may be deprived of protection under this Directive by designating the law of a non-Member country as the law applicable to the contract; whereas provisions should therefore be included in this Directive designed to avert this risk;
Whereas persons or organizations, if regarded under the law of a Member State as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms of contract drawn up for general use in contracts concluded with consumers, and in particular unfair terms, either before a court or before an administrative authority competent to decide upon complaints or to initiate appropriate legal proceedings; whereas this possibility does not, however, entail prior verification of the general conditions obtaining in individual economic sectors;
Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts,
HAS ADOPTED THIS DIRECTIVE:

Article 1
1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.

Article 2
For the purposes of this Directive:
(a) 'unfair terms' means the contractual terms defined in Article 3;
(b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
(c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

Article 3
1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract

if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 4
1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

Article 5
In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

Article 6
1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.
2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Article 7
1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

Article 8
Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.

Article 9

The Commission shall present a report to the European Parliament and to the Council concerning the application of this Directive five years at the latest after the date in Article 10 (1).

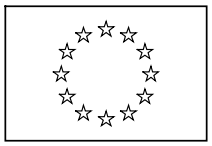
Article 10
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 1994. They shall forthwith inform the Commission thereof.
These provisions shall be applicable to all contracts concluded after 31 December 1994.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate the main provisions of national law which they adopt in the field covered by this Directive to the Commission.

Article 11
This Directive is addressed to the Member States.
Done at Luxembourg, 5 April 1993.
For the Council
The President
N. HELVEG PETERSEN

(1) OJ No C 73, 24. 3. 1992, p. 7.
(2) OJ No C 326, 16. 12. 1991, p. 108 and OJ No C 21, 25. 1. 1993.
(3) OJ No C 159, 17. 6. 1991, p. 34.
(4) OJ No C 92, 25. 4. 1975, p. 1 and OJ No C 133, 3. 6. 1981, p. 1.

ANNEX
TERMS REFERRED TO IN ARTICLE 3 (3) 1. Terms which have the object or effect of:
(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
(h) automatically extending a contract of fixed duration where the consumer does

not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.
2. Scope of subparagraphs (g), (j) and (l)
(a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.
Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
(c) Subparagraphs (g), (j) and (l) do not apply to:
- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.04.2000
COM(2000) 248 final

REPORT FROM THE COMMISSION

ON THE IMPLEMENTATION OF COUNCIL DIRECTIVE 93/13/EEC OF 5 APRIL 1993 ON UNFAIR TERMS IN CONSUMER CONTRACTS

SUMMARY

The purpose of this report is not only to appraise Directive 93/13/EEC of 5 April 1993, five years after the deadline for its transposition, but also to raise a number of questions with a view to improving the existing situation.

The first part of the report recapitulates the different stages in the preparation and adoption of the Directive; the second part describes the impact of the various actions mounted by the Commission since 1993. These mainly concern infringement procedures (for non-communication, incomplete transposition and complaints on incorrect implementation), market studies to identify the use of unfair terms in different economic sectors, subsidies granted with a view to eliminating unfair terms in certain economic sectors, the dialogue between consumers and professionals (at national and European level), information campaigns, the conference organised in Brussels in July 1999, and the Clab database. Drawing on the experience gained in implementing the Directive in the Member States, the third part of the report suggests a number of improvements. The suggestions mainly concern the scope of the Directive and its limitations, the notion of unfair term, the list in the annex to the Directive, the failure to supervise pre-contractual terms and conditions, the principle of transparency and the right to information, penalties, existing national arrangements for eliminating unfair terms (as well as the possibility of designing a system for eliminating such terms at European level), the problems posed by certain economic sectors, and the future of the Clab database.

The fourth part highlights the repercussions which the Directive has had for consumers and the business community, the legislation of the Member States, national jurisprudence, the case law of the Court of Justice, and legal doctrine.

Finally, the report includes three annexes. The first annex features the various legal instruments transposing the Directive with a breakdown by Member State. The second contains additional information on the studies carried out by the Commission and the actions it has funded. The third annex consists of a series of graphs and comments on the Clab database.

The Commission, which at this stage has no position on the questions raised, wishes merely to trigger the widest and most fruitful possible debate on the subject; it is keen to receive numerous suggestions on the ideas and issues discussed here (and notably replies to the questions in Part III). If measures should prove to be desirable or even necessary to improve the existing situation, they do not necessarily have to be taken at European level.

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I – INTRODUCTION

The adoption by the Council on 5 April 1993 of Directive 93/13/EEC on unfair terms in consumer contracts was a milestone in consumer policy. Ever since the first Community consumer policy programme was adopted in 1975[1] the need for a European-level initiative to ensure consumer protection had become obvious, and the first preliminary draft Directives, discussed informally with the Member States' representatives, were in place just a year later.

Hence the two years and eight months of work carried out by the different institutions between the Commission's formal adoption of the proposal for a Directive on 27 July 1990[2] and its final endorsement by the Council represented only the tip of the iceberg – the final step in the long gestation period of the Community text[3].

It is hardly surprising that the text which the Council ultimately adopted unanimously – the upshot of delicate compromises between the legal traditions of the different Member States[4] – was not to everyone's liking. The European Parliament was particularly critical of the Council's common position (which, with minor changes, corresponds to the text finally adopted) and even threatened to reject it. However, the Directive, despite its gaps[5] and flaws, was at the time a major step forward by comparison with the legislation of most of the Member States and, thanks to its "minimal" character (see Article 8), did not prevent them from adopting or retaining more stringent provisions to ensure a higher level of consumer protection.

Hence, the text was adopted by the Council with the support of a comfortable majority of the members of the European Parliament, which however stressed the importance of the report provided for in Article 9 of the Directive. Article 9 reads:

"The Commission shall present a report to the European Parliament and to the Council concerning the application of this Directive five years at the latest after the date in Article 10(1)."

The date in Article 10(1) is 31 December 1994, the deadline for transposing the Community text. Since then five years have elapsed and so the time has come to present this report. The Commission began preparing the report as soon as the Directive was adopted. In a path-breaking initiative, the Commission created an instrument for monitoring the enforcement of the Directive in the various Member States, namely the CLAB database.

The Commission also mounted or supported a large number of actions to combat unfair terms. These actions have furnished invaluable information for measuring the Directive's impact and

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1 Council Resolution of 14.4.1975, OJ C 92/1, 24.4.1975. Besides, on 14 February 1984 the Commission presented a Communication to the Council (COM(84)55 final) on unfair terms in consumer contracts.

2 COM(90)322 final, OJ C 243, 28.9.1990.

3 Notably, with its Communication "Unfair terms in consumer contracts" of 14 February 1984 the Commission launched a public debate on this subject (COM(84)55 final, published in Supplement 1/84 of the Bulletin of the European Communities).

4 While Directive 93/13/EEC goes to the heart of national legislation, several Member States had in the meantime legislated in this area on the basis of different philosophies.

5 One of the gaps was the absence, contrary to the Commission's proposals, of rules approximating national legislation governing the sale of consumer goods. This gap was bridged with the adoption of Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees of 25.05.1999, OJ L 171, 7.7.1999, pp. 12-16.

the effective level of consumer protection against unfair terms. Besides, they have often contributed to reinforcing the Directive's impact.

Unfortunately, the fact that several Member States[6] were slow to transpose the Directive and its incomplete or incorrect transposition by others[7] considerably curtailed, in practice, the five years provided for in the Directive and have not made the Commission's evaluation task any easier.

Hence this report does not contain any formal proposal for an amendment to Directive 93/13/EEC. However, it raises a considerable number of questions on which a vast public consultation is being launched (see Chapter III). These questions concern not only possible Community-level initiatives to improve the existing situation, but also initiatives which could be taken by the Member States themselves to develop the existing national systems. Every interested party is invited to submit replies, together with any other comments they consider useful, to the European Commission.

All correspondence must be delivered to the following address by 30 September 2000:

European Commission

Directorate-General for Consumer Health and Consumer Protection

Rue de la Loi 200

1049 Brussels

Belgium

The correspondence must be clearly marked as follows: *Reply to the Commission Report on Directive 93/13/EEC.*

6 It was not until May 1998 that all the Member States had transposed the Directive, the last country to do so being the Kingdom of Spain.

7 This is the Commission's view, but no judgment of the Court of Justice has been handed down in the cases in point.

II – OPERATIONAL MONITORING AND ACTIONS TO REINFORCE THE IMPLEMENTATION OF THE DIRECTIVE

1. INFRINGEMENT PROCEDURES

a) For failure to communicate transposition measures

The Commission mounted infringement procedures against the Member States that failed to meet the deadline of 31 December 1994 ((DE, UK, E, I, LUX, P)[8]. All Member States communicated the transposition measures to the Commission before the Court of Justice had occasion to hand down a judgment[9].

b) For incomplete or incorrect transposition

The Commission scrutinised the national texts communicated by the Member States. This led to the opening of infringement procedures against all the Member States.

Some of these procedures are still under way, but excellent results have already been obtained. Several Member States have already amended their national law and others have undertaken to do so in the near future.

Hence Belgium has adopted two new instruments - a first act in 1997 which specifically covers contracts with members of the liberal professions and a second act in 1998 aligning the 1991 legislation with the Directive[10]. Likewise, Portugal adopted an amendment to its 1985 legislation on 7 July 1999[11]. The United Kingdom adopted a new instrument in 1999 amending its earlier 1994 Act[12]. Finland recently supplemented its old rules dating from 1994 by adopting a new act in 1999[13].

Greece recently notified the Commission of a new Act of 28 September 1999 amending its earlier legislation[14].

Other Member States have pledged to amend their existing legislation to bring it fully into line with Directive 93/13/EEC. Germany intends to amend its 1976 legislation (as amended

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8 Denmark, France and Ireland notified the transposition measures within a few weeks or with just a few days delay.

9 In some cases, the reason for non-communication was not that the Member State had not legislated in this field, but simply because it had introduced amendments with a view to bringing the old law into line with the Directive. This is the case of Germany, where an act on general contractual terms was adopted in 1976.

10 The Belgian legislation of 1991, whose scope was narrower than the Directive's, did not provide for complete transposition of Articles 5 and 7(2) (as regard to the latter, actions for injunctions were limited to unfair terms listed in the Act as well as those concerning contracts covered by the 1997 Act). Besides, Article 6(2) had not been transposed.

11 Portugal's 1985 legislation (as amended in 1995) had not correctly transposed Article 3(2) and completely ignored the third sentence of Article 5.

12 The Statutory Instrument on Unfair Terms 1994 did not transpose the third sentence of Article 5 and did not fully implement Article 7(2) (since actions for injunctions could only be mounted by the Office of Fair Trading).

13 Act 1259/1994 (which amended Act 38/78) does not transpose Article 6(2).

14 The previous Act No 2251 of 16 November 1994 did not fully transpose Articles 3(2), 5, 6(2) and 7(3) of the Directive. The Greek legislation was limited in scope to general terms and conditions only. Besides, it only protected consumers if the contract had a link with Greek territory and did not provide for remedies against professional associations that use or recommend unfair terms. The new Act No 2741 of 28 September 1999 is currently being examined.

by the 1996 Act) in order to fully transpose Article 6(2)[15]. France also intends to supplement its 1995 Act with a view to correctly transposing Article 4(2)[16]. The Netherlands are reviewing their Civil Code in order to transpose Article 4(2)[17] and Article 5. Finally, Italy has pledged to amend its Civil Code so widen its scope[18] and to fully transpose Articles 5 and 6(2), while contesting the need to transpose Article 7(3) of the Directive.

Although many difficulties have already been resolved (or are currently being cleared up), there are still a number of outstanding problems as regards the scope, the Annex, Article 5, Article 6(2) and Article 7 of the Directive[19].

c) Complaints concerning incorrect application

In 1997 and 1998 several complaints were submitted to the Commission by Italian consumer associations with a view to mounting an infringement procedure against Italy for incorrect transposition of Article 7 of the Directive. Italy has put in place a standard procedure and an emergency procedure in order to transpose this article. The emergency procedure differs from the one existing in ordinary Italian law because the criteria for invoking it have been tightened by the Italian authorities. While in ordinary law the procedure in question can only be relied on in the event of serious and irreparable harm, it may, in the case of injunctions, be invoked when there are good grounds. However the consumer associations claim that the notion of "good grounds" is interpreted too restrictively by the Italian courts and protects only the primary essential rights of consumers (life and health).

Since there is no established case law on the restrictive interpretation of Article 7 of the Directive, the Commission has not brought an infringement procedure against Italy (however, it has requested the consumer associations to furnish fresh documentation with a view to learning more about Italian case law in this field). This case raises the important question of the effectiveness in practice of the systems put in place by the Member States to enjoin the use of unfair terms by professionals.

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15 German legislation protects consumers only when the contract has a close link with German territory.

16 The French transposition Act 95-96 of 1 February 1995, since it does not completely transpose Article 4(2), makes it impossible to assess the unfairness of terms pertaining to the definition of the main subject of the contract and the correspondence between the price and the services or goods supplied. However, the first sentence of Article 4(2) provides for such an assessment when the terms in question have not been drafted in plain intelligible language.

17 For the same reasons as in the case of France.

18 Italian legislation covers only contracts for the sale of goods or the provision of services.

19 The scope has been restricted by certain national transposition rules to contracts relating exclusively to the supply of goods and services. Although contracts for the sale of products or the provision of services are those most frequently concluded between professionals and consumers, the Directive also covers other contracts such as contracts pertaining to guarantees for the benefit of a financial institution or even cases in which the consumers themselves are sellers (provided the buyer is acting in the course of business, of course). The Annex has not been transposed into the corpus of the transposition instruments of certain Member States (the three Nordic countries), which consider that to do so would run counter to consumers' interests (see point III.3). Article 5 has not been fully transposed (notably the second and third sentences) by all the Member States. Article 6(2) raises certain difficulties in application because certain Member States have either added additional conditions to the application of the Article or made consumer protection exclusively conditional on the criterion of residence. Article 7 has also given rise to certain problems arising either from the restrictions to the second paragraph (limiting the right to bring matters before the courts or administrative bodies to specific persons) or the failure to transpose the third paragraph (which provides for remedies against associations of professionals that use or recommend the use of unfair terms).

2. "MARKET" STUDIES

In 1993 the Commission began launching studies to analyse certain types of standard-term contracts proposed to consumers in the different Member States. These studies concerned contracts of sale, car rental contracts, contracts concerning certain banking services (such as current accounts and consumer credit contracts) and insurance contracts (civil liability for motor vehicles, home insurance), contracts concerning various types of tourist services (rented accommodation, holiday clubs, package holidays, timeshares, etc.), contracts in the field of air transport (terms and conditions recommended by IATA), and contracts concerning the provision of general interest services. These studies have not only demonstrated the ubiquity of unfair terms in standard-form contracts but also the enormous difficulty of getting hold of the contractual terms before concluding a contract or independently of such a contract. On several occasions the Commission has had to intervene directly or via the national authorities to enable the contractors carrying out the studies to access standard-form contracts, which shows not only that transparency is lacking but also that it is impossible to rely on market forces in this area.

3. SUBSIDIES FOR SIMULTANEOUS ACTIONS FOR INJUNCTIONS IN SEVERAL MEMBER STATES

Since 1996 the Commission has been subsidising actions mounted by consumer associations with a view to eliminating (either via negotiation or litigation) unfair terms in different economic sectors in several Member States. Actions for injunctions have been mounted in the new technology sectors (mobile telephony, cable and satellite television), and in the field of car rental, timeshare and holiday services. By and large the results of these actions have been positive, in that the professionals have consented either to modify their contractual terms and conditions or to negotiate changes in the near future.

4. DIALOGUE BETWEEN CONSUMERS AND INDUSTRY AT NATIONAL LEVEL

Dialogue between consumer associations and the business community with a view to drafting fair standard contracts is an established tradition in certain countries, such as the Netherlands. In general, however, these practices are not very widespread in most Member States. The Commission has subsidised a project (contract B5-1000/98/000021- DECO (P)) proposed by a Portuguese consumer association, with a view to drawing up, through negotiation with professional bodies, standard-form contracts for five economic sectors characterised by a large number of individual disputes over terms regarded as unfair - namely the sale and brokerage of real estate, timeshare contracts, travel contracts, contracts for the purchase and sale of used cars and contracts for the repair of vehicles. In four of the five sectors standard-form contracts have been drawn up together with industry, timeshare contracts being the only sector in which the negotiations have not been successful.

5. DIALOGUE BETWEEN CONSUMERS AND INDUSTRY AT EUROPEAN LEVEL

In the case of package holidays, the pilot project spawned a fresh project based on consumer/industry dialogue at European level. After having been contacted by the ECTAA (European Confederation of Travel Agencies) in connection with the package holidays project, the Commission proposed organising a round table with consumer representatives to discuss improvements in the general terms and conditions used in package holiday contracts. This proposal was endorsed by the ECTAA; the next step was to verify how willing the two

parties were to mount this exercise; to this end the ECTAA consulted its members and the Commission consulted the Consumer Committee. A group has been set up, consisting of seven industry representatives, seven consumer representatives and six high-level independent experts from various national authorities. This group convened for the first time on 13 December 1999. At this initial meeting the group discussed the round table's objectives and the methodology to be used to achieve its goals. This is the first experience of its kind and could function as a pilot for fresh initiatives in the future.

Besides, in order to ensure that European citizens are fully aware of their rights, the dialogue between "Citizens and the business community" mounted by the Commission allows for continuous communication with the public. Thanks to an Internet site and a hotline (each Member State providing a freephone number for its citizens), the public can access detailed information, ask questions and receive customised advice concerning their opportunities and rights (such as in the case of unfair terms in consumer contracts) in the internal market. The results obtained improve the interactive nature of a policy designed to develop the internal market, in the interests of citizens and firms.

6. INFORMATION CAMPAIGNS

The first information campaign was mounted from 13 November to 8 December 1995, with a view to alerting the general public to their rights under Community law as regards unfair contractual terms and conditions and also as regards package holidays and overbooking in air transport.

This campaign, which was orchestrated simultaneously by 11 Member States (B, D, E, F, G, I, IRL, LUX, NL, P and UK), consisted mainly of short, hard-hitting messages broadcast by the national radio stations. In certain Member States these messages were also disseminated via other means of communication, such as TV (G, I, NL, P) and the press (IRL and P).

The campaign was accompanied by a series of flanking measures (such as the distribution of brochures and the creation of mechanisms to deal with enquiries from the public) which were developed with the support of the national consumer associations. The messages included postal addresses or freephone numbers to give citizens an opportunity to obtain more detailed information on the issues addressed in the campaign.

According to the evaluation performed by the advertising firm that orchestrated the campaign, the radio messages reached on average 120 million persons (each addressee having the opportunity to relay each message between 10 and 16 times) in the 11 Member States concerned.

This campaign, besides the fact that it was welcomed by the public as a form of direct contact with the European Union, prompted numerous requests for additional information (not only from the public but also from professionals). It also helped promote the role and importance of the national consumer associations involved.

A second information campaign focusing exclusively on unfair terms was mounted in September 1997 in Spain, Greece, Italy, Ireland and Portugal, the EC countries in which consumer representation is weakest. This campaign, which was organised in the context of the "Citizens of Europe" programme, was implemented by a European communications firm and 25 consumer organisations in the countries concerned were involved in the project.

In each country the campaign kicked off with a press conference organised by European and national parliamentarians and was followed by short radio messages drawing the public's attention to unfair terms.

During the campaign, a freephone number was made available to citizens in the Member States concerned, allowing them not only to request more detailed written information (in the form of brochures, information leaflets, etc.) but also to respond to the problems raised.

For their part, the consumer associations were actively involved in the campaign. In particular they tried to sensitise the lower courts and the national bar associations to the scope of Directive 93/13 by hosting conferences and seminars. They also contributed considerably to disseminating information via the national press or in the form of brochures.

Among the key results the evaluation stresses that the campaign encouraged consumer associations (notably in Italy and Portugal) to bring actions for the injunction of unfair terms. In some cases the courts did not have to adjudicate because the professionals were persuaded to modify their contractual terms and conditions following negotiations with consumer associations.

Finally, the campaign gave a big fillip to the consumerist movement in the five Member States covered.

7. EUROPEAN CONFERENCE OF 1 TO 3 JULY 1999 IN BRUSSELS

On 1 to 3 July 1999, with a view to promoting a public debate and to assembling as much information and input possible, the European Commission hosted an international conference on Directive 93/13/EEC. Approximately 300 delegates attended, including not only a large number of leading European specialists but also representatives of the Member States, the consumer movement and the different economic sectors. The applicant countries were also widely represented. After a series of presentations concerning national experiences and the CLAB database and the lively discussions that ensued, six specific themes were addressed at working group level:

– the scope of the Directive (standard terms in consumer contracts)

– the application of the Directive to public services

– the application of the Directive to financial services and the new technologies

– the definition of unfairness

– the obligation as regards intelligibility and the interpretation most favourable to the consumer and

– the mechanisms for monitoring unfair terms.

The working groups' conclusions were then debated in plenary session.

The proceedings of this conference are available on the Commission's Internet site in a multilingual version (http://europa.eu.int/comm/dgs/health_consumer/index_fr.htm) and will shortly be published in book form. They may be obtained on request by writing to the

Directorate-General for Consumer Health and Consumer Protection, European Commission, Rue de la Loi 200, 1049 Brussels, or by fax at (32) 2 29 59490.

8. THE CLAB DATABASE

The CLAB project (unfair terms) was launched by the Commission immediately after the adoption of Directive 93/13. The idea was to create an instrument for monitoring the practical enforcement of the Directive in the form of a database on "national jurisprudence" governing unfair terms. This database can be consulted free of charge on the Commission's server (http://europa.eu.int/clab/index.htm). "Jurisprudence" as understood by CLAB covers not only court judgments but also decisions by administrative bodies, voluntary agreements, out-of-court settlements and arbitration awards. The database concerns the practical enforcement of the Directive[20] and now contains 7 649 cases. Despite all the work that has gone into it, it would be an exaggeration to claim that the database inventories all existing "jurisprudence". However, it contains the most important "jurisprudence" which each contractor was able to assemble. Although the results of a statistical analysis of the data contained in CLAB may not faithfully mirror the realities, they do at any rate reveal clear trendlines where national "jurisprudence" is concerned; hence, some sound conclusions can tentatively be drawn. Thus the Commission scrutinised these data carefully in preparing this report.

Annex III contains a number of graphs concerning the various points analysed.

[20] The database includes not only jurisprudence under specific national laws pertaining to unfair terms but also all jurisprudence which, although based on other provisions or general legal principles (good faith, equity, abuse of rights, etc.) has an unfair terms dimension.

III – DETAILED ANALYSIS AND DISCUSSION POINTS

As Advocate-General Saggio emphasised in his grounds of 16 December 1999[21], the Directive is designed to give special protection to "interests of the community which, while part of the economic order, go beyond the specific interests of the parties".

The use of terms which lead to a significant imbalance in the contractual relations between the parties undermines not only the interests of the consenting party but also the legal and economic order as a whole.

General contractual terms and conditions aim to replace the legal solutions drawn up by the legislator and at the same time to replace the legal rules in force in the Community by unilaterally designed solutions with a view to maximising the particular interests of one of the parties.

From the economic viewpoint this can be extremely harmful. The economy can function correctly only if resources are optimally allocated. This is possible only if the market is competitive enough and if the relations between the economic operators are balanced. In economic terms, a risk should be borne by the person who is best able to prevent this risk or to insure himself against it; an obligation must be assumed by the person who is best placed to assume it.

Unfair terms shift the burden of risks and obligations by externalising the costs in question. This has two major consequences: firstly, the prices of products and services do not reflect true costs, creating distortions to competition in favour of less efficient firms and leading to lower quality products and services; secondly, the costs incurred by society are higher, because the risks and obligations are borne by persons other than those who could bear them most efficiently from the economic viewpoint.

Hence it is disconcerting to ascertain that, despite the endeavours of the Community legislator and the national authorities, balanced contractual relations are anything but the rule, that unfair terms are widely used, and that new types of unfair terms arise by the day.

This chapter scrutinises the various questions raised by the application of the Directive in the light of national experiences and contemplates a number of proposals aimed at improving the system. Note that the questions raised at the end of each subsection in no way commit the Commission to any particular policy. **At this stage the Commission has no position on the questions raised and wishes only to trigger the widest and most fruitful possible debate on these issues.** Hence the Commission has decided to raise all the relevant questions that have been submitted to it over the past five years, notably in the context of the conference of 1 to 3 July 1999, even if they may appear unusual, or too daring or unworkable. **Besides, even if is concluded that certain actions are desirable or even necessary, this does not automatically mean that they have to be undertaken at Community level.**

1 – CURRENT LIMITATIONS ON THE DIRECTIVE'S SCOPE

Several years ago the Union pledged to simplify Community law. This involves not only consolidating several instruments governing the same area but also tidying up the existing law

[21] Joint cases C-240/98 to C-244/98, Océano Grupo Editorial, S.A. and Salvat Editores, S.A. v Rocío Murciano Quintero et al.

with a view to repealing obsolete or redundant provisions and to clarifying rules which have led to difficulties in interpretation. During the negotiations with the Council a number of limitations were introduced into the scope of the Directive. The validity and the practical utility of these limitations were often questioned in the debates on the Directive, and notably at the Brussels Conference in July 1999. From what the Commission has learnt about the transposition and enforcement of these rules, the need for some of these limitations has not been conclusively demonstrated. If this information is confirmed, they should be eliminated with a view to simplifying Community law.

a) Individually negotiated terms

The Directive excludes contractual terms which have been individually negotiated by the consumer[22].

Some Member States (DK, FIN, F, S and to some extent A and NL) have not transposed this exclusion, without any practical problems arising in practice. Besides, the CLAB database also shows that this exclusion has not had any practical effect in the Member States which transposed it, because none of the cases in the database concerns an individually negotiated contractual term. Indeed it is fanciful to think that contracts of adherence could truly contain individually negotiated terms other than those relating to the characteristics of the product (colour, model, etc.), the price or the date of delivery of the good or provision of the service - all terms which rarely give rise to problems concerning their potential unfairness.

On the other hand, the presence of this exemption in the text of the Directive hardly makes for clarity and encourages misinterpretations which may lead to a confusion between what is meant by "negotiated" and what is meant by "expressly accepted". The point is that certain firms have introduced new practices with a view to circumventing the enforcement of the national provisions transposing Directive 93/13/EEC. Some contracts now include terms by which the consumer declares that he has negotiated and expressly accepted the general contractual terms and conditions; indeed, sometimes firms go so far as to use contracts which seem to be tailor-made for the consumer, even though all are entirely computer-generated and do not exist in a pre-printed version!

Although these practices are legally speaking null and void, they are very prejudicial to consumers because they mislead them as to their rights. They are directly inspired by the Directive's scope being limited to contractual terms that have "not been individually negotiated".

b) The exclusion concerning mandatory provisions (Article 1.2)

Several Member States have not transposed this limitation on the scope of the Directive (A, DK, FIN, F, NL, S, EL, B) without this leading to problems of application. Within the meaning of the Directive, the expression "mandatory" does not reflect the normal distinction made in civil law between binding provisions and supplementary provisions. The Directive states that the wording "mandatory, statutory or regulatory provisions" also covers rules which, according to the law, apply between the contracting parties provided that no other arrangements have been established (13th recital). Again, in the spirit of the Directive,

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22 This is merely in the form of an indirect exclusion pursuant to Article 3, which serves only as a criterion for assessing any term "which has not been individually negotiated". This exclusion results from the elimination by the Council of Article 4 of the Commission's amended proposal (COM(92)66 final, OJ C 73, 24.3.1992) which laid down specific criteria applicable to individually negotiated terms.

contracts embodying statutory or regulatory provisions are supposed not to contain unfair terms and can thus be excluded from the scope of the Directive, provided Member States see to it that they do not include unfair terms (14th recital).

Besides in the context of Article 1(2), public services, which are **included** in the definition of the "seller or supplier", i.e. professional, (Article 2c) cannot be excluded from the scope of the Directive in respect of "mandatory provisions". This reading is shored up by the Commission's statement in the Council minutes in connection with the adoption of the common position concerning Article 2 on the notion of the contract. The Commission points out that the notion of contract also includes transactions involving supplies of goods or services in a regulatory framework.

However, the control of general interest service contracts has met with opposition in the different Member States and national courts are reluctant to enjoin due control of contractual terms and conditions governing the provision of these services.

The Commission's study on the application of the Directive to general interest services revealed enormous problems, but also showed that these sprang from the specific nature of these services and the national legal orders and had little to do with whether or not Article 1(2) of the Directive has been transposed.

c) Exclusion as regards the price and the subject matter of the contract (Article 4(2))

Again, many Member States have not transposed this limitation (DK, E, FIN, L, P, S, EL). And again, no problems have arisen in practice. The courts of these Member States have not taken it upon themselves to revise prices or to meddle with the main subject matter of contracts in a massive or indiscriminate way, as had been feared by the proponents of certain doctrines and in certain professional circles. Indeed in the vast majority of cases neither the price as such – which results from the play of market forces – nor terms which plainly concern the definition of the subject matter of the contract are likely to raise problems which could be resolved by applying the legislation on unfair terms. However, their exclusion raises interpretative problems which can compromise the proper application of the text.

Terms concerning the price do indeed fall within the remit of the Directive, since the exclusion concerns the adequacy of the price and remuneration as against the services or goods supplied in exchange and nothing else. The terms laying down the manner of calculation and the procedures for altering the price remain entirely subject to the Directive.

As regards the subject matter of the contract, its exclusion from the Directive in no way contributes to resolving the few cases in which this aspect is of real importance. The typical example concerns insurance: how can one determine whether the exclusion of a certain risk from insurance coverage[23] is a term pertaining to the subject matter of the contract – hence not subject to control – or whether it is a term waiving liability, which is indeed subject to the Directive?

Question No 1: Should one or more of the three abovementioned limitations be eliminated from the scope of the Directive? If so, which limitations should be eliminated and under what conditions?

[23] Whether worded negatively (exclusion) or positively (risk not included) is irrelevant.

2. THE NOTION OF UNFAIR TERM AND THE LIST IN THE ANNEX

The Directive provides for two ways of determining whether a contractual term is unfair – one main approach and one supplementary one. The Directive contains a general criterion (Article 3(1))[24], supplemented by an indicative list of terms which may normally be regarded as unfair (Annex to the Directive).

The general criterion has been transposed in different ways by the Member States. Some countries have transposed the text literally, while others have rephrased it a greater or lesser extent. However, practice shows that what ultimately counts is the concrete enforcement of the general criterion and not the actual text of the law.

The second way of assessing the unfairness of a contractual term is the indicative list annexed to the Directive. Since the list is indicative, a contractual term corresponding to one of the examples in the annex is not automatically deemed unfair[25]. However, it is an invaluable tool both for the courts, the authorities and the economic operators.

Although the list is "indicative", Member States are obliged to include it in the transposition instrument so as to familiarise legal experts and the general public with its existence. Hence the content of the list should be part and parcel of the national legal instruments. Indeed, the Court has consistently held that it is of the essence, in order to satisfy the requirement of legal uncertainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights[26].

This obligation to transpose the list itself has triggered two types of problems.

Firstly, certain countries have refused to transpose the list as it stands[27]. The national authorities of these Member States argue that an indicative list of unfair terms might create confusion and adversely affect consumer protection (because certain terms are already outlawed in their domestic legal orders); they also fear that the courts might tend to confine their review to the terms in this list, to the detriment of the general assessment criterion.

Secondly, case law has shown that the way the list is drafted has weakened its practical impact. Many of the terms in the list are somewhat vaguely worded, with the result that a single term in the list may relate to a large number of different contractual terms. Indeed, one third of the cases contained in CLAB relating to the annex exclusively concern point b) in the list!

The question as to the status of the list was raised during the preparatory work on the Directive. In the initial proposal of 24 July 1990[28], the nature of the list in the annex was not spelt out by the Commission. However, in the amendments approved at first reading on 20 November 1991 the European Parliament demanded[29] that the list be binding but not

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24 Article 3(1) provides that a term shall be regarded as unfair "if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".

25 The inverse also applies in the sense that a contractual term which might seem to be authorised by the annex is not automatically "non-unfair".

26 Judgment of 19 September 1996, case C-236/95, *Commission* v *Hellenic Republic*, [1996] ECR I-4459, grounds 13.

27 Namely Finland, Sweden and Denmark. Infringement proceedings have been brought against these countries.

28 COM(90)322 final, OJ C 243, 28 September 1990.

29 In amendment 11.

exhaustive. The Commission's amended proposal of 5 March 1992[30] provided for a binding list, but this was scotched by the Council, which in its common position of 22 September 1992 deemed that the list should be indicative.

The national legislations have not generally followed the approach enshrined in the Directive and often contain more stringent requirements. Thus certain countries (A, E, B, LUX, G) have published lists of terms which are regarded as unfair (black lists), while others provide for black and grey lists (P, NL, D, I); only a minority (F, UK, IRL) has opted for a non-binding list like the one in the Directive.

The role of a "black" list in assessing the unfairness of a term is highly important for the courts. From CLAB it emerges that out of a total of 1 849 cases that refer to national lists of terms, 1 689 concern binding (or black) lists while only 160 concern non-binding (or grey) lists.

Question No 2: As regards the content of the list, should the examples be drafted in greater detail, or should the number of terms be increased to enhance the practical impact of this list?

Should the nature of the list be altered, with a view not only to ensuring more faithful application of the Directive but also to contributing to the harmonisation of national laws?

3. THE PRINCIPLE OF TRANSPARENCY AND THE RIGHT TO INFORMATION

Article 5 of the Directive says that contractual terms offered to the consumer must always be drafted in plain, intelligible language.

The principle of transparency, on which Article 5 is based, has various functions depending on how it is linked with the Directive's other provisions.

The principle of transparency may be seen as a way of vetting the insertion of contractual terms at the time of conclusion of the contract (if analysed on the basis of recital No 20)[31] or of checking the content of the contractual conditions (if read in the light of the general criterion enshrined in Article 3).

Transparency also means that consumers should be able to obtain, prior to conclusion of the contract, the information they need to make their decisions in full knowledge of the facts.

The Commission, aware of the importance for consumers of the right to pre-contractual information, drafted a provision to this effect in the context of its amended proposal of 1992[32].

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30 OJ C 73, 24 March 1992.

31 Recital No 20 provides that: "Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail;".

32 Originally, Article 5(2) of the Directive provided that *"regardless of whether or not they are unfair, the terms which have not been individually negotiated shall be regarded as having been accepted by the consumer only where the latter has had a proper opportunity to examine the terms before the contract was concluded"*.

Although the right to information was later rejected by the Council[33], certain aspects of the Directive lend themselves to an interpretation which might lead to the implicit recognition of such a right[34].

However, the reality is entirely different, since professionals rarely provide consumers in advance with the contractual conditions which will ultimately govern their contracts, even when consumers expressly ask for them.

This difficulty was noted by the Commission in connection with the studies it commissioned with a view to examining the prevalence of unfair terms in certain economic sectors[35].

Hence the situation is characterised by a total absence of "competition" as regards the quality of contractual terms.

Besides, infringement of the principle of transparency is not penalised in the strict sense of the word, because contractual terms which do not comply with the criteria of clarity and intelligibility are neither removed from the contract nor regarded as unfair[36].

Indeed Article 5 provides that in such cases the interpretation most favourable to the consumer shall prevail, so that the contractual term may be maintained despite its irregularities.

Question No 3: Is there a need to flesh out the notion and function of the principle of transparency in the Directive?

Question No 4: Should consumers be given the express right to become effectively acquainted with the contractual terms prior to concluding the contract[37]? Should this right be extended to all interested parties, such as researchers, competitors themselves, in order to improve market transparency and thus competition?

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33 Although the Council was in favour of vesting such a right in consumers, it considered that this did not come within the legal framework of Directive 93/13 but rather that of national rules concerning the formation of contracts.

34 Recital No 20 concerning Article 5 provides that *" the consumer should actually be given an opportunity to examine all the terms"*. Point i of the Annex provides that a term that "*irrevocably bind[s] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract*" may be deemed unfair.

35 For example, it proved particularly difficult to obtain contractual terms and conditions in the context of the studies concerning insurance contracts, tourist contracts and financial services.

36 However, some courts have ruled that the absence of clarity in a contractual term may be illegal in itself. The CLAB database contains some examples, such as the judgment of 20 September 1989 of the Creteil Court of Final Instance, before which consumer associations had sought an injunction against a term in a credit contract. The term provided, without further indications, that the borrower would have to prepare his dossier within the stipulated deadline for his request to be approved. The court considered the term to be illegal because of the absence of clarity (Clab FR 000012).

37 Various sectoral Directives have explicitly enshrined the right to pre-contractual information. Examples include Directive 85/577 on contracts negotiated away from business premises (Article 4), Directive 90/314 on package travel, package holidays and package tours (Article 4), Directive 94/47 on the purchase of the right to use immovable properties on a timeshare basis (Article 3), Directive 97/7 on distance contracts (Article 4), etc.

Question No 5: In the event of infringement of the principle of transparency, should the level of consumer protection be raised by providing either for an extension of the scope of Article 7 (possibility of actions for injunctions in respect of unclear terms, regardless of their unfairness[38]), or a specific sanction (such as providing that contractual terms that are unclear to the consumer be deemed unenforceable if the consumer does not have an opportunity to familiarise himself with them before conclusion of the contract)?

4. SANCTIONS

Article 6(1) of the Directive provides that unfair terms contained in an individual contract shall not be binding on the consumer, as provided for under national law. Hence the objective envisaged has to be achieved in the light of the different legal orders governing unfair terms.

Because of the diversity of legal traditions, this provision has been transposed in different ways (the civil penalties include non-existence, nullity, revocability, voidability and unenforceability of such unfair terms).

However, with a view to maintaining the scope and the effectiveness of the Directive, the legal orders must respect a number of principles to ensure that an unfair term does not actually bind the consumer. In this respect consumers must not only have the unwaivable opportunity of invoking the unfairness of the contractual terms during a court procedure, but they must also be free to refuse to honour their obligations under unfair terms before a court has adjudicated on the matter in hand[39].

Besides, any court judgment that finds a term to be unfair must provide that the judgment take effect from the time of conclusion of the contract (*ex tunc*). Finally, the court should be *ex officio* entitled to rule on the unfairness of the contractual term, to the extent that this is necessary for its decision. It is somewhat difficult to gauge to what extent the different national legal orders meet these requirements, but it seems they do not always do so.

The Belgian system is a good example. This Member State had adopted an act prior to the Directive containing a general definition of unfair terms as well as a black list of terms regarded as unfair. The terms included in this list were automatically considered as null and void and banned, while those that came within the general definition were not automatically null and void. In this system it seemed that the courts were free to set aside any such terms, but were not obliged to do so, with the effect that an unfair term could still be binding on the consumer. This situation, which runs counter to the spirit of the Directive, was resolved by amending the act.

However, other problems exist in this area. Hence, it is far from evident that the courts are obliged, or even entitled, to adjudicate *ex officio* as to the unfairness of contractual terms. It goes without saying that we are referring to the courts' power or obligation to assess *ex officio* the unfairness of contractual terms which are relevant to the resolution of the dispute at issue and not all the other terms of the contract. Experience in the Member States shows that some

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38 This possibility might also be derived from Directive 98/27/EC on actions for injunctions, which must be transposed by 1 January 2001.

39 It goes without saying that, if the firm challenges the consumer's position, it may sue the consumer in question and win the case, with all the associated consequences for the consumer, if the court finds that the contested term is not unfair.

national courts are reluctant to address such terms *ex officio* and that, on the other hand, when they proceed to do so they risk being penalised. In this connection the French Court of Cassation set aside – on procedural grounds – a court decision which assessed *ex officio* the unfairness of a contractual term (Cass. civ. 16/02/94 – INC No 3326 – Clab fr000524).

However, in order to ensure that the Directive is fully effective (and notably Article 6(1), which provides that unfair contractual terms shall not be binding on consumers), national courts should be empowered to assess such terms *ex officio*[40]. Besides, the civil penalties provided for by the Member States do not seem sufficient to protect consumers and to effectively oblige professionals to refrain from using unfair terms[41]

Indeed the only risk (and it is a minor one) run by the professional when a consumer challenges a term before the courts is that this term may be declared invalid. Besides, when an action for an injunction is brought against a professional the only risk he runs is that he may have to replace the offending term by another one. In both cases the professional is ultimately in a situation pretty similar to the one which would have existed if he had never used the unfair term. However, he can make the most of the term in respect of all consumers who do not have the information or wherewithal to react. In the case of injunctions the penalty is not dissuasive enough to the extent that it does not penalise the prior use of the unfair term, but simply means that the professional may not use it in future.

Question No 6: Should the existing civil penalties be reinforced in order to ensure genuine and effective protection of consumers against unfair contractual terms?

Question No 7: Should national courts be explicitly obliged / empowered to assess *ex officio* the unfairness of contractual terms which may be relevant to the outcome of a dispute?

Question No 8: Should other penalties be envisaged (criminalisation, damages) in order to effectively dissuade professionals from using unfair terms?

5. THE NATIONAL SYSTEMS FOR ELIMINATING UNFAIR TERMS

Article 7 of the Directive requires Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers.

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40 The Conclusions of the Advocate General of 16 December 1999 (joint cases C-240/98 to C-244/98 – *Océano Grupo Editorial, S.A. and Salvat Editores, S.A. v Rocío Murciano Quintero et al*) fully support this position. According to the Advocate General the penalty provided for in Article 6(1) of the Directive "means that the Directive's provisions can be characterised as "imperative" rules of public economic order which cannot but be reflected in the powers vested in the national court". The Advocate General also stresses that "it is in the public interest that terms harmful to consumers be unenforceable" and that "the ex officio involvement of the court is not only extremely effective with a view to suppression but also seems likely to genuinely dissuade firms from including unfair terms in consumer contracts".

41 In this connection, the Commission indicated in its Communication to the Council and the European Parliament on the role of penalties in implementing Community internal market legislation (COM(95)162 final) that it was important to ensure the transparency of national penalties so as to be able to confirm that they are effective, proportionate and dissuasive. In its Resolution of 29 June 1995 (on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, OJ C 188 of 22 July 1995) the Council reiterated these arguments and added that, pursuant to Article 5 of the Treaty, Member States must take any appropriate measures to guarantee the scope and effectiveness of Community law by, inter alia, making the chosen penalty effective, proportionate and dissuasive.

Although the Directive allows Member States to choose between a legal procedure and an administrative one, all countries have opted for the legal procedure.

Pursuant to existing positive law in the Member States, only the courts are empowered to prohibit the use of unfair contractual terms.

There are big differences between the different national judicial systems as regards these powers.

As regards the *rationae materiae*, jurisdiction lies with the ordinary courts (in most Member States) or designated bodies (such as the High Court in the United Kingdom and Ireland and the Market Court in the Nordic countries).

As regards the *rationae loci*, jurisdiction lies either with the courts of the defendant's place of residence (in most Member States) or a dedicated court which is responsible for the entire national territory (such as the Market Court in the Nordic countries).

Finally, there are also substantial differences as regards the authority of the courts' decisions as *res judicata*. Although in most legal orders the court decisions may be appealed, in some national courts the decision handed down is final (this is the case of the Market Court in the Nordic countries).

It is interesting to note that, although the courts play a predominant role, many systems have a substantial "administrative" admixture. In some Member States it is not only consumer associations that are entitled to seek injunctions against unfair terms: the initiative may be taken by a person responsible for upholding the public interest. This is notably the case of the Director of the Office of Fair Trading in the United Kingdom, the Director of Consumer Affairs[42] in Ireland, the consumer ombudsman in the Nordic countries, and the Verbraucherschutzvereine[43] in Germany. The cases of Portugal and Spain[44] are particularly interesting because in these two Member States the Public Ministry is also entitled to sue, meaning that the national territory is completely covered since they are present throughout the country.

Besides, other Member States (France and Belgium) have created collegiate bodies whose main mission is to recommend the elimination of unfair terms. Indeed in practice the courts often refer to the recommendations issued by these bodies in the grounds to their judgments[45].

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42 In Ireland, Instrument No 27/1995 transposing the Directive provides that only the Director of Consumer Affairs shall be entitled to bring actions for an injunction (an infringement procedure has been brought against the Republic of Ireland for failure to transpose Article 7(2) of the Directive correctly).

43 Although the Verbraucherschutzverein is not formally an administrative body but an association under private law, it is largely subsidised by public funds for fulfilling missions of general interest.

44 Even before the Directive was adopted, Portuguese legislation (Decree-Law No 446/85 of 25 October 1985) already empowered certain consumer associations and certain trade unions, professional and business associations and the Ministry of the Public to bring proceedings. Besides, the Spanish transposition Act No 7/1998 of 13 April 1998 also vested this power in the Public Ministry.

45 The summary of the case files concerning the elimination of unfair terms dealt with by UFC- Que Choisir (a French consumer organisation) since 1984 (published in 1999) contains examples of judgments which mention the recommendations of the Unfair Terms Commission. Besides CLAB contains numerous decisions handed down by French courts of first instance and French appeal courts which refer to the recommendations of the Unfair Terms Commission. This is the case as regards contracts for the purchase of motor vehicles (Clab FR 000411), holiday contracts (Clab FR 000412), seasonal rental contracts (Clab FR 000414), motorway subscription contracts (Clab FR 000450), remote surveillance contracts (Clab FR 000579), cable or pay television subscription contracts(Clab FR000653), etc.

As regards the court system, a number of problems have arisen. Procedures are time-consuming and the offending terms continue to have their effects until the decision is handed down, which may take several years. In order to address this problem, which is due to the slowness of the law in the Member States, it would be a good thing to introduce procedures to ensure the swift elimination of unfair terms[46].

Besides, Italian case law has also recognised the need for an emergency procedure with special criteria[47]. Italian law provides for two procedures in respect of actions for injunctions, namely a "normal one" and an emergency one. In the dispute in question the court considered that the criteria for triggering an emergency procedure, when this concerned the injunction of an unfair term, should be assessed in the light of specific considerations and not the general conditions of "*periculum in mora*".

Another equally important problem concerns the consequences of the effect in relation to the *res judicata* not only between the parties but also as regards the term in question.

Firstly, a court decision declaring a term to be unfair is binding only on the professional who is party to the dispute and so the effects of the decision do not affect other professionals who use identical terms[48].

Hence, these decisions are not much help cleaning up the market. When 100 firms use unfair terms and one of these firms is served with an injunction, the other 99 firms remain unaffected, so that all of them would also have to be sued in order to prohibit them from using terms having the same effect as the one declared to be unfair! Besides, the situation resulting from the first judgment leads to a distortion of competition between the firm that has been obliged to relinquish the term and those that may continue to use it with complete impunity.

To avoid a situation like this, one might consider putting in place a special procedure making it possible to seek a fresh ruling with a view to extending the effects of the first judgment to other professionals in the same economic sector. In this scenario it goes without saying that these other professionals would have a right to defence under this special procedure.

Besides, a court decision declaring a term to be unfair and enjoining its elimination applies only to the wording of the term in question and not to the effect is produces.

Indeed there is a contradiction between the goal of the legislation on unfair terms and the result of its enforcement. We know that the grounds for declaring a term to be unfair is the imbalance which the term creates between the professional and the consumer (a term is considered to be unfair because of its effects). However the force of *res judicata* of a decision enjoining the elimination of an unfair term is limited to the term itself, to its actual wording. The effects of the term, which underlie the court's decision, lie outside the scope of the force of *res judicata*. This means that professionals who have been prohibited from using a term found to be unfair may circumvent the judgment by replacing the offending term by another one whose effect and/or object is also unfair.

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46 As in Directive 84/450 on misleading advertising and also in Directive 98/27 of 19 May 1998 on injunctions for the protection of consumers' interests, which require Member States to provide for emergency procedures. This Directive must be transposed by 1 January 2001 at the latest.

47 Ordinanza of the Palermo Court 17-22 October 1997.

48 It is interesting to note that Brazil has found a solution to this problem: in certain conditions, actions for injunctions may have an effect erga omnes.

Hence the rules designed to protect consumers do not achieve their stated goal, since it would be necessary to bring another action for an injunction against the new term introduced by the professional. It would make more sense if the effects of a judgment were wider and not just limited to the wording of the terms, in order to avoid further litigation.

In order to offset the drawbacks posed by the principle of the *res judicata* effect, Spain[49] has recently created a register of contractual terms which have been declared unfair by final court decisions. The effects of these decisions are not only *inter partes* but also *erga omnes* and *ultra partes* to the extent that anybody can invoke the unfairness of these terms before other Spanish courts and instances[50].

Finally, in prescribing the use of "adequate and effective means", the Directive requires Member States to ensure that the courts or supervisory bodies have real power to oblige professionals to remove unfair terms from their contracts. The Member States have introduced mechanisms to dissuade professionals from ignoring injunctions. This mechanism normally takes the form of a fine in the event of a repetition of a specified infringement[51]. However, as regards fines, several practical problems arise when the professional does not comply with the decision. In order to obtain satisfaction the plaintiff must not only be able to prove that the professional has repeatedly infringed the law, but also take him to court once again.

Question No 9: Should there be a special accelerated procedure to enjoin the rapid elimination of unfair terms?

Question No 10: Should a mixed system be put in place whereby an administrative body would be responsible for analysing and prohibiting the use of certain contractual terms, it being for the professional to bring proceedings if he does not accept the administrative decision?

Question No 11: Should the force of the *res judicata* be widened to include not only the wording of the term itself but also its effects and hence prevent professionals from replacing prohibited terms by other terms having the same effect?

Question No 12: Should a special procedure be established to ensure that decisions concerning injunctions in respect of a particular firm be declared applicable to other firms involved in the same kind of activity? If so, what types of decisions could be subject to such a procedure and how could one ensure the right of all the parties concerned to defend themselves?

Question No 13: Should specific, coercive penalties be imposed on professionals who intentionally use unfair terms?

Question No 14: Should more specific or supplementary penalties be introduced to ensure compliance with injunctions, such as publication of the court judgment at the firm's expense?

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49 Transposition Act No 7/1998 of 13 April 1998.

50 Portugal and certain Nordic countries have also introduced a system for registering court decisions on unfair terms handed down in the context of individual actions or actions for an injunction.

51 In certain cases the legal system of the Member States also considers this refusal to comply with an injunction to be a penal infringement, and sometimes this may be more dissuasive than a fine.

6. TOWARDS A "POSITIVE" SYSTEM FOR ELIMINATING UNFAIR TERMS

The traditional approach to eliminating unfair terms based on actions for injunctions is a "negative" system. Once a term is deemed to be unfair, the court orders that it be removed from the contracts. The professional must cease to use this term in consumer contracts. Normally he will replace this term by another one.

As a result the new term may also be unfair and the only way to remove it is to start all over again. Unfair terms are like the Hydra: cut off one head and others grow in its place. Besides, the judgments rarely spell out the parameters for amending the term: for example, the court may declare that imposing a penalty of 50% of the price for non-performance by the consumer to be unfair, but will refrain from saying what amount is deemed acceptable – 10%, 20%, 40% or nothing at all?

Besides, unfairness may result not only from the presence in contracts of certain contractual terms but also from the vagueness of certain terms or even the fact that contracts are silent about certain matters.

Cases like this are prevalent in the insurance sector. Certain insurance policies are imprecise or silent as to the obligations to pay the premium, which means that policyholders may not know how to meet their obligations and the consequences for their insurance cover if they fail to pay[52].

In order to effectively eliminate terms and to remove unfair silences, certain national systems for monitoring unfair terms (such as the ombudsman in the Nordic countries or the OFT in the United Kingdom) have encouraged direct negotiations between individual professionals and professional associations, with considerable success.

At the level of individual negotiation the case of the United Kingdom is particularly interesting, since the Office of Fair Trading plays a pivotal role in eliminating unfair terms. Once it receives a complaint about a term regarded as unfair, the OFT directly initiates discussions and negotiations in order to persuade the professional to modify the term in question[53].

At the level of collective negotiations, certain national systems provide for *a priori* control of contractual conditions. This control begins with the very drafting of the contractual terms in the context of collective agreements. Standard-form contracts are drafted in the framework of negotiations between the consumer associations (the Netherlands is a typical case) or bodies

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[52] According to a 1995 study performed by the Centre du Droit de la Consommation of the University of Montpellier, certain optional insurance policies contain no details e.g. as regards the obligation on the insurer to reply to an accident statement, the appointment of an expert, the payment of commission, etc. ... which may give rise to unfair "silences". CLAB also contains abundant examples from the insurance sector of vaguely worded terms or unfair silences. As regards vague contractual terms, the Belgian Court of Cassation deemed unfair a term waiving the guarantee in respect of certain damages on the grounds that that *an exclusion clause cannot be validly relied on against the insuree unless the clauses in question are "clear, express and limited"* … (Clab BE 000447). As regards unfair silences, the Lyons Court of Final Appeal in its judgment of 23 May 1996 ruled that a term was unfair *because it does not subject increases in the premium to any contractrual condition and gives the insurance company an unfair advantage because it does not have to justify any increase in the premiums it decides to adopt* (Clab FR 000324). Likewise, the Athens Court of First Instance considered a term to be unfair *… on grounds that the increase in the price of the premium was not governed by special and precise criteria set out in the contract* (Clab GR 000189).

[53] The results speak for themselves: between 1995 and 1998, a total of 1 200 professionals modified or eliminated unfair terms from their contracts following discussions with the Office of Fair Trading.

with a legitimate interest in protecting consumers (such as the consumer ombudsman in the Nordic countries) and professionals or associations of professionals[54].

Experience with these collective agreements has been mixed. For example, although these agreements have not had much impact in France (mainly because their effects were limited to the signatory organisations and valid only at local level), experience in Sweden has shown that, following negotiations in the individual sectors, the number of judgments handed down by the courts in the field of unfair terms dropped significantly[55]. Likewise in the Netherlands the professional organisations and consumer associations have concluded full-fledged sectoral-level agreements. The originality of the Dutch system, besides the use by professionals of standard terms endorsed by the consumer associations, lies in the gradual establishment of a system for the out-of-court resolution of disputes over these standard-form contracts. Indeed, following the negotiations, a genuine sector-specific complaints bureau is being put in place and will be entitled to handle disputes concerning the conclusion and performance of consumer contracts in the economic sector in question.

Question No 15: Should one provide for and encourage the establishment of systems that encourage the negotiation and discussion of terms with the professionals (obviously without prejudice to competition law)?

Question No 16: Should the courts, in the context of actions for injunctions, be empowered to propose that the parties adopt a new wording in the case of terms that have to be eliminated, or at least to provide for special arbitration procedures, integrated into the injunction procedure, to facilitate out-of-court settlements whose goal would be to reword the offending terms?

7. TOWARDS A EUROPEAN SYSTEM FOR THE ELIMINATION OF UNFAIR TERMS

The need to protect consumers against unfair terms is all the greater now that consumers are increasingly required, because of the single market, to conclude contracts that are drawn up in a language other than their own and that are governed by a different legal order than their own.

Certain contracts are steadily acquiring a cross-border dimension or have cross-border repercussions (rental of vehicles, credit accounts, international haulage contracts, package holidays, timeshares, electronic commerce, etc.). Besides, companies are becoming increasingly international and are often present on different national markets simultaneously. Finally, in certain cases contractual terms are based on international agreements – as in the case of the IATA agreements in the field of civil aviation, which lay down the standard-form contracts used by most airline companies. The Commission has carried out various pilot tests to eliminate unfair terms in certain types of contracts. The idea is to encourage cooperation

54 For example in the United Kingdom a new standard contract was recently drafted by the Office of Fair Trading and the British Vehicle Rental and Leasing Association (a professional association which alone represents 85% of turnover in the rental and leasing of vehicles in the United Kingdom).

55 The CLAB database shows that, in Sweden, nine decisions were handed down since 31 December 1994 (the deadline for transposition of the Directive), while 189 judgments had been handed down before that date. Likewise in the Netherlands 28 decisions have been handed down since 31 December 1994 as opposed to 69 judgments prior to that date.

between different consumer associations in several Member States at the same time, in order to enjoin the removal of unfair contractual terms of this kind[56].

The creation of a European system to eliminate unfair terms could improve the practical enforcement of Directive 93/13 and maximise its impact, thanks to the resulting economies of scale.

In this connection the European Parliament, in the amendments it made to the proposal for a Directive of 18 November 1991, proposed creating a Community mediator for unfair terms[57]. The Commission did not take up this idea in its amended proposal of 1992[58] because it considered that the time was not ripe to create new administrative structures in this area.

In its 1998 opinion "Consumers and the insurance market"[59], the Economic and Social Committee (ESC) pointed out that certain institutional mediation systems in the Member States *are not impartial and do not even provide consumers and insurance companies with identical guarantees of protection. They may discriminate on grounds of nationality, especially in cases where complaints are assessed by professional bodies*. However, the ESC ascertains that the mediations performed by independent arbitration bodies or by independent specialised mediators (such as the ombudsman in Great Britain) have led to positive results in practice.

Taking these points into account, the ESC proposed to the Commission and the Member States *to put in place not only arrangements to settle disputes by arbitration or the appointment of independent ombudsmen but also to consider creating an observatory to deal with complaints about insurance at Community level*.

Besides, among the action lines set out in the last three-year action plan[60], the Commission, in Annex 1 to the plan, adumbrated the appointment of a European ombudsman responsible mainly for transnational consumer complaints. It argued that one of the main missions of consumer policy was to ensure complete respect for consumers' economic interests and insisted on the need to improve the enforcement and follow-up of the existing legislation so as to resolve problems with a European if not indeed global dimension.

One interesting case is currently being addressed by the Office of Fair Trading in the United Kingdom. It concerns a complaint brought by the Air Transport Users' Council against unfair terms in air transport contracts recommended by IATA. The Director-General of the Office of Fair Trading has begun negotiations with IATA. The latter has announced that it is preparing recommendations to change certain contested terms.

The contractual terms recommended by IATA are used not only in the United Kingdom but in Europe generally, and indeed throughout the world. In this connection the procedure brought

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56 The Commission has subsidised actions for injunctions in regard to car rental contracts, timeshare contracts, contracts concerning new technologies and contracts concerning holidays. Besides, the Commission has mounted a project that focuses on dialogue between professionals and consumers in the field of package holidays (see Chapter II of this report).

57 In amendment No 49, the European Parliament suggested that the main functions of the mediator should be to *"supervise the implementation of the Directive by the Member States, try to settle disputes associated with the presence of unfair terms on an amicable basis, organise meetings between the contracting parties when they reside in two or more different Member States, and prepare an annual report on unfair terms."*

58 OJ C 73/7, 24.3.1992.

59 OJ 95, 30.3.1998, p. 72.

60 Consumer Policy Action Plan 1999-2001 – COM(1998) 696 final of 1.12.1998.

by a Member State authority, namely the Office of Fair Trading, may have cross-border consequences. Would it not be more appropriate for a European body to address such issues in cases of this kind?

Question No 17: Should actions be mounted at Community level to eliminate unfair contractual terms? What type of actions?

8. THE MORE PROBLEMATIC SECTORS

The question of approximating or harmonising national legislation is particularly relevant to certain economic sectors, such as general interest services (utilities) and financial services.[61]

On the one hand, general interest services are highly complex because of the intrinsic need to regulate them. The liberalisation and privatisation of these utilities (water, gas, electricity, post and telecommunications, transport, etc.) have profoundly altered the regulatory framework of public services.

In this connection, the study carried out for the Commission in 1997 (see above, II.2) showed that a large number of contracts used by privatised general interest services (water, gas, electricity, telecommunications, post, transport and health) not only contained grossly unfair terms but also lacked transparency, notably as regards the terms applied.

Besides, the study revealed that there are major obstacles to supervising public service contracts in the different Member States and that the national courts are reluctant to review the terms under which public services are provided on the grounds that basically these services are governed not by contract but by regulation. In practice, therefore, whole swathes of the economy are not subject to control in respect of unfair contractual terms.

Besides, financial services "consume" a large quantity of contractual terms. For example, in the insurance sector the product sold is in reality the contract itself. The control of unfair terms in contracts of this kind is highly complex because of the uniqueness of the sector. In this connection, a study[62] carried out in different Member States on unfair terms in certain insurance contracts revealed numerous infringements of Directive 93/13.

Though at the current stage full harmonisation in the insurance field is still a long way off, certain Member States are keen to bring about partial approximation of the sector.

In its opinion "Consumers and the insurance market"[63], the Economic and Social Committee urged the Commission to define minimum common requirements at Community level for insurance contracts, notably by creating a black list of unfair terms.

Finally, it is interesting to note that in the field of insurance, Article 7 of Commission Regulation (EEC) No 3932/92 of 21 December 1992[64] provides a black list of clauses in

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[61] At the conference in June 1999, the financial community expressed its misgivings about the different degrees of protection within the Member States (these misgivings being all the more pronounced in the field of the crossborder provision of financial services because of the need for a clear and standard contractual framework).

[62] Study on unfair terms in certain insurance contracts carried out for the Commission by the Centre du Droit de la Consommation, University of Montpellier/France, July 1995

[63] OJ C 95, 30.3.1998.

[64] On the application of Article 81(3) of the Treaty (ex-Article 85(3)) to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 398, 31.12.1992.

standard policy conditions to which the exemptions from the Treaty's cartel rules do not apply. Besides, Article 17 of the Regulation provides that the Commission may withdraw the benefit of the Regulation *where it finds in a particular case that a … concerted practice … has certain effects which are incompatible when the standard policy conditions contain clauses …which create, to the detriment of the policy holder, a significant imbalance between the rights and obligations arising from the contract*.

Question No 18: Should mechanisms be established via which contracts or supplies of general interest services would be subject to prior control?

Question No 19: Is there a need for specific action in certain sectors? If so, which ones?

Question No 20: Should these actions include legislative measures? What other types of action are conceivable? Should codes of conduct or similar instruments be envisaged for certain problematic sectors?

9. THE FUTURE OF THE CLAB DATABASE

The CLAB project consists of a database created by the Commission which is currently accessible to the public via the Internet and also of a network of contractors in different Member States who input data into this database. In the first year the contractors had to assemble all existing case law in the field of unfair terms before the European Directive, wherever possible. In the following years the contractors were responsible for keeping the database up-to-date. These contractors were selected on the basis of an open invitation to tender. The Commission provided them with the necessary software for the creation of standardised jurisprudence files. These files are sent to the Commission, which, after checking their quality, inputs them into the CLAB database. A more modern and user-friendly query interface will shortly be available.

Each file in CLAB concerns a contractual term whose fairness has been disputed, regardless of whether it has been declared unfair or not. Thus, one and the same court decision may give rise to several files. It is the contractual term and not the decision that is the focus of the database.

Although it focuses on contracts concluded with or offered to consumers, CLAB also contains certain decisions handed down in disputes between professionals which are of interest for consumer law (because they are transposable). Currently, the query interface exists only in English, but the text of the base (the contractual term and the commentary on the decision) can be consulted in the original language, in French and in English. The database allows very fine-tuned searches based on criteria such as the nature of the decision, the type of procedure, the type of term, the type of contract, the economic sector, etc.

In mounting this project, the Commission was inspired by two basic ideas: firstly, it wanted to create a tool for the systematic monitoring of the practical enforcement of Directive 93/13/EEC in the different Member States[65], notably with a view to preparing this report; secondly it wanted to provide this information to the public with a view to promoting the harmonious and consistent enforcement of the Directive in the different Member States.

65 The base also includes the EEA countries Iceland and Norway.

The CLAB project was initially launched for a period of five years. These five years come to an end in the course of 2000. Thus we should now reflect on the future of this project, which until now has been entirely funded under the Community budget.

Question No 21: Should the CLAB project be continued in the future or should one discontinue updating the database? What kind of amendments are in order? Would it be possible to create a partnership with the Member States or with certain institutions or non-profit associations in which the partners could assume responsibility for assembling the jurisprudence and preparing the files and the Commission would be responsible for the technical management and translation of the files?

Question No 22: Should users be charged for accessing CLAB, with a view to financing the updating and development of the database?

IV – ADDITIONAL OBSERVATIONS

a) The impact on the legislation in the Member States

Despite the misgivings of the proponents of a certain legal doctrine who feared that unity of contract law would be rent asunder, the Member States were able to integrate the Directive into their legal orders without major problems. The impact of the Directive on their domestic laws varied from country to country. It was considerable in countries which did not have existing legislation in the field of unfair terms or in countries whose legislation was incomplete (Ireland, Italy or Belgium for example). The impact was also considerable in countries which, although legislation had long been enacted in this area, did not make use of certain mechanisms, such as actions for injunctions (for example the United Kingdom and Spain). Generally speaking, other countries that already had quite detailed legislation in this area (for example, Germany, the Netherlands, Portugal and the Nordic countries) merely had to amend their existing laws. France is a unique case: the text of the law adopted in 1978 had major gaps by comparison with the Directive. However, most of these gaps were subsequently filled by the courts. The legislator eventually decided to bring the text of the law into line with case law and replaced the 1978 act by a new one.

However, the relationship between the Directive and the national legislations involves far more than simply transposing the Directive. In order to determine whether a term can be declared unfair, it is not enough just to apply the general assessment criterion; one also has to determine what legal rule would apply in the absence of such a term.

In a word, the yardstick is based not only on the general criterion, but also on how supplementary substantive law would apply if the term in question did not exist. Thus the application of the same general criterion in two Member States may give rise to very different decisions, as a result of the divergences between the rules of substantive law that apply to different contracts. Hence harmonisation under the Directive is more apparent than real.

There is a close relationship between the control of unfair terms and supplementary substantive law which must not only make up for the inadequacies of the contracting parties but also fill in the gaps resulting from the elimination of contractual conditions declared to be unfair. This supplementary substantive law, most of which is not harmonised, must ensure a balance in the rights and obligations of the parties. However, certain sectors of supplementary substantive law (some of which have even been partially harmonised) raise a number of problems and do not provide for balance between the parties.

A persuasive example is that of the Luxembourg regulation of 1994 concerning package travel, package holidays and package tours. The case in question concerned a travel agent based in the Grand Duchy of Luxembourg whose contracts contained an unfair term pursuant to which consumers could not transfer their contract any later than 21 days before the departure. The professional pointed out that this term was prescribed by Luxembourg law itself. Indeed the Luxembourg instrument[66] transposing Directive 90/314 on package travel,

[66] Grand-Ducal Regulation of 4 November 1997 on prior information and the terms of contracts relating to package travel, package holidays and package tours, pursuant to Articles 9, 11 and 12 of the Act of 14 June 1994 governing the conditions for the exercise of activities relating to the organisation and sale of holidays and travel.

package holidays and package tours[67] contains an explicit provision of this kind in regard to cancellations and transfers of the contract[68].

In order to remedy distortions of this kind, some parties have suggested and have long been calling for an approximation of the private law of the Member States.

Hence the European Parliament called for harmonisation in this area in two resolutions of 1989[69] and 1994[70] on the approximation of the private law of the Member States.

The issue of the approximation of civil law was also raised at the extraordinary Tampere European Council of 15 and 16 October 1999 on the creation of a common zone of freedom, safety and justice within the European Union.[71]

In this context one should also reconsider the Directive's scope, which is limited to contracts between "sellers or suppliers" (i.e. professionals) and consumers (Article 1). The definition of these two terms corresponds to criteria which have already been very clearly enshrined in the field of consumer protection policy. However the idea of widening the scope to relations between professionals has been regularly adumbrated at several levels and on different occasions, notably in the context of the last July's conference on unfair terms.

It is interesting to note that in certain Member States (D, NL, P, E) the law on general terms and conditions also applies to relations between firms, although stricter rules apply to relations with consumers. This approach has worked very well in practice.

Relations between firms are of various kinds, notably taking the form either of a seller / final consumer or producer / distributor relationship, or a 'horizontal' relationship in the case of a partnership within a joint venture. Regardless of the nature of this relationship, firms– like consumers – may be in a weak position when they are confronted with the general contractual terms and conditions imposed on them by their trading partners[72].

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67 OJ L 158/59, 23.6.1990.

68 Considering that the period of 21 days before departure imposed an unfair limitation on the right to transfer the booking provided for by Article 4(3) of the Directive 90/314, infringement proceedings have been brought against the Grand Duchy of Luxembourg. The Luxembourg authorities recently informed the Commission that they will shortly amend the contested provision with a view to bringing it into line with Directive 90/314.

69 In its Resolution on the approximation of the private law of the Member States (OJ C 158/400), Parliament called in particular for preparatory work to be begun with a view to drafting a common Community code of private law, and the creation, by the Member States that accept the principle of unification, of a committee of qualified scientists who could propose priorities and organise all the activities needed with a view to harmonising private law in these states.

70 In its Resolution on the harmonisation of certain sectors of private law in the Member States (OJ C 205, 25.7.94), Parliament urged the Commission to begin work on the possibility of drafting a common Community code of private law and reiterated its opinion that a committee of qualified scientists should be created to propose priorities for partial harmonisation in the short term and more general harmonisation in the long-term.

71 The Council and the Commission were invited to strive towards greater convergence of private law and in particular to prepare a general study on the need to approximate the legislation of the Member States in civil matters with a view to eliminating barriers to the smooth functioning of civil procedures.

72 **The CLAB database also contains approximately 500 cases pertaining exclusively to relations between undertakings which are considered to be of great interest for consumers.** Besides, some of these decisions apply the criteria of the Directive to disputes between professionals. One example is the judgment of the Milan court of 5 September 1995, which examined and declared to be unfair certain contractual terms waiving liability in respect of an insurance company which had been sued by another company, in regard to the provisions of the Directive (Clab IT 000452).

Such a situation could also be covered by European competition law, and notably by Article 82 (ex Article 86) of the EC Treaty, to the extent that it might point to a dominant position. Besides, extending control of unfair terms to the general terms and conditions used in relations between firms would make it easier for firms to shift their obligations vis-a-vis consumers to a higher level in the marketing chain. For example, in the absence of such control, the seller cannot exclude his liability vis-à-vis the consumer for the sale of a defective product, but his rights in respect of his supplier might be limited by the general terms and conditions used by the latter[73]. Finally, in many contracts of adherence it is difficult to find any difference between the "adherent" to the contract, regardless of whether the person is "acting in the course of business" or not. Why should the relationship between the airline passenger and the terms governing the travel contract differ when he is travelling to a conference rather than simply taking a holiday?

b) On national "jurisprudence"

The term "jurisprudence" is used here in the same sense as in CLAB: all concrete applications of the Directive, including not only court judgments but also administrative rulings and any other relevant decisions.

There has been a considerable increase in the number of cases in several countries, particularly in the field of preventative control (actions for injunctions) of unfair terms. The prime example is the United Kingdom: in the past, there was no control whatsoever; today, the Office of Fair Trading examines over 800 cases annually, and in over 500 cases firms have taken measures which have generally involved a change or elimination of the offending contractual terms[74].

Spain is also a good example: here, the transposition of the Directive led to the introduction of actions for injunctions as a new means of reviewing unfair terms. In this respect CLAB shows how Spain has begun to use this instrument in practice.

Besides, in certain countries which already provided for actions for injunctions, such as Portugal and Belgium, there has also been a considerable increase in the number of cases, and it seems that the Directive may have functioned as a catalyst.

In qualitative terms it is interesting to note that certain national courts are becoming increasingly sensitive to European law and often refer to it in their decisions. An analysis of CLAB shows that already 4.4% of the judgments handed down by national courts in the field covered by the Directive refer to the Community text. At the current stage of European construction this is a figure to be proud of and reflects the progressive impact of Community law on the national legal orders.

A very recent Belgian judgment provides a good illustration[75]. A consumer association brought an action for an injunction against unfair terms imposed by a bank on its clients. This action was not based on the list of terms that may be regarded as unfair but on the general

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73 Article 4 of Directive 99/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees touches on this problem, but does not fully resolve it, since it leaves it to national law to protect the final seller vis-à-vis his supplier. The nature of this protection generally depends on whether or not there is a general law governing contractual conditions.

74 The CLAB database highlights the importance of the cases addressed in the United Kingdom by administrative procedures since the time limit for transposition of the Directive: 625 of the 865 administrative measures listed up to now in the database hail from this Member State.

75 Judgment delivered on 8 September 1999 by the Merchant Court of Namur.

definition of what constitutes an unfair term. The bank challenged the court's competence, claiming that an action for an injunction could only be brought in respect of the unfair terms mentioned in the list and arguing that a consumer association did not have standing to sue if the unfairness of the terms in question derived only from the general definition, as was the case[76].

The court decided otherwise and declared that an association was entitled to sue regardless of whether the offending terms came within the general definition or were contained in an indicative list. To support this interpretation of the law, the court directly referred to the European Directive and included many citations from the relevant legal literature.

Another interesting example concerns a judgment recently handed down in Italy[77]. A consumer association brought an action for an injunction against recommendations made by professionals concerning the use of unfair terms. Although Italian law does not expressly provide that actions may be brought against recommendations, the court found for the plaintiff and interpreted the law in the light of the Directive. Indeed the court mentioned the fact that there was an ongoing infringement procedure in regard to this point in the grounds for its decision.

Our final example[78] concerns a landmark Spanish ruling. The novelty of the judgment lies in the rationale for recognising the direct horizontal effect of Directive 93/13/EEC (which has not yet been transposed into Spanish domestic law)[79]. In the case in question the Spanish Supreme Court recognised the direct horizontal effect of Article 3(3) (reference to the Annex, in particular point q)) of the Directive. According to this provision, terms requiring express submission to a specific jurisdiction may be considered unfair. Despite the opposition of a certain part of Spanish doctrine to the judgment's line of reasoning, this decision demonstrates the increasing importance of Community law within the national legal orders, even before transposition, as in this particular case.

Also from a qualitative viewpoint, there have been some very interesting developments in the way the unfairness of certain terms is assessed. Austrian case law provides an interesting example. In 1996 the Austrian Supreme Court endorsed a waiver of liability on the part of a firm in respect of personal harm to a consumer during a package holiday, on the grounds that there had only been minor negligence on the part of the professional[80]. On the contrary, in a 1997 case, a term that waived liability for a mere mistake was found to be unfair. The reversal was occasioned by the amendment made to Austrian law in 1996, which took effect on 1 January 1997, to ensure proper transposition of the Directive[81].

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76 Indeed this interpretation could be in accordance with the Belgian act before it was recently amended in order to bring it into line with the Directive, following the initiation of an infringement procedure. This shows the real impact of these types of procedures on national law.

77 Decision of the Ordinary Court of Turin of 7 July 1999.

78 Judgment of the Spanish Supreme Court of 8 November 1996.

79 The CJEC does not recognise the direct horizontal effect of a Directive. Hence, a private individual can directly rely on a Directive before a national court only against the Member State to which it is addressed but not against another private party. Nevertheless the CJEC has allowed for the possibility of a "indirect horizontal effect" via reliance on interpretative criteria, notably in Von Colson v Harz (14/83 and 79/83 of 10.4.1984). The indirect nature of the horizontal effect presumes that national court are duty bound to interpret national law in the light of the wording and the objectives of the Directive, in order to arrive at the result required by Article 249 of the Treaty, though without prejudice to legal certainty and non-retroactivity.

80 OGH 11.1.1996. ecolex 1996, 358 = KRES 3/94.

81 "Vorprozessuales Abmahnverfahren" (Pre-trial Reprimand Procedure) Decision of 25 December 1997, AGB-Info 1997/17.

c) On the jurisprudence of the European Court of Justice

Despite the growing familiarity of national courts with European law, Directive 93/13/EEC has so far had very little impact on the case law of the Court of Justice. Up to now the Court has only had to adjudicate on two references for a preliminary ruling in this field.

The first[82] concerned a dispute between the Consumers Association and the UK Government and concerned the fact that British legislation had deprived consumer associations of the right to seek injunctions for the removal of unfair terms (this right having been exclusively vested in the Office of Fair Trading). Following an agreement between the parties (which led to a change in British law), the case was closed by the Court.

The second case[83] is still pending and concerns the important question of determining whether the court may (or even should) assess the validity of a contractual term in the light of the legislation on unfair terms, even if the parties do not demand this. The judgment in question concerns various disputes between professional sellers and Spanish consumers concerning the performance of hire purchase contracts. The contracts contained a clause specifying Barcelona as the only place of jurisdiction (a city in which none of the individuals were domiciled but in which the professionals had their head offices). The Barcelona Court of First Instance, in the light of contradictory national rulings as to whether Spanish courts may *ex officio* assess the validity of unfair terms concerning the choice of jurisdiction, requested the European Court for an interpretation of Directive 93/13/EEC in 1998. The judgment has not yet been handed down but the grounds presented by Advocate General Saggio on 16 December 1999 are exemplary and include an extensive and in-depth analysis of the Directive and its goals. As to the substance, the Advocate General considers that the Directive entitles the national court to rule *ex officio* on the nullity of such a term and to ignore any national law which would prevent the court from doing so (see also under III.6).

National courts could have referred many cases to the Court of Justice for a preliminary ruling and it would have been very useful if the judgments of Court of Justice had been able to cast light on the scope of some of the Directive's more obscure provisions. Indeed the doctrine reveals the reluctance of the national courts to refer cases to the Court of Justice in this legal field.

This may be illustrated using a concrete example taken from German doctrine.

The Directive was transposed into German law by amending an existing act, namely the Standard Terms and Conditions Act (AGB). At the time of transposition the German legislator considered that Article 8[84] of this Act was consistent with the Directive, because the contractual terms which, pursuant to this provision, are not subject to review in respect of their content would not be subject under Article 4(2) of the Directive either.

However, the differences in the wording of these two provisions suggest that there may also be differences in their application. Indeed, in many disputes the German courts, in applying Article 8 of the AGB, have developed a very broad notion of the "main subject matter of the contract" (a term which does not exist in German law!), hence limiting the extent to which the

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82 Case C-82/96 The Queen v Secretary of State for Trade and Industry.

83 Joint cases C-240/98 to C-244/98 Océano Grupo Editorial, S.A. and Salvat Editores, S.A. v Rocio Murciano Quintero and others.

84 Article 8 of the General Terms and Conditions Act (Gesetz über allgemeine Geschäftsbedingungen/ABGB) provides that only "general terms and conditions whose rules derogate from ordinary law or supplementary rules" are subject to control in respect of their content.

contract may be reviewed in respect of its content. This notion of "main subject matter" includes, for example, terms setting out the conditions under which a consumer may rely on an insurance contract, or terms concerning additional charges imposed by a credit institution for certain additional services provided in connection with the issuance of a credit card or a savings account.

German legal reviews contain many reports on cases in which the Bundesgerichtshof discussed the application of Article 8 of the Act and Article 4(2) of the Directive to contracts of adhesion, without ever considering the consistency of its jurisprudence with the other language versions of the Directive and the interpretations made by other European supreme courts and without ever entertaining the idea of requesting the European Court of Justice for a preliminary ruling. Indeed as one decision the Bundesgerichtshof says quite tersely: "*der Bundesgesetzgeber hat die an die Mitgliedstaaten gerichtete und nur für sie verbindliche Richtlinie … in nationales Recht umgesetzt. Er hat dabei zu einer Änderung des § 8 AGBG wegen seiner Übereinstimmung mit Art. 4 Nr. 2 der Richtlinie keinen Anlaß gesehen … Die Beantwortung der Frage, ob die beanstandete Klausel einer Überprüfung am Maßstab der §§ 9 - 11 AGBG entzogen ist, ist Sache der deutschen Gerichte, über die der Europäische Gerichtshof nach Art. 177 EG-Vertrag nicht zu entscheiden hat*"[85].

d) The impact on legal doctrine

The Directive has had an enormous impact on legal doctrine. Hundreds of articles and dozens of monographs have been published on the subject of unfair contractual terms. This has not only influenced case law itself but has also made the business community more aware of the need to draft more equitable terms. Some doctrines focused on the particularities of the national legal orders, while other doctrines have highlighted the specific nature of European law and endeavoured to incorporate it into national law, even if the results are hard to reconcile with traditional orthodoxy. The emergence of a European doctrine on unfair terms is one of the more successful achievements of Directive 93/13/EEC.

e) Some points for discussion

The Directive's impact has clearly been positive, but it has not always achieved the desired result: the establishment of balanced contractual relationships between consumers and professionals.

Despite the legal mechanisms created to encourage the elimination of unfair terms in consumer contracts, such terms continue to be used on a wide scale.

Besides, declaring an unfair term to be "null and void" is a very ineffective mechanism for protecting specific consumers, since the way it works largely depends not only on ease of access to justice for consumers but also - and perhaps primarily - on consumer information and education in these fields.

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85 "The Federal legislator has transposed into national law a Directive addressed to the Member States which is binding only on these States. There is no need to amend Article 8 of the General Terms and Conditions Act because it is already in conformity with Article 4(2) of the Directive. It is for the German courts to determine whether the term in question is subject to review in respect of its subject matter, and the European Court of Justice, pursuant to Article 177 of the EC Treaty, has no say in this area". – BGH 7.7.1998, Der Betriebs-Berater 1998, 1864.

New problems are continually cropping up, as a result of the development of the consumer society. It may well be that the natural development of economic relationships will not tend towards greater equity in contractual relations.

Just as this report was being finalised, the Danish Consumer Ombudsman alerted his opposite numbers in the context of the IMSN – International Marketing Supervision Network[86] – to new contractual practices. Apparently, a growing number of car rental contracts offered to foreign tourists contain terms to the effect that surcharges, damages resulting from accidents, etc. may be directly debited from their credit cards. Concrete problems are said to have arisen in the case of Danish consumers who, following the insolvency of the travel agent to whom they had paid the rental in advance, found that the amount in question had been deducted a second time from their credit cards.

The problem posed by terms like these is all the more acute in that consumers may sign and perform contracts of this kind entirely on the territory of a third country, although theoretically Article 6(2) should be able to cover these situations. However, such practices are very worrying and illustrate the profusion of new problems that are cropping up in the context of an increasingly globalised economy.

The Commission hopes that this report will pave the way to a comprehensive discussion of these complex and important issues and hopes to receive numerous comments and suggestions on the ideas put forward here.

[86] The International Marketing Supervision Network is a cooperative network involving the authorities responsible for implementing Community law.

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Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

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COUNCIL DIRECTIVE
of 13 June 1990
on package travel, package holidays and package tours
(90/314/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas one of the main objectives of the Community is to complete the internal market, of which the tourist sector is an essential part;

Whereas the national laws of Member States concerning package travel, package holidays and package tours, hereinafter referred to as 'packages', show many disparities and national practices in this field are markedly different, which gives rise to obstacles to the freedom to provide services in respect of packages and distortions of competition amongst operators established in different Member States;

Whereas the establishment of common rules on packages will contribute to the elimination of these obstacles and thereby to the achievement of a common market in services, thus enabling operators established in one Member State to offer their services in other Member States and Community consumers to benefit from comparable conditions when buying a package in any Member State;

Whereas paragraph 36 (b) of the Annex to the Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (4) invites the Commission to study, inter alia, tourism and, if appropriate, to put forward suitable proposals, with due regard for their significance for consumer protection and the effects of differences in Member States' legislation on the proper functioning of the common market;

Whereas in the resolution on a Community policy on tourism on 10 April 1984 (5) the Council welcomed the Commission's initiative in drawing attention to the importance of tourism and took note of the Commission's initial guidelines for a Community policy on tourism;

Whereas the Commission communication to the Council entitled 'A New Impetus for Consumer Protection Policy', which was approved by resolution of the Council on 6 May 1986 (6), lists in paragraph 37, among the measures proposed by the Commission, the harmonization of legislation on packages;

Whereas tourism plays an increasingly important role in the economies of the Member States; whereas the package system is a fundamental part of tourism; whereas the package travel industry in Member States would be stimulated to

greater growth and productivity if at least a minimum of common rules were adopted in order to give it a Community dimension; whereas this would not only produce benefits for Community citizens buying packages organized on the basis of those rules, but would attract tourists from outside the Community seeking the advantages of guaranteed standards in packages;

Whereas disparities in the rules protecting consumers in different Member States are a disincentive to consumers in one Member State from buying packages in another Member State;

Whereas this disincentive is particularly effective in deterring consumers from buying packages outside their own Member State, and more effective than it would be in relation to the acquisition of other services, having regard to the special nature of the services supplied in a package which generally involve the expenditure of substantial amounts of money in advance and the supply of the services in a State other than that in which the consumer is resident;

Whereas the consumer should have the benefit of the protection introduced by this Directive irrespective of whether he is a direct contracting party, a transferee or a member of a group on whose behalf another person has concluded a contract in respect of a package;

Whereas the organizer of the package and/or the retailer of it should be under obligation to ensure that in descriptive matter relating to packages which they respectively

organize and sell, the information which is given is not misleading and brochures made available to consumers contain information which is comprehensible and accurate;

Whereas the consumer needs to have a record of the terms of contract applicable to the package; whereas this can conveniently be achieved by requiring that all the terms of the contract be stated in writing of such other documentary form as shall be comprehensible and accessible to him, and that he be given a copy thereof;

Whereas the consumer should be at liberty in certain circumstances to transfer to a willing third person a booking made by him for a package;

Whereas the price established under the contract should not in principle be subject to revision except where the possibility of upward or downward revision is expressly provided for in the contract; whereas that possibility should nonetheless be subject to certain conditions;

Whereas the consumer should in certain circumstances be free to withdraw before departure from a package travel contract;

Whereas there should be a clear definition of the rights available to the the consumer in circumstances where the organizer of the package cancels it before the agreed date of departure;

Whereas if, after the consumer has departed, there occurs a significant failure of performance of the services for which he has contracted or the organizer perceives that he will be unable to procure a significant part of the services to be provided; the organizer should have certain obligations towards the consumer;

Whereas the organizer and/or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising from the contract; whereas, moreover, the organizer and/or retailer should be liable for the damage resulting for the consumer from failure to perform or improper performance of the contract unless the defects in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services;

Whereas in cases where the organizer and/or retailer is liable for failure to perform or improper performance of the services involved in the package, such liability should be limited in accordance with the international conventions governing such services, in particular the Warsaw Convention of 1929 in International Carriage by Air, the Berne Convention of 1961 on Carriage by Rail, the Athens Convention of 1974 on Carriage by Sea and the Paris Convention of 1962 on the Liability of Hotel-keepers; whereas, moreover, with regard to

damage other than personal injury, it should be possible for liability also to be limited under the package contract provided, however, that such limits are not unreasonable;
Whereas certain arrangements should be made for the information of consumers and the handling of complaints;
Whereas both the consumer and the package travel industry would benefit if organizers and/or retailers were placed under an obligation to provide sufficient evidence of security in the event of insolvency;
Whereas Member States should be at liberty to adopt, or retain, more stringent provisions relating to package travel for the purpose of protecting the consumer,
HAS ADOPTED THIS DIRECTIVE:
Article 1
The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to packages sold or offered for sale in the territory of the Community.
Article 2
For the purposes of this Directive:
1. 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:
(a) transport;
(b) accommodation;
(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.
The separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under this Directive;
2. 'organizer' means the person who, other than ocasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;
3. 'retailer' means the person who sells or offers for sale the package put together by the organizer;
4. 'consumer' means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee');
5. 'contract' means the agreement linking the consumer to the organizer and/or the retailer.
Article 3
1. Any descriptive matter concerning a package and supplied by the organizer or the retailer to the consumer, the price of the package and any other conditions applying to the contract must not contain any misleading information. 2. When a brochure is made available to the consumer, it shall indicate in a legible, comprehensible and accurate manner both the price and adequate information concerning:
(a) the destination and the means, characteristics and categories of transport used;
(b) the type of accommodation, its location, category or degree of comfort and its main features, its approval and tourist classification under the rules of the host Member State concerned;
(c) the meal plan;
(d) the itinerary;
(e) general information on passport and visa requirements for nationals of the Member State or States concerned and health formalities required for the journey and the stay;
(f) either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;
(g) whether a minimum number of persons is required for the package to take

place and, if so, the deadline for informing the consumer in the event of cancellation.
The particulars contained in the brochure are binding on the organizer or retailer, unless:
- changes in such particulars have been clearly communicated to the consumer before conclusion of the contract, in which case the brochure shall expressly state so,
- changes are made later following an agreement between the parties to the contract.
Article 4
1. (a) The organizer and/or the retailer shall provide the consumer, in writing or any other appropriate form, before the contract is concluded, with general information on passport and visa requirements applicable to nationals of the Member State or States concerned and in particular on the periods for obtaining them, as well as with information on the health formalities required for the journey and the stay;
(b) The organizer and/or retailer shall also provide the consumer, in writing or any other appropriate form, with the following information in good time before the start of the journey:
(i) the times and places of intermediate stops and transport connections as well as details of the place to be occupied by the traveller, e.g. cabin or berth on ship, sleeper compartment on train;
(ii) the name, address and telephone number of the organizer's and/or retailer's local representative or, failing that, of local agencies on whose assistance a consumer in difficulty could call.
Where no such representatives or agencies exist, the consumer must in any case be provided with an emergency telephone number or any other information that will enable him to contract the organizer and/or the retailer;
(iii) in the case of journeys or stays abroad by minors, information enabling direct contact to be established with the child or the person responsible at the child's place of stay;
(iv) information on the optional conclusion of an insurance policy to cover the cost of cancellation by the consumer or the cost of assistance, including repatriation, in the event of accident or illness.
2. Member States shall ensure that in relation to the contract the following principles apply:
(a) depending on the particular package, the contract shall contain at least the elements listed in the Annex;
(b) all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and must be communicated to him before the conclusion of the contract; the consumer is given a copy of these terms;
(c) the provision under (b) shall not preclude the belated conclusion of last-minute reservations or contracts.
3. Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package. The transferor of the package and the transferee shall be jointly and severally liable to the organizer or retailer party to the contract for payment of the balance due and for any additional costs arising from such transfer.
4. (a) The prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in:
- transportation costs, including the cost of fuel,
- dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports,

- the exchange rates applied to the particular package.
(b) During the twenty days prior to the departure date stipulated, the price stated in the contract shall not be increased.
5. If the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, he shall notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular:
- either to withdraw from the contract without penalty,
- or to accept a rider to the contract specifying the alterations made and their impact on the price.
The consumer shall inform the organizer or the retailer of his decision as soon as possible.
6. If the consumer withdraws from the contract pursuant to paragraph 5, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled:
(a) either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer;
(b) or to be repaid as soon as possible all sums paid by him under the contract.
In such a case, he shall be entitled, if appropriate, to be compensated by either the organizer or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, except where:
(i) cancellation is on the grounds that the number of persons enrolled for the package is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the package description; or
(ii) cancellation, excluding overbooking, is for reasons of force majeure, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.
7. Where, after departure, a significant proportion of the services contracted for is not provided or the organizer perceives that he will be unable to procure a significant proportion of the services to be provided, the organizer shall make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the packag, and where appropriate compensate the consumer for the difference between the services offered and those supplied.
If it is impossible to make such arrangements or these are not accepted by the consumer for good reasons, the organizer shall, where appropriate, provide the consumer, at no extra cost, with equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed and shall, where appropriate, compensate the consumer.
Article 5
1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.
2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:
- the failures which occur in the performance of the contract are attributable to the consumer,
- such failures are attributable to a third party unconnected with the provision of

the services contracted for, and are unforeseeable or unavoidable,
- such failures are due to a case of force majeure such as that defined in Article 4 (6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.
In the cases referred to in the second and third indents, the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.
In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.
In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.
3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.
4. The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity.
This obligation must be stated clearly and explicily in the contract. Article 6
In cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions.
Article 7
The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.
Article 8
Member States may adopt or return more stringent provisions in the field covered by this Directive to protect the consumer.
Article 9
1. Member States shall bring into force the measures necessary to comply with this Directive before 31 December 1992. They shall forthwith inform the Commission thereof.
2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive. The Commission shall inform the other Member States thereof.
Article 10
This Directive is addressed to the Member States.
Done at Luxembourg, 13 June 1990.
For the Council
The President
D. J. O'MALLEY
(1) OJ No C 96, 12. 4. 1988, p. 5.
(2) OJ No C 69, 20. 3. 1989, p. 102 and
OJ No C 149, 18. 6. 1990.
(3) OJ No C 102, 24. 4. 1989, p. 27.
(4) OJ No C 165, 23. 6. 1981, p. 24.
(5) OJ No C 115, 30. 4. 1984, p. 1.
(6) OJ No C 118, 7. 3. 1986, p. 28.
ANNEX
Elements to be included in the contract if relevant to the particular package;
(a) the travel destination(s) and, where periods of stay are involved, the relevant periods, with dates;
(b) the means, characteristics and categories of transport to be used, the dates,

times and points of departure and return;
(c) where the package includes accommodation, its location, its tourist category or degree of comfort, its main features, its compliance with the rules of the host Member State concerned and the meal plan;
(d) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation;
(e) the itinerary;
(f) visits, excursions or other services which are included in the total price agreed for the package;
(g) the name and address of the organizer, the retailer and, where appropriate, the insurer;
(h) the price of the package, an indication of the possibility of price revisions under Article 4 (4) and an indication of any dues, taxes or fees chargeable for certain services (landing, embarkation or disembarkation fees at ports and airports, tourist taxes) where such costs are not included in the package;
(i) the payment schedule and method of payment;
(j) special requirements which the consumer has communicated to the organizer or retailer when making the booking, and which both have accepted;
(k) periods within which the consumer must make any complaint concerning failure to perform or improper performance of the contract.

SEC(1999) 1800 final

Report on the Implementation of Directive 90/314/EEC on Package Travel and Holiday Tours in the Domestic Legislation of EC Member States

INTRODUCTION

Nine years after the adoption and seven years after the coming into force of Directive 90/314/EEC on Package Travel and Holiday Tours[1] the Commission releases the present report with the aim

– to inform on the measures taken by Member States to transpose that Directive,

– to identify the problems thereby occurred and

– to launch a discussion that could, eventually, lead to an improved implementation.

Following these objectives, the **first part** of this report gives a brief summary of the measures of transposition adopted by Member States and, where appropriate, of infringement procedures relating thereto. On this basis, some issues for further discussion are identified.

A complete list of national measures of implementation and infringement procedures is given in **Annex I**. This annex also lists the decisions of the European Court of Justice relating to Directive 90/314/EEC.

The **second part** of this report is dedicated to the transposition and implementation of Article 7 of the directive, which, among all the provisions contained in the Directive, opens the largest margin of interpretation and has therefore been transposed in very different ways by the various Member States. The European Court of Justice have made a number of decisions with reference to Article 7 of the directive which are analysed below. In addition, proposals are made as to the interpretation of this Article.

Short commentaries on the legal texts transposing Article 7 of the are given in **Annex II**.

The Commission invites the governments of Member States as well as all other interested persons to submit their comments on this report until 30 April 2000 to the following address:

European Commission
Directorate General Health and Consumer Protection
Unit C/2
Rue de la Loi 200
B-1049 Brussels
Belgium

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1 OJ No L 158 of 13 June 1990, page 159

1. GENERAL REMARKS ON THE IMPLEMENTATION OF THE PACKAGE TRAVEL DIRECTIVE

Essentially, the purpose of the Package Travel Directive is to set out minimum standards concerning the information provided to the consumer, formal requirements for package travel contracts, to provide compulsory rules applicable to the contractual obligations (cancellation, modification, the civil liability of package tour organisers or retailers etc.) and to achieve an effective protection for consumers in the case of the package tour organiser's insolvency:

Information of consumer: Information must not be misleading (Art 3 – 1) Minimum information to be contained in brochures – Brochure is binding to organiser/retailer (Art 3 – 2) Minimum information to be given to consumer (visa requirements, time schedules, local representative etc) (Art 4 – 1)
Contract law: Minimum form requirements and minimum information to be contained in the contract (Art 4 –2) Transfer of booked package must be possible (Art 4 – 3) No price changes, except under special circumstances (Art 4 – 4) In case of alteration of package consumer must have right to either withdraw and receive compensation for non-performance or accept substitute package. (Art 4 – 5 and 4 - 6) In case of grave problems after departure: alternative arrangements or home transport (Art 4 – 7)
Liability: Organiser/retailer liable for proper performance and for damages (Art 5) In cases of complaint, organiser must take prompt efforts to find solution (Art 6)
Security in case of insolvency: Security must be provided for refund of money paid over and for repatriation in case of security (Art 7)

1.1. The Transposition of the Directive into Member States' domestic legislation

The Directive is now completely transposed by all Member States, with the sole exception of Italy, where the Travel Guarantee Fund, which should provide the security foreseen by Article 7 of the Directive, has not yet been created.

The laws adopted by Member States in order to comply with the Directive have been scrutinised by the Commission. In this context, it should be noted that many of the Directive's provisions allow for a very large margin of interpretation for national legislators. Consequently, the approaches taken by different Member States to transpose the Directive (and the level of protection of consumers' economic interests) differ considerably. However, the cases where the Commission has observed that the Directive had not been correctly transposed into a Member State's domestic legislation have remained rather scarce.

Whilst several of the provisions of the Directive might be considered imprecise, we limit ourselves to give a few examples that illustrate the potential problem:

– The whole issue of the field of application of the Directive, as provided for in Article 2: what is meant by "pre-arranged combination"? Are tailor-made holidays not included? How are the words "other than occasionally" in the definition of a travel organiser to be understood? What is meant by "other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package"? Member States have incorporated these definitions into their domestic legislation[3], thus staying in line with the directive, but at the same time transporting the problem of interpretation from the supranational to the national level.

– Art 4 (3) of the Directive provides: "Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package." Most Member States have not foreseen, in their legislation, a definition of what would be considered a "reasonable notice"[4]. Some

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[3] e.g. Sweden, § 2 Package Tours Act (SFS 1992:1672) and Denmark, Chapter 2 of Law 472 of 30 June 1993; Germany (§ 651a BGB) does not at all foresee a definition of a package in the sense of the Directive.

[4] e.g. Austria, § 31c (3) Konsumentenschutzgesetz, Sweden § 10 Package Tours Act (SFS 1992:1672)

Member States have foreseen a deadline of a few days before departure[5]. Luxembourg foresaw a deadline of three weeks[7]; due to an intervention of the Commission, the Grand Duchy envisages now to modify this provision, which will then foresee that "reasonable notice" should be given.[9]

– Article 5 (2) of the Directive provides in its last sentence: "In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable." Here again, the views on which limitation would have to be considered "unreasonable" seem to differ considerably. While some Member States have simply not transposed the provision (thus applying the general rules of their tort law)[10] or taken over the provision of the Directive, others have issued more detailed provisions[11]. The Commission, being in charge of the control of application of the directive, would from its part consider "unreasonable" a provision that would limit or exclude the organiser's/retailer's liability in cases of gross negligence; this policy appears to be in keeping with the general rules of tort law in all Member States.[12]

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5 For example, Italy, in Art. 10 of Legislative decree 111/1995, foresees a deadline of 4 working days before departure; Germany (§ 651b BGB) even foresees that the package may be transferred at any time before departure

7 Règlement grand-ducal du 04/11/1997 déterminant les éléments de l'information préalable et les dispositions du contrat relatifs aux voyages, Art 3, par 15

9 This new legislation has not yet been adopted

10 e.g. Austria, Sweden, Denmark

11 Ireland, Statutory Instrument 1995 N° 235, Regulation 20 (4)(b) foresees that "the organiser may not limit liability to less than (a) in the case of an adult an amount equal to double the inclusive price of the package to the adult concerned, and (b) in the case of a minor an amount equal to the inclusive price of the package to the minor concerned". In Italy, a minimum threshold is determined by referring to Art 13 of the CCV (International Convention of Travel Contracts, Brussels, 23 April 1970). In Germany, liability can be limited to triple the value of the package (c;f; § 651h Abs 1 BGB). In Portugal, liability may be limited to five times the price of the package (c.f. Decree-Law 209/97, Art. 40 (5))

12 However, these general rules of tort law, which are of decisive importance for the application of the Directive, have not been notified by the Member States to the Commission. Any shortcomings in the application of this aspect of the Directive, if such existed, could only be revealed by individual complaints submitted to the Commission. Until now, the Commission has not received any complaint that would allow for the conclusion that an "unreasonable" limitation of liability were admitted under a Member State's domestic legislation. In any case, any such limitation could be assessed under national legislation implementing Directive 93/13 on Unfair Contract Terms.

– Article 6 of the Directive provides: "In cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions". Obviously, this provision is extremely vague: it constitutes no obligation for the organiser/retailer to have a local representative to which consumers could address their complaints, and it does not set out what is meant by an "appropriate" solution. For example, if the complaint appears unreasonable to the organizer, he might consider it "appropriate" to take no further action. Furthermore, organizers/retailers are obliged "to make prompt efforts to find an appropriate solution", not to actually find one. No wonder, therefore that some Member States[13] have not explicitly transposed this provision, whereas others have adopted rules that differ considerably from the Directive.[14]

– Finally, the interpretative problems raised by Article 7 of Directive are so important, that a separate section of this report needed to be dedicated to this complex matter.

1.2. Points for discussion, concerning the interpretation of the Directive

As can be seen from the above, the control of transposition has not only revealed some shortcomings in the national measures of execution adopted by the Member States but also some weaknesses in the Directive itself.

The Commission would therefore like to invite further reflection by Member States' governments and all interested parties on the following points which may finally lead to a common interpretation of the Directive. If necessary, modifications of the Directive could also be envisaged.

1.2.1. The scope of the Directive

According to Article 2, the Directive is applicable to organisers, who, other than occasionally, organise packages and sell them or offer them for sale, whether directly or through a retailer. A "package" in the sense of the Directive is a pre-arranged combination of transport, accommodation and other tourist services (wherever two of these three elements are combined), sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation.

Some elements of this definition might be reconsidered. For example, the criteria "*sold or offered at an inclusive price"* appears to be on the one hand a compulsory element of the definition of package travel and thus of the

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13 E.g. Italy, Germany

14 For example, Austria (§ 31e Konsumentenschutzgesetz) foresees that in case of non-execution or insufficient execution (which is quite different from the "case of complaint" envisaged by the Directive) the organiser is obliged to undertake all reasonable effort to provide assistance to the consumer to overcome difficulties (which is also not mentioned in the Directive: are cockroaches in the hotel room a reason for complaint or a "difficulty" that needs to be overcome?). A local agent is not mentioned.

scope of the directive. On the other hand, the last sentence of Article 2 (1)[15] seems to state that the element *"inclusive price"* has only indicative character. This point should be clarified.

Also, the meaning of the word *"pre-arranged"* in the definition of package travel occasions some uncertainties. In the original proposal for the Directive[17], it had been made clear that the Directive should be applied only to packages that were offered *"by means of brochures, or other forms of advertising, to the public generally"*[18], so as not to include tailor-made arrangements. In the later course of the legislative procedure, however, the Economic and Social Committee and the European Parliament considered that this was an excessive restriction upon the scope of the proposal. The amended proposal eliminated this restriction[19]. Accordingly, also packages that have not been advertised as such are to be considered "pre-arranged". If this is the case, then it would be difficult to argue that tailor-made packages are excluded. Within the definition of "package" in Art 2 of the Directive, the word "pre-arranged" appears to be artificial, of unclear meaning and effect and could be eliminated. The consumers' need for protection may, in some circumstances, be the same with regard to tailor-made as with regard to other packages.[20]

Finally, some provisions of the Directive, especially the organiser's/retailer's duty to provide security for the event of his insolvency, require public authorities to undertake steady efforts to supervise the market and to enforce the law. Many Member States have therefore instituted a licensing system under which each travel organiser/retailer needs to fulfil certain requirements in order to obtain a license that would allow him to pursue his business [21]. In other Member States, some organisers/ retailers need to hold a license whereas others do not[22]. Some Member States do not foresee a licensing system[23]. In this context, the Commission would like to point out that the provisions of the Directive must be applied without any discrimination to all

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15 "The separate billing of various components of the same package shall not absolve the organizer or the retailer from the obligations under this directive"

17 OJ No C 96, 12.4.1988, p.5

18 cf. the definition of "organizer" in the original proposal.

19 Amended Proposal OJ No C 190, 27.7.1989, p. 10

20 Note that the Portuguese Law (Decree-Law 209/97) specifically mentions "tailor-made" holidays in its Article 17 (3). However, most of the provisions transposing Directive 90/314/EEC are not applicable to this type of arrangement, but only to package tours (as defined in Article 17 (2)).

21 such is the case in most Member States, for example Italy (c.f. Art 3 and 4 of Legislative Decree 111/1995), Portugal (c.f. Decree-Law 198/93, Articles 14), Austria (§ 166 Gewerbeordnung)

22 E.g. the United Kingdom

23 E.g. Germany

travel organisers/retailers in the sense of Article 2 of Directive 90/314, not only to those who are in possession of a valid license or who would be obliged to hold one

1.2.2. Liability

Article 5(1) of the Directive provides: "Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services."

With this provision, the Directive has left it to the Member States to determine the respective liabilities of organisers and retailers. Obviously, the Directive aims that national legislators determine clearly who is liable to the consumer.

The majority of Member States have made provision for a different and separate liability of the organiser and the retailer, with each of them being liable for problems occurred in their respective spheres.[25] The non-performance of the services involved in the package and supplied by third parties in most Member States entails the direct liability of the tour organiser, but not of the retailer.

Yet this might lead to shortcomings in the case where a consumer purchases from a retailer in his home country a package organised by a foreign tour organiser (or even by an organiser who has his seat outside the EEA). In this case, the consumer might have to address complaints to a defendant organiser outside his own country, which would entail all the disadvantages connected to trans-border litigation[26]. This would be contrary to the aims of the directive, which was to provide the consumer with one contract partner responsible for the execution of the contract and easily accessible to him (as

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25 e.g. Austria, §§ 31b-f Konsumentenschutzgesetz, OGH 6 Ob 519/95; Belgium, Law of 16 February 1994, Art. 18 and 27; Italy, Legislative Decree 111/1995, Art. 14; In Portugal, liability rests with the Travel agent (retailer), c.f. Decree-Law 209/97, Art. 39. The UK Package Travel Regulations, Reg. 2, paragraph 1, define the travel contract as "the agreement linking the consumer to the organiser or retailer, *or to both* as the case may be"; this wording appears to allow to hold the retailer liable in addition to the organiser.

26 e.g. the questions of the applicable law, the competent law court, the enforcement of a judgment or the language problem

opposed to the previous situation where complaints were to be addressed to a great diversity of suppliers in the country he is travelling to).

This point should be clarified. If need be, the Directive could be amended to clearly state that a retailer, who offers packages that are organised by an organiser based in a jurisdiction outside the EEA, shall be held liable for their proper execution.

1.3. Other points of discussion, concerning the further development of Consumer Protection in the tourism sector

Even if the Package Travel Directive were completely and satisfactorily transposed by all Member States, the protection of consumers in the field of tourism would still be open for improvement. The Commission would like to highlight the following deficiencies:

1.3.1. Packages not covered by the Package Travel Directive- should the scope of the Directive be extended?

Apart from the interpretative problems mentioned above, it appears desirable to discuss the extension of the field of application of the Directive, notably to such packages that are, at present, excluded by the criteria "when the service covers a period of more than twenty-four hours or includes overnight accommodation"[27], e.g. organised sightseeing excursions or the organised tours to cultural or sport events.

For example, an arrangement consisting of a ticket for the Soccer World Cup Final and a return air ticket for the same day could easily cost more than an average one week package tour. The need for consumer protection is comparable in these circumstances.[28]

1.3.2. Rules to be applied in the case of the unjustified withdrawal of the consumer from their contract

The Directive makes no provision for the case where the consumer withdraws without good reason from the travel contract. In practice, travel contracts contain "penalty clauses" that specify penalties of up to 100% of the package price (depending on when the withdrawal is effected)[29]. Yet such

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27 c.f. Article 2 (1) of the Directive

28 Note that the Austrian measures of execution have not taken over the limitation to services lasting more than 24 hours, thus considerably broadening their field of application.

29 Directive 93/13/EC on Unfair Contract Terms provides, in sub-section 1 (d) of its annex, that terms which have the effect of "permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract" may be considered unfair and thus void. The same goes, according to sub-section 1 (e) of this annex, for contract terms "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation". Nevertheless, a specific rule for "no-shows" might be helpful.

penalties should be limited to a reasonable extent, corresponding to the damage caused by such behaviour. While it is true that a "no-show" is very costly to a tour organiser, it is also true that a consumer announcing the withdrawal with reasonable notice is likely to originate few costs for the organiser. There is no justification for the consumer, in the case where the contract is not executed due to the fault of the organiser, will receive compensation only for proven damages[30], while the tour organiser needs not to prove any damage in order to obtain a "penalty" payment in the case of unjustified withdrawal of the consumer.

1.3.3. Consumer protection in the field of civil aviation…

The Package Travel Directive is not applicable to air travel, except where it is included in a package. Yet the ever increasing number of complaints addressed by consumers to the Commission appears to indicate that the level of consumer protection in the field of air travel is insufficient. The issues to be tackled comprise compensation for unjustified delays, improvement of market transparency, the improvement of civil liability rules.

1.3.4. … and in the field of public transport

Likewise, there should be a discussion whether measures could be taken to improve consumer protection in the field of public transport in general, especially where the general terms of contract of public transport enterprises, usually regulated by statutory law in the Member States, are concerned.

1.3.5. The sale of packages via e-commerce

Another point of concern is the problems arising in the context of cross-border purchases of travel packages through the Internet. However, it would appear that this issue should be considered by horizontal legislation (e.g. Directive 97/7/EC on Distance Selling or the proposed Directive on Electronic Commerce[31]) rather than by measures specifically applying to the tourism sector.

1.4. The issue of unfair contract terms in package travel contracts

The Package Travel Directive and national measures of transposition related thereto set out a statutory framework for package travel contracts. Apart from the protection awarded to him by this directive, it is of essential importance to the consumer that the contract does not contain any unfair, unclear or incomprehensible contract terms.

Protection against unfair contract terms is provided by Directive 93/13/EC, on Unfair Contract Terms, which covers not only package contracts, but all contracts concluded between consumers and professionals. This directive establishes, as a basic principle, that unfair contract terms used in a contract

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30 c.f. Art. 4(6), 4(7) and 5 of the Directive

31 c.f. the Amended Proposal, COM (1999) 427 final

concluded with a consumer by a seller or supplier shall not be binding on the consumer. An indicative list of contract terms that may be regarded as unfair is given in the Annex of Directive 93/13/EC.

In order to provide to the public easily accessible and transparent information on the court practices of European Law Courts in the field of unfair contract terms, the Commission has created the CLAB-Database which is accessible on internet under http://europa.eu.int/clab/index.htm. This database contains information on decisions on unfair contract terms by judicial and extra-judicial decision making bodies from all over Europe, covering all economic sectors.[32]

As an additional step, the Commission is organising an expert working group ("round table") on unfair contract terms in package travel arrangements. Representatives of consumers and the industry and independent experts will meet to discuss and, if possible, to set out a code of conduct, which, whilst having only the character of "soft law", will serve as a point of reference for travel organisers, retailers and consumers throughout Europe.

[32] Of the 6673 decisions contained in the database on 1st July 1999, 273 concerned the tourism sector. Of these, 182 concerned contract terms stipulated in package travel contracts.

2. SECURITIES FOR THE TRAVEL ORGANISER'S/RETAILER'S INSOLVENCY (ARTICLE 7 OF DIRECTIVE 90/314)

The transposition of Article 7 of the Package Travel Directive into Member States' domestic legislation is a matter of concern for various reasons. The European Commission, in line with the commitments taken in its working paper on Enforcement of European Consumer Legislation[33], has therefore invited consumers' associations from all over Europe to submit their observations on the implementation of Article 7 in their respective country. Many associations submitted valuable information, which helped the Commission to understand the different approaches taken by different national legislators.

As a next step, the Commission invited Member States to discuss the consequences that might result from differences in the interpretation and implementation of that provision. To that end, a meeting of government experts took place in Brussels on 14 April 1999.

The main points of discussion were:

– The interpretation of the words "evidence for sufficient security" in Article 7 of Directive 90/314/EEC;

– The enforcement of provisions of Member States' national legislation that are meant to transpose Art. 7 of the Package Travel Directive and the efficiency of these provisions;

– Undesirable consequences of the disparities in the national measures of implementation (e.g. the very different levels of protection in different Member States and possible distortions of competition)

– Trans-border aspects

Each delegation had the opportunity to present the system of implementation adopted by its country and to make observations to the implementing measures of other Member States. Thanks to the good co-operation of all delegations, this resulted in a fruitful discussion which provided the services of the Commission with valuable information that helped her draft this report and, in particular, its Annex II.

2.1. Points of reference for the Interpretation of Article 7 of Directive 90/314

2.1.1. Wording of Article 7

The text of the Directive states:

"The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency."

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[33] Commission's working paper on Enforcement of European Consumer Legislation, 27 March 1998, SEC (98) 527

This text leaves great liberty to the Member States in the choice of the appropriate measures. There is, however, no room for interpretation as regards the very clear aim of the provision: to provide that the security provided by retailers/organisers must cover the total refund of money paid over and the full repatriation costs. Therefore, no solution can be accepted that would, in effect, allow the refund of money paid over and repatriation expenses to be limited, even if that were to happen only under extreme circumstances.

2.1.2. Interpretation by the European Court of Justice

In its decisions referring to Art 7 of the Package Travel Directive, the European Court of Justice stated that, in the case of insolvency of a travel organiser, consumers were to receive the full cost of their repatriation and the full amount of monies paid over.

2.1.2.1. The Dillenkofer Case:

In case C-178/94 (Dillenkofer)[34] the Court decided that the failure of Germany to transpose the Package Travel Directive in time constituted civil liability of the state to such consumers who had suffered damage because of the absence of a provision to transpose Article 7 of the Directive.

The German Government had argued that, already before the law to transpose the Package Travel Directive came into force, there had been a constant court practice in favour of consumers. According to this court practice the travel organiser, before having handed over "documents of value" to the consumer, was allowed only to require a deposit towards the travel price of up to 10% of the travel price with a maximum of DM 500.

The Court dismissed this argument, saying that

– if a Member State allows the travel organizer to require payment of a deposit of up to 10% towards the travel price, with a maximum of DM 500, the protective purpose pursued by Article 7 of the Directive is not satisfied unless a refund of that deposit is also guaranteed in the event of the organizer' s insolvency;

and that

– the protection which Article 7 guarantees to consumers could be impaired if they were made to enforce credit vouchers against third parties who are not, in any event, required to honour them and who are likewise themselves exposed to the risks consequent on insolvency.

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34 Judgement of the Court of 8 October 1996.
Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland. Reference for a preliminary ruling: Landgericht Bonn - Germany. Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94. European Court Reports 1996 page I-4845

These statements by the Court of Justice give rise to the conclusion that the provision transposing Article 7 of the Package Travel Directive must not allow the consumer to suffer the loss of any portion of the package price, be it only less than 10%. Also, it must be concluded that the refund of repatriation expenses and monies paid over should be guaranteed by a guarantor who is "not exposed to the risks consequent on insolvency".

There is a third requirement that, though rather vaguely, is also contained in the Court's judgement: the refund should be effected quickly and without too much bureaucracy. A security system that would require the consumer to "enforce credit vouchers against third parties" is not considered to conform to the directive. In fact, as far as the repatriation of consumers is concerned, it is obvious that the guarantee system ought to become active on its own initiative to organise and finance the return travel of consumers trapped at their holiday destination. A consumer, who has already paid for the package, should not be expected to finance his own travel home and then hope to receive, sooner or later, a refund of these expenses.

2.1.2.2. The Case VKI vs Österreichische Kreditversicherung

The decision of the European Court of Justice C-364/96[35] deals with a prejudicial question that had been submitted by the District Commercial Court of Vienna (Austria). Here, a non-governmental consumers' association, acting on behalf of two consumers who had been on a package holiday while the tour organiser became insolvent, sued an insurance company for reimbursement of the outlays the consumers paid for repatriation. These outlays covered not only transport costs, but also the hotel bill, as the proprietor of the hotel had not let the consumers go before his bill was paid. The insurance company had declared its readiness to reimburse the home transport, but not the hotel bill, because, according to its restrictive interpretation of the directive (and the transposing law), these outlays were not covered by the term "repatriation costs".

The Court of Justice ruled that Article 7 of the Package Travel Directive must be interpreted "as covering, as security for the refund of money paid over, a situation in which the purchaser of a package holiday who has paid the travel organiser for the costs of his accommodation before travelling on his holiday is compelled, following the travel organiser's insolvency, to pay the hotelier for his accommodation again in order to be able to leave the hotel and return home."

In its reasoning the Court affirmed that "the purpose of Article 7 is to protect consumers against the risks arising from the insolvency of the package holiday or tour organiser". In the given context, the emphasis lies on the issue that all risks arising from the insolvency of the tour organiser must be covered.

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35 Judgement of the Court (Fifth Chamber) of 14 May 1998.
Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG. Reference for a preliminary ruling: Bezirksgericht für Handelssachen Wien - Austria. Case C-364/96. European Court Reports 1998 page I-2949

2.1.2.3. The Rechberger Case

The factual background to this decision (case C-140/97)[36] was as follows: an Austrian newspaper offered to its subscribers a free package holiday as a reward for their fidelity. The subscribers needed to pay only for the airport taxes and, if they desired a single room, a supplement. If a subscriber wished to be accompanied by a second person, this person had to pay the full price of the package. Unfortunately, more subscribers enrolled for this than the newspaper and the co-operating travel agency had ever expected, and the travel agency finally went bankrupt.

Following this, the six plaintiffs could not depart for their free holiday: four of them, because there were no places available, the other two, because the travel agency had already gone bankrupt. All of them had, however, effected the payments that had been required from them, but they could only recover a small proportion in the bankruptcy procedure.

The Landesgericht Linz (Austria) submitted six prejudicial questions to the European Court of Justice, of which some concerned the belated transposition of Article 7 into Austrian Law[37] and others the interpretation of Article 7 of Directive 90/314.

In its decision, the Court of Justice stated for the first time that a Member State's measures had clearly been insufficient to transpose Article 7 of the Package Travel Directive: "Article 7 of Directive 90/314 has not been properly transposed where national legislation does no more than require, for the coverage of the risk, a contract of insurance or a bank guarantee under which the amount of cover provided must be no less than 5% of the organiser's turnover during the corresponding quarter of the previous calendar year, and which requires an organiser just starting up in business to base the amount of cover on his estimated turnover from his intended business as a travel organiser and does not take account of any increase in the organiser's turnover in the current year."[38]

The court's reasoning explicitly stated that, "having regard to the fact that the sum secured is calculated on the basis of the turnover achieved by a given agency during the preceding year or, in the case of new travel organisers, on the basis of the turnover estimated by the organiser himself, the specific

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36 Judgement of the Court of 15 June 1999.
Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich. Reference for a preliminary ruling: Landesgericht Linz - Austria. Case C-140/97.

37 In accordance with the Act concerning the conditions of accession of Norway, Austria, Finland and Sweden and the adjustments to the Treaties on which the European Union is based (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1), Austria was required to implement the Directive by 1 January 1995. The Austrian Reisebürosicherungsverordnung, however, applied only to packages booked after 1 January 1995 *with a departure date of 1 May 1995 or later*; the plaintiffs in the Rechberger Case where therefore not covered. The CJ ruled that the limitation to packages with a departure date of 1 May 1995 or later constituted a "serious breach of Community law".

38 Point 5 of the Court Ruling

arrangements prescribed by the Austrian Government were inadequate given that the Regulation only requires a limited guarantee both in terms of the amount of cover and the basis on which that cover is calculated. That system therefore appears *structurally incapable* of catering for events in the economic sector in question, such as a significant increase in the number of bookings in relation to either the turnover for the previous year or the estimated turnover."[39] Also, the Court emphasised that there was "no indication, either in the recitals in the preamble to the Directive or in the wording of Article 7, to suggest that the guarantee prescribed by that provision might be limited, as it was when it was put into effect in Austria."[40]

What are the conclusions to be drawn from this decision? Quite clearly, the protection granted to consumers by the original version of the Austrian *Reisebürosicherungsverordnung* is denounced to have been insufficient. Therefore, we know now for certain that a limitation of the security to be furnished to 5% of the organiser's turnover during the corresponding quarter of the previous calendar year is inadmissible.

Now it is obvious that 5% of a quarter's (or 1,25% of a year's) turnover would indeed provide no sufficient security: this sum would roughly equal to a week's turnover, whereas most packages are paid some weeks in advance, so that the monies held by the organiser would be in all cases higher than the insurance coverage. Thus, the Court limited itself to state the obvious. On the other hand, the Court omitted to state precisely the conditions under which a national system of implementation would be seen to comply with Article 7 of the Package Travel Directive[41].

2.1.2.4. The Ambry Case

The decision in the Case C-410/96[42] dealt with certain single market aspects of the implementation of Article 7 of Directive 90/314.

The manager of a travel agency of Metz (France) had been charged in a criminal procedure with having assisted or engaged in an activity relating to the organisation and sale of travel and holidays without having obtained the licence required by Article 4 of French Law No 92/645. He had obtained no licence, because the insurance policy he had taken to cover the risks set out in

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39 cf. par 62 of the decision

40 cf. par 63 of the decision

41 for example, no figures are given as to whether any kind of "minimum insurance sum", if sufficient, would be acceptable. It must be noted that The Austrian Reisebürosicherungsverordnung has, since 1995, been amended four times, and the minimum insurance coverage has been considerably increased – It now amounts to 5-9% of the tour organiser's annual turnover. Unfortunately, the Rechberger decision gives no hint as to whether this limitation is considered by the Court of Justice to conform to the Directive.

42 Judgement of the Court of 1 December 1998.
Criminal proceedings against André Ambry. Reference for a preliminary ruling: Tribunal de grande instance de Metz - France. Case C-410/96. European Court Reports 1998 page I-7875

Article 7 of Directive 90/314, had been concluded not with a French insurance company, but with an Italian insurance company that had no premises in France.

This was not accepted by the French authorities, because French law requires that "a financial security may be provided by a credit institution or insurance company only if that institution or company has its registered office in the territory of a Member State of the European Community or has a branch in France. In all cases, the financial security must be available for immediate payment in order to ensure the repatriation of customers (…). If the credit institution or insurance company is situated in a Member State of the European Community other than France, an agreement to that effect must be concluded between that body and a credit institution or insurance company situated in France".

The Court of Justice emphasised that the intention of the French legislator, to make sure that the security in question must not only exist but must also be immediately available for payment if required for the repatriation of travellers, was in line with Directive 90/314.

Then, however, it ruled: "it is contrary to Article 59 of the EC Treaty and to Second Council Directive 89/646/EEC on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC and Council Directive 92/49/EEC (third non-life insurance Directive) for national rules to require, with a view to implementing Article 7 of Council Directive 90/314/EEC on package travel, package holidays and package tours, that, where financial security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in France".

2.2. Principles for the Implementation of Travel Guarantees

In the light of the above overview on the decisions of the European Court of Justice on Art 7 of the Package Travel Directive it appears that the following principles should be observed by national measures implementing this provision.

- Security must fully cover all risks arising from the insolvency of the tour organiser (including e.g. costs of accommodation that the consumer is required to pay before he can set out on his travel home[43]).

- Thus, the guarantor (be it an insurance company, a financial institute, a trustee or a joint guarantee fund) should take over unlimited liability. The amount to be refunded must not be limited to any maximum refund or maximum portion.

- Security must be provided by a guarantor who himself is not exposed to the risks consequent on insolvency. The guarantor must be sufficiently

[43] c.f. the above-mentioned case VKI vs Österreichische Kreditvericherung (C-364/96).

independent from the tour organiser and must maintain sufficient funds to cover the insured risk.

– The security, whatever its nature, should be quickly available. All services and refunds to the consumer under Art 7 of the Package Travel Directive should be effected quickly and without too much bureaucracy. Public authorities should ensure that no organiser/retailer offers packages on the market unless they have given evidence of security as required by Art 7 of the Package Travel Directive. Whether there is a licensing system or not, this implies constant efforts to monitor the market and the elimination of professionals that do not comply with the security requirement.

– There should be a single market for the guarantee services required by Art 7 of the Package Travel Directive. Thus, guarantors (insurance companies, financial companies etc.) should be free to offer their services in all Member States. Domestic legislation must not, in an unjustified manner, reserve the right to offer such services to certain firms or other institutions.

– Likewise, Member States should (without prejudice of the principles set out above) mutually recognise their systems of implementation, thereby ensuring that a professional that has furnished the security required by one Member State's legislation should be allowed to do business in all other Member States.

Furthermore, it would appear reasonable to provide that

– there should be a professional assessment of the insured risk (if possible by the guarantor himself). Member States should avoid setting up a system where the cost of insurance per package sold would be the same for each professional (irrespective of that professional's financial standing or of the risk connected with each specific package). National measures of implementation of Article 7 of the Package Travel Directive should not distort competition, imposing "coercive solidarity" on competing professionals by imposing on them to participate in closed systems on a national basis.

– In cases where the consumer needs to be repatriated, he should not be required to pre-finance the transport home nor to organise it himself.

At present, it appears uncertain whether the principles set out above are fully taken into account by the national measures of implementation adopted by a considerable number of Member States[44]. The Commission would wish to

[44] C.f. Annex II to this report. It must be noted that the outline of the measures adopted by the different Member State contained in that annex is of a solely descriptive, not evaluative character.

31994L0047

Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis

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Swedish special edition: Chapter 13 Volume 27 P. 0040

MORE INFO TEXT:

DIRECTIVE 94/47/EC OF THE EUROPEAN PARLIAMENT AND THE COUNCIL of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3),

1. Whereas the disparities between national legislations on contracts relating to the purchase of the right to use one or more immovable properties on a timeshare basis are likely to create barriers to the proper operation of the internal market and distortions of competition and lead to the compartmentalization of national markets;

2. Whereas the aim of this Directive is to establish a minimum basis of common rules on such matters which will make it possible to ensure that the internal market operates properly and will thereby protect purchasers; whereas it is sufficient for those rules to cover contractual transactions only with regard to those aspects that relate to information on the constituent parts of contracts, the arrangements for communicating such information and the procedures and arrangements for cancellation and withdrawal; whereas the appropriate instrument to achieve that aim is a Directive; whereas this Directive is therefore consistent with the principle of subsidiarity;

3. Whereas the legal nature of the rights which are the subject of the contracts covered by this Directive varies considerably from one Member State to another; whereas reference should therefore be made in summary form to those variations, giving a sufficiently broad definition of such contracts, without thereby implying harmonization within the Community of the legal nature of the rights in question;

4. Whereas this Directive is not designed to regulate the extent to which contracts for the use of one or more immovable properties on a timeshare basis may be concluded in Member States or the legal basis for such contracts;

5. Whereas, in practice, contracts relating to the purchase of the right to use one or more immovable properties on a timeshare basis differ from tenancy agreements; whereas that difference can be seen from, inter alia, the means of payment;

6. Whereas it may be seen from the market that hotels, residential hotels and other

similar residential tourist premises are involved in contractual transactions similar to those which have made this Directive necessary;
7. Whereas it is necessary to avoid any misleading or incomplete details in information concerned specifically with the sale of the rights to use one or more immovable properties on a timeshare basis; whereas such information should be supplemented by a document which must be made available to anyone who requests it; whereas the information therein must constitute part of the contract for the purchase of the right to use one or more immovable properties on a timeshare basis;
8. Whereas, in order to give purchasers a high level of protection and in view of the specific characteristics of systems for using immovable properties on a timeshare basis, contracts for the purchase of the right to use one or more immovable properties on a timeshare basis must include certain minimal items;
9. Whereas, with a view to establishing effective protection for purchasers in this field, it is necessary to stipulate minimum obligations with which vendors must comply vis-à-vis purchasers;
10. Whereas the contract for the purchase of the right to use one or more immovable properties on a timeshare basis must be drawn up in the official language or one of the official languages of the Member State in which the purchaser is resident or in the official language or one of the official languages of the Member State of which he is a national which must be one of the official languages of the Community; whereas, however, the Member State in which the purchaser is resident may require that the contract be drawn up in its language or its languages which must be an official language or official languages of the Community; whereas provision should be made for a certified translation of each contract for the purposes of the formalities to be completed in the Member State in which the relevant property is situated;
11. Whereas to give the purchaser the chance to realize more fully what his obligations and rights under the contract are he should be allowed a period during which he may withdraw from the contract without giving reasons since the property in question is often situated in a State and subject to legislation which are different from his own;
12. Whereas the requirement on the vendor's part that advance payments be made before the end of the period during which the purchaser may withdraw without giving reasons may reduce the purchaser's protection; whereas, therefore, advance payments before the end of that period should be prohibited;
13. Whereas in the event of cancellation of or withdrawal from a contract for the purchase of the right to use one or more immovable properties on a timeshare basis the price of which is entirely or partly covered by credit granted to the purchaser by the vendor or by a third party on the basis of an agreement concluded between that third party and the vendor, it should be provided that the credit agreement should be cancelled without penalty;
14. Whereas there is a risk, in certain cases, that the consumer may be deprived of the protection provided for in this Directive if the law of a non-Member State is specified as the law applicable to the contract; whereas this Directive should therefore include provisions intended to obviate that risk;
15. Whereas it is for the Member States to adopt measures to ensure that the vendor fulfils his obligations,
HAVE ADOPTED THIS DIRECTIVE:

Article 1
The purpose of this Directive shall be to approximate the laws, regulations and administrative provisions of the Member States on the protection of purchasers in respect of certain aspects of contracts relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis.

This Directive shall cover only those aspects of the above provisions concerning contractual transactions that relate to:
- information on the constituent parts of a contract and the arrangements for the communication of that information,
- the procedures and arrangements for cancellation and withdrawal.
With due regard to the general rules of the Treaty, the Member States shall remain competent for other matters, inter alia determination of the legal nature of the rights which are the subject of the contracts covered by this Directive.

Article 2
For the purposes of this Directive:
- 'contract relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis`, hereinafter referred to as 'contract`, shall mean any contract or group of contracts concluded for at least three years under which, directly or indirectly, on payment of a certain global price, a real property right or any other right relating to the use of one or more immovable properties for a specified or specifiable period of the year, which may not be less than one week, is established or is the subject of a transfer or an undertaking to transfer,
- 'immovable property` shall mean any building or part of a building for use as accommodation to which the right which is the subject of the contract relates,
- 'vendor` shall mean any natural or legal person who, acting in transactions covered by this Directive and in his professional capacity, establishes, transfers or undertakes to transfer the right which is the subject of the contract,
- 'purchaser` shall mean any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being outwith his professional capacity, has the right which is the subject of the contract transferred to him or for whom the right which is the subject of the contract is established.

Article 3
1. The Member States shall make provision in their legislation for measures to ensure that the vendor is required to provide any person requesting information on the immovable property or properties with a document which, in addition to a general description of the property or properties, shall provide at least brief and accurate information on the particulars referred to in points (a) to (g), (i) and (l) of the Annex and on how further information may be obtained.
2. The Member States shall make provision in their legislation to ensure that all the information referred to in paragraph 1 which must be provided in the document referred to in paragraph 1 forms an integral part of the contract.
Unless the parties expressly agree otherwise, only changes resulting from circumstances beyond the vendor's control may be made to the information provided in the document referred to in paragraph 1.
Any changes to that information shall be communicated to the purchaser before the contract is concluded. The contract shall expressly mention any such changes.
3. Any advertising referring to the immovable property concerned shall indicate the possibility of obtaining the document referred to in paragraph 1 and where it may be obtained.

Article 4
The Member States shall make provision in their legislation to ensure that:
- the contract, which shall be in writing, includes at least the items referred to in the Annex,
- the contract and the document referred to in Article 3 (1) are drawn up in the language or one of the languages of Member State in which the purchaser is resident or in the language or one of the languages of the Member State of which he is national which shall be an official language or official languages of the Community, at the purchaser's option. The Member State in which the purchaser

is resident may, however, require that the contract be drawn up in all cases in at least its language or languages which must be an official language or official languages of the Community, and - the vendor provides the purchaser with a certified translation of the contract in the language or one of the languages of the Member State in which the immovable property is situated which shall be an official language or official languages of the Community.

Article 5

The Member States shall make provision in their legislation to ensure that:

1. in addition to the possibilities available to the purchaser under national laws on the nullity of contracts, the purchaser shall have the right:

- to withdraw without giving any reason within 10 calendar days of both parties' signing the contract or of both parties' signing a binding preliminary contract. If the 10th day is a public holiday, the period shall be extended to the first working day thereafter,
- if the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, at the time of both parties' signing the contract or of both parties' signing a binding preliminary contract, to cancel the contract within three months thereof. If the information in question is provided within those three months, the purchaser's withdrawal period provided for in the first indent, shall then start,
- if by the end of the three-month period provided for in the second indent the purchaser has not exercised the right to cancel and the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, to the withdrawal period provided for in the first indent from the day after the end of that three-month period;

2. if the purchaser intends to exercise the rights provided for in paragraph 1 he shall, before the expiry of the relevant deadline, notify the person whose name and address appear in the contract for that purpose by a means which can be proved in accordance with national law in accordance with the procedures specified in the contract pursuant to point (l) of the Annex. The deadline shall be deemed to have been observed if the notification, if it is in writing, is dispatched before the deadline expires;

3. where the purchaser exercises the right provided for in the first indent of paragraph 1, he may be required to defray, where appropriate, only those expenses which, in accordance with national law, are incurred as a result of the conclusion of and withdrawal from the contract and which correspond to legal formalities which must be completed before the end of the period referred to in the first indent of paragraph 1. Such expenses shall be expressly mentioned in the contract;

4. where the purchaser exercises the right of cancellation provided for in the second indent of paragraph 1 he shall not be required to make any defrayal.

Article 6

The Member States shall make provision in their legislation to prohibit any advance payments by a purchaser before the end of the period during which he may exercise the right of withdrawal.

Article 7

The Member States shall make provision in their legislation to ensure that:

- if the price is fully or partly covered by credit granted by the vendor, or - if the price is fully or partly covered by credit granted to the purchaser by a third party on the basis of an agreement between the third party and the vendor,

the credit agreement shall be cancelled, without any penalty, if the purchaser exercises his right to cancel or withdraw from the contract as provided for in Article 5.

The Member States shall lay down detailed arrangements to govern the

cancellation of credit agreements.

Article 8
The Member States shall make provision in their legislation to ensure that any clause whereby a purchaser renounces the enjoyment of rights under this Directive or whereby a vendor is freed from the responsibilities arising from this Directive shall not be binding on the purchaser, under conditions laid down by national law.

Article 9
The Member States shall take the measures necessary to ensure that, whatever the law applicable may be, the purchaser is not deprived of the protection afforded by this Directive, if the immovable property concerned is situated within the territory of a Member State.

Article 10
The Member States shall make provision in their legislation for the consequences of non-compliance with this Directive.

Article 11
This Directive shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards the protection of purchasers in the field in question, without prejudice to their obligations under the Treaty.

Article 12
1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive no later than 30 months after its publication in the Official Journal of the European Communities. They shall immediately inform the Commission thereof.
When Member States adopt those measures, they shall include references to this Directive or shall accompany them with such references on their official publication. The Member States shall lay down the manner in which such references shall be made.
2. The Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

Article 13
This Directive is addressed to the Member States.

Done at Strasbourg, 26 October 1994.
For the European Parliament, The President K. HAENSCHFor the Council The President J. EEKHOFF

ANNEX

Minimum list of items to be included in the contract referred to in Article 4
(a) The identities and domiciles of the parties, including specific information on the vendor's legal status at the time of the conclusion of the contract and the identity and domicile of the owner.
(b) The exact nature of the right which is the subject of the contract and a clause setting out the conditions governing the exercise of that right within the territory of the Member State(s) in which the property or properties concerned relates is or are situated and if those conditions have been fulfilled or, if they have not, what conditions remain to be fulfilled.
(c) When the property has been determined, an accurate description of that property and its location.

(d) Where the immovable property is under construction:
(1) the state of completion;
(2) a reasonable estimate of the deadline for completion of the immovable property;
(3) where it concerns a specific immovable property, the number of the building permit and the name(s) and full address(es) of the competent authority or authorities;
(4) the state of completion of the services rendering the immovable property fully operational (gas, electricity, water and telephone connections);
(5) a guarantee regarding completion of the immovable property or a guarantee regarding reimbursement of any payment made if the property is not completed and, where appropriate, the conditions governing the operation of those guarantees.
(e) The services (lighting, water, maintenance, refuse collection) to which the purchaser has or will have access and on what conditions.
(f) The common facilities, such as swimming pool, sauna, etc., to which the purchaser has or may have access, and, where appropriate, on what conditions.
(g) The principles on the basis of which the maintenance of and repairs to the immovable property and its administration and management will be arranged.
(h) The exact period within which the right which is the subject of the contract may be exercised and, if necessary, its duration; the date on which the purchaser may start to exercise the contractual right.
(i) The price to be paid by the purchaser to excercise the contractual right; an estimate of the amount to be paid by the purchaser for the use of common facilities and services; the basis for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs).
(j) A clause stating that acquisition will not result in costs, charges or obligations other than those specified in the contract.
(k) Whether or not is is possible to join a scheme for the exchange or resale of the contractual rights, and any costs involved should an exchange and/or resale scheme be organized by the vendor or by a third party designated by him in the contract.
(l) Information on the right to cancel or withdraw from the contract and indication of the person to whom any letter of cancellation or withdrawal should be sent, specifying also the arrangements under which such letters may be sent; precise indication of the nature and amount of the costs which the purchaser will be required to defray pursuant to Article 5 (3) if he exercises his right to withdraw; where appropriate, information on the arrangements for the cancellation of the credit agreement linked to the contract in the event of cancellation of the contract or withdrawal from it.
(m) The date and place of each party's signing of the contract.

SEC(1999) 1795 final

REPORT ON THE APPLICATION

OF DIRECTIVE 94/47/EC

OF THE EUROPEAN PARLIAMENT AND COUNCIL

of 26 October 1994

on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis

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INTRODUCTION

In its working document of 27 March 1998 (SEC1998) 527 final) on the enforcement of consumer legislation, the Commission, among other things, suggested presenting reports on the national transposition of the Directives.

The report on the application of Directive 94/47/EC belongs in the context of this suggestion, which received widespread backing from the senior national officials responsible for consumer policy.

This report, whose aim is to provide a comprehensive and comparative picture of the various approaches adopted by the Member States in transposing Directive 94/47/EC, consists of three sections. The first part recalls the current state of transposition in the Member States and is mainly devoted to the formal and methodological techniques used by the Member States in transposing the Directive.

The second part addresses the substance and highlights among other things the national provisions which go beyond the minimum consumer protection measures prescribed by Directive 94/47/EC. This part also focuses on the problems and discussion points which have cropped up in examining the different national transposition instruments.

Finally, and after identifying the problems still faced by private parties in their dealings with timeshare developers and vendors, the report draws some conclusions which will in due time make it possible to reopen the debate on possible adaptations or amendments to Directive 94/47/EC.

The Commission invites interested parties to submit, by 30 April 2000, any comments they may have on this report and any answers to the questions raised in the third part of the report, to the following address:

European Commission
Directorate General for Health and Consumer Protection
Unit C3
Rue de la Loi, 200
1949 Brussels
Belgium

I. TRANSPOSITION BY THE MEMBER STATES

A. Current status

Directive 94/47/EC, adopted on 26 October 1994 by the European Parliament and Council and published in the Official Journal on 29 October 1994 (OJ EC No L 280/83), provides (Article 12) that the Member States must comply with the Directive no later than 30 months after its publication.

By the transposition deadline (30 April 1997) only two Member States (United Kingdom and the Federal Republic of Germany) had communicated to the Commission their national measures transposing Directive 94/47/EC. Greece was the last Member State to communicate its transposition measures, on 1 October 1999.

Below we recap the various national provisions transposing Directive 94/47/EC.

Germany	Act of 20 December 1996
Austria	Act of 27 March 1997
Belgium	Act of 11 April 1999
Denmark	Act No 234 of 2 April 1997
Spain	Act 42/98 of 15 December 1998
Finland	Act 1162/97 of 11 December 1997
France	Act 98/566 of 8 July 1998
Greece:	Act of 25 August 1999
Ireland	Statutory Instrument No 204 of 1997
Italy	Legislative Decree No 427 of 9 November 1998
Luxembourg	Act of 18 December 1998
Netherlands	Act of 26.03.1997 and Decree of 25 June 1997
Portugal	Legislative Decree No 275/93 of 5 August 1993, amended by
Legislative	Decree No 180/99 of 22 May 1999
United Kingdom	Timeshare Act 1992, amended by the Timeshare Regulations 1997
Sweden	Act No 218 of 3 June 1997.

B. Transposition methodologies and techniques

1. Literal approach

In transposing the Directive certain Member States opted for what might be called a literal approach, since the national measures adopted are very similar (if not indeed identical) to the minimum content of the Directive (this applies in particular to Denmark, Finland, the Netherlands, Ireland, Italy, Luxembourg, Sweden, Germany and Austria).

2. Innovative approach

The innovative approach concerns not only certain Member States which prior to Directive 94/47/EC had already enacted their own timeshare legislation, but also other Member States which, when transposing the Directive, reinforced the protection already afforded to consumers by the Directive.

Before adopting Directive 94/47/EC, four Member States (Portugal, United Kingdom, France and Greece) had already enacted timeshare legislation.

Besides, certain instruments that were in place prior to transposition (such as the British Timeshare Act 1992 and the Portuguese Decreto Lei No 275/93) contain certain provisions which are more protective than those prescribed by the Directive (for example, these two national instruments grant the purchaser a cooling-off period of 14 days, while the period prescribed by Directive 94/47/EC is only ten days).

Certain Member States (France, Belgium, Portugal and Spain) also decided, when transposing the Directive, to reinforce consumer protection (notably as regards guarantees).

France substantially tightened up its legislation by comparison with Directive 94/47/EC by affording greater protection to the purchaser, not only by imposing a broad range of penalties (notably: the contract may be deemed null and void for up to five years if the vendor fails to observe certain obligations) but also by considerably extending the scope of the rules prescribed by the Directive in the event of conflict of laws.

Belgium also strengthened the protection of purchasers by prescribing that any professional who intends to offer or conclude timeshare contracts must, when he registers with the Ministry of Economic Affairs and provides the information document and the contract, furnish proof that he has sufficient guarantees (other than those provided for in Directive 94/47/EC concerning immovable property under construction) in the form of insurance or a bank guarantee or surety to ensure that he can observe his obligations vis-à-vis the purchaser.

Besides, Belgian law grants the purchaser a cooling-off period of 15 days; the purchaser may also renounce the contract within a period of one year if certain particulars are missing from the contract.

Portugal has also prescribed other guarantees incumbent on the owner or developer, whose object is mainly to ensure exercise of the right to use the property during the agreed period, sound administration and upkeep of the property, and to protect the purchaser if the property is mortgaged or otherwise encumbered, and to reimburse all amounts paid over when the purchaser cannot access the property.

Portuguese timeshare legislation notably permits the establishment of a special real property right of residence (subject to authorisation by the Directorate-General for Tourism and the formalities governing real property rights); "non-real" rights of utilisation are also governed by the law.

Besides, Portuguese legislation permits only the sale of timeshares in the form of accommodation units integrated into holiday developments. These must be approved by the Directorate-General for Tourism and may not exceed a certain percentage of the accommodation units in the holiday development, certain accommodation units being earmarked for hotel use.

Likewise, besides guarantees linked to the sale of immovable property under construction, Spanish law stipulates that the owner of the immovable property must take out two additional insurance policies. The first is intended to cover harm to third parties from the time of development to transfer of the timeshare rights. The second type covers civil liability for whatever might happen to the occupants of the accommodation units as a result of their occupation of the latter and general damages to the building and all its facilities and fittings.

Spanish legislation has created a new legal system for timeshare contracts, on the same lines as Portugal.

II. COMMENTS ON THE TRANSPOSITION

A. The nature of the law

1. Absence of a special legal framework

Directive 94/47/EC is silent on the nature of the timeshare contract and Member States are free to define its legal nature. Most Member States have refrained from doing so.

Note that pursuant to the common law of the United Kingdom - although this country did not adopt specific provisions when amending the Timeshare Act 1992 as regards the legal nature of these contracts - timeshare contracts cannot be considered as vesting a real property right (because it is not possible for more than four persons to register for a single property in the land register) or as a right to lease property for less than 21 years (leases of this kind cannot be registered).

2. Creation of a specific legal framework

Only two Member States - Spain and Portugal - have created a specific legal framework for timeshare contracts. Like Portugal, Spain has decided to grant timeshare contracts the status of a real property right and so they are subject to the same formalities as real contracts (authenticated documents, entry in the land register, etc.).

However, there are certain differences between the systems put in place by these two Member States.

The Spanish Act 42/98 provides that timeshare rights must take one of two expressly stipulated forms, failing which the contracts are null and void. Either the timeshare right is a limited real property right, or it is concluded in the form of a temporary tenancy for a period of three to 50 years for which the rent is paid in advance.

For its part, Portugal allows a variety of contractual arrangements concerning timeshare rights. The Legislative Decree of 22 May 1999 puts in place a legal framework which encompasses and regulates all contractual situations, hence maximising the protection afforded to the purchaser.

Thus, a timeshare right may take the form of a real property right to periodic accommodation, in which case it is subject to the formalities governing real property rights (authenticated document, entry in the land register, etc.).

In addition, the Portuguese system also regulates contracts concerning holiday accommodation rights and other new contractual formulas developed by the business community (such as the *cartões, clubes de férias, cartões turisticos*).

B. Scope

1. Text of the Directive

Pursuant to the first indent of Article 2, Directive 94/47/EC applies to "*any contract or group of contracts concluded for at least three years under which, directly or indirectly, on payment of a certain global price, a real property right or any other right relating to the use of one or more immovable properties for a specified or specifiable period of the*

year, which may not be less than one week, is established or is the subject of a transfer or an undertaking to transfer.."

Directive 94/47/EC has provided for two different periods of time regulating its scope in respect of timeshare contracts.

The contract between the purchaser and vendor must have been concluded for a period of at least three years allowing use by the purchaser of one or more immovable properties for a specified or specifiable period of the year, which may not be less than one week.

2. Comments on the duration of the contract

Most Member States have explicitly adopted the minimum three-year period provided for by Directive 94/47/EC. Thus in this respect the scope of the national transposition instruments coincides with that of the Directive in that they do not cover contracts relating to the use of such properties for less than three years.

Finland is the exception because its transposition act does not prescribe any specific duration for the contract.

Luxembourg's transposition act also applies to contracts concluded for a specified period of less than three years, if they include a renewal clause.

Portugal provides that in the case of contracts relating to real property rights the parties may specify the duration of the contract provided it is not less than 15 years (if the parties agree on a duration of less than 15 years the contract is void).

As regards contracts relating to holiday accommodation rights (irrespective of the contractual formula used in business practice), their duration may also be specified by the parties provided it is not less than three years. If the parties specify a duration of less than three years the contracts are considered as void.

Directive 94/47/EC does not put an upper limit on the duration of the contract and the majority of Member States have followed suit. Spain and Portugal have adopted a different approach.

Spain lays down a maximum duration of 50 years (both for contracts relating to real property rights and contracts for the lease of property subject to the transposition act). However, if these contracts relating to a period of over three years do not belong to one of the two legal forms expressly provided for by the transposition act, they are deemed null and void.

Portugal provides that contracts pertaining to non-real property rights (i.e. holiday accommodation rights) shall be perpetual (if the owner has created the right and does not specify another duration) or valid for a maximum of 30 years (if the right has not been created by the owner). In the case of contracts relating to real property rights the duration is considered to be perpetual unless stated otherwise in the contract.

3. Comments on the annual utilisation period

Certain Member States (Netherlands, Ireland and Italy) have applied the same criteria as those specified by Directive 94/47/EC, viz. an annual period of at least seven days. Hence all contracts for a specified or specifiable period of less than seven days fall outside the

remit of the national timeshare instruments and are governed by the ordinary law of each of these countries.

Spain also provides for a minimum annual utilisation period of at least seven days, but the consequences attached to contracts that ignore this rule depend on whether the contract is for more than three years (in this case the contract is deemed to be void) or less than three years (in this case the Spanish transposition act does not apply).

Portugal, while laying down a minimum period of seven days, provides that the annual utilisation period may not exceed 30 days. Contracts (whether pertaining to real property rights are to holiday accommodation rights) relating to periods of less than seven days or more than 30 days are null and void).

Other Member States such as Germany, Austria, Belgium, Denmark, Finland, France, Luxembourg, United Kingdom and Sweden have decided not to limit the annual utilisation period to a minimum of seven days.

Hence in these Member States contracts relating to specified or specifiable periods of less than seven days are covered by their transposition measures. Besides, Belgium has prohibited timeshare contracts relating to right of use for a period of less than two days.

Besides, certain Member States (Spain and Portugal) expressly provide that the vendor must set aside at least one week each year for cleaning and maintenance purposes.

C. The information document

1. Text of the Directive

Pursuant to Article 3(1) of Directive 94/47/EC "*[t]he Member States shall make provision in their legislation for measures to ensure that the vendor is required to provide any person requesting information on the immovable property or properties with a document which, in addition to a general description of the property or properties, shall provide at least brief and accurate information on the particulars referred to in points (a) to (g), (i) and (l) of the Annex and on how further information may be obtained.*"

2. Comments

Most Member States (Austria, Belgium, Denmark, Spain, Finland, the Netherlands, Italy, Luxembourg and Portugal) have extended the vendor's obligation to provide information to particulars other than those referred to in Article 3(1) of the Directive.

The Netherlands are the only country to require that all the particulars included in the annex to Directive 94/47/EC be included in the information document.

Besides, Belgium requires the vendor to indicate in his information document the nature, extent and amount of the guarantees to ensure that he can observe his various obligations vis-à-vis the purchaser.

3. Penalties

a. concerning the information document

When the information document does not contain all the particulars indicated in Article 3(1), and provided the contract has been concluded, the most common penalty in Germany is a fine (which also provides for the possibility of rescinding the contract within a month), as it is in Austrian and Belgian legislation (which also provides for the possibility of cancelling the contract), in Danish, Finnish, French, Italian, Luxembourgish and Portuguese legislation (which also provides that the vendor may be prohibited from carrying on business for two years and that the judgment condemning the vendor be published in his establishments and in a newspaper), and in British and Swedish law.

Certain Member States expressly provide that purchasers shall be entitled to damages (the Netherlands and Sweden). France and Spain also provide that the contract shall be null and void if the offer does not contain the necessary particulars.

Ireland does not explicitly stipulate penalties in cases in which the information document does not contain the necessary particulars.

b. concerning advertising

Pursuant to Article 3(3) of Directive 94/47/EC any advertising must indicate the possibility of obtaining the information document and state where it may be obtained.

Only four Member States (Portugal, United Kingdom, Denmark, France) explicitly prescribe a fine in the event of non-compliance. Spain provides that the contract shall be null and void and that in certain circumstances damages must be paid in respect of the infringements in question.

Besides, certain Member States (Spain and Portugal) have banned the use of the expressions "timeshare" and similar terms in the information documents and advertising relating to immovable property. On the other hand, Italy expressly authorises the use of the term "timeshare" but only in cases in which the contract concerns a real property right.

Portugal also provides for the possibility of prohibiting the professional from carrying on business for two years and for the publication in his establishment and in a newspaper of the court decision.

Italy also provides for a ban on carrying on business as a possible penalty.

In Belgium, any advertising designed directly or indirectly to promote the sale of timeshares must clearly indicate this objective.

4. Problems encountered

a. concerning the content

Although certain Member States (Italy and Spain) have reinforced the vendor's obligation to provide information, they have not included all the minimum particulars required by Article 3(1) and therefore an infringement procedure has been brought against them.

b. concerning the obligation to provide the document

In its transposition act, Denmark specified that this obligation should apply only in cases in which the person concerned intends to act in his capacity as consumer in the event of conclusion of a contract.

Hence Denmark does not require that the document be provided when the person concerned intends to use the information in the course of business.

Although the Directive does not expressly mention the objectives of Article 3(1), it is to be assumed that the idea is to inform consumers and not competitors. Hence the Commission has decided not to bring an infringement procedure against Denmark.

D. The contract

1. Text of the Directive

Pursuant to the first indent of Article 4, "*the contract, which shall be in writing, includes at least the items referred to in the Annex..*"

2. Comments

Although most Member States have simply transposed the first indent of Article 4 as it stands, certain Member States (Belgium, Denmark, Spain, France, Luxembourg and Portugal) have provided for the inclusion of additional items in the contract.

For example, Luxembourg and Belgium require the contract to indicate that in the event of the possibility of participating in an exchange or resale system, the purchaser must be warned that this participation does not provide any guarantee that the exchange or resale will be realised (the vendor must also inform the purchaser of any particulars of the exchange or resale system which may limit opportunities for exchange or resale).

Belgian law also requires vendors to provide detailed particulars on the administration and management of the immovable property (such as the choice of managers, participation in meetings, contribution to exceptional charges and penalties in the event of late payment). Besides, Belgian law provides that the contract must also indicate the mortgage situation and any encumbrances on the immovable property.

For its part Portugal insists in particular on information concerning accommodation units (such as their precise description, designation of the units which may be the object of a real property right, such units as a percentage of the total number of units in the holiday development, etc.) and on the different guarantees which the vendor must supply (such as those concerning good administration and maintenance of the property and guarantees protecting the purchaser in respect of the existence of mortgages or other encumbrances, etc.

3. Penalties

a. concerning the written form

If the contract is not in writing (as required by Article 4, indent 1), certain Member States penalise the vendor by deeming the contract null and void (Germany, Belgium, Spain, France, Italy and Sweden).

Other Member States prescribe a fine (Finland, Denmark, Portugal and the United Kingdom). Portugal also provides for the possibility of prohibiting the professional from carrying on business for two years and for the publication of the judgment in his establishment and in a newspaper.

Denmark is the only Member State that provides that the absence of a contract in writing renders the contract unenforceable against the purchaser.

The Netherlands, Ireland and Luxembourg do not prescribe explicit penalties in their transposition measures.

b. concerning the content

As to the content of the contract (pursuant to the first indent of Article 4 all items in the annex to the Directive must be included), Member States penalise vendors for failing to provide information either by deeming the contract null and void (Germany, Belgium, France, Sweden and Luxembourg) or by imposing a fine (Austria, Belgium, Denmark, Spain, Finland, France, the Netherlands, Italy, Luxembourg, Portugal, the United Kingdom and Sweden).

Portugal also provides for the possibility of prohibiting the professional from carrying on business for two years and for the publication of the judgment in his establishment and in a newspaper.

Ireland is the only Member State that does not explicitly provide for a penalty in the event of missing information (an infringement procedure has been brought against it for this reason).

E. The language of the contract and its translation

1. Text of the Directive

Pursuant to the second and third indents of Article 4 "*the contract and the document referred to in Article 3 (1) are drawn up in the language or one of the languages of Member State in which the purchaser is resident or in the language or one of the languages of the Member State of which he is national which shall be an official language or official languages of the Community, at the purchaser's option. The Member State in which the purchaser is resident may, however, require that the contract be drawn up in all cases in at least its language or languages which must be an official language or official languages of the Community, and*

- the vendor provides the purchaser with a certified translation of the contract in the language or one of the languages of the Member State in which the immovable property is situated which shall be an official language or official languages of the Community."

2. Comments

Certain Member States (Austria, Denmark, Finland, the Netherlands and the United Kingdom) have widened the scope of this obligation to the official languages of the countries of the European Economic Area.

Note also that the second indent of Article 4 allows Member States to require that the contract be drawn up in their official languages, provided the purchaser is not deprived of his freedom to choose (Ireland, Italy and Spain have availed of this option).

However, difficulties have arisen as regards the right to choose the language in two of these Member States (Ireland and Spain), as will be explained below.

3. Penalties

If the purchaser is not free to choose the language of the document and the contract, the contract is deemed null and void (Austria, France, Spain and Sweden) or a fine is imposed (Austria, Belgium, Denmark, Finland, France, Luxembourg, Portugal and the United Kingdom).

In Belgium the purchaser also has the right to deem the contract null and void if the vendor does not give him the choice to which he is entitled.

Portugal also provides for the possibility of prohibiting the professional from carrying on business for two years and for the publication of the judgment in his establishment and in a newspaper.

Germany provides for two different penalties depending on whether the absence of the right to choose the language concerns the document (in which case the purchaser may withdraw from the contract within a month) or the contract itself (which may then be declared null and void).

If the vendor fails to provide a translation of the contract, he may in certain Member States be required to pay a fine (Belgium, Italy, United Kingdom, Austria, Denmark, Finland and France); other Member States deem the contract null and void (France). Sweden prescribes that in the absence of a translation the purchaser may cancel the contract. Belgium also allows the purchaser to have the contract rescinded.

4. problems encountered

a. concerning the information document

Infringement proceedings have been brought against Sweden for failure to fully transpose the second indent of Article 4.

Sweden allows the purchaser to choose the language only in respect of the contract. The Commission considers that such an analysis of the second indent of Article 4 leads to an overly restrictive interpretation in the light of the objective pursued.

The second indent of Article 4 must be understood in a broad sense as including not only private parties involved in the contract with the vendor (the actual purchaser) but also private parties not yet involved in a contractual relationship (the potential purchaser), for to do otherwise would be to defeat the object of this article.

b. concerning the contract

Infringement proceedings have been brought against Spain, Luxembourg and Ireland for inadequate transposition of the provisions of the second indent of Article 4.

The Spanish transposition act provides that both the document and the contract be drafted in Castilian or another official language of the country, depending on where the contract is concluded (purchasers are also entitled to obtain the document and the contract in the official language of the country in which they are resident).

This transposition is inadequate in respect of the second indent of Article 4 because it does not entitle the purchaser to choose the official language of the State of which he is a national for the document and the contract.

The infringements concerning Luxembourg and Ireland concern the option that Member States have under the second indent of Article 4 to require that the contract be drafted in their national language, while allowing the purchaser to choose a contract drafted in the language of the State of which he is a national.

Here both the Luxembourgish and Irish transposition acts provide that if the purchaser is resident in the Grand Duchy of Luxembourg or Ireland respectively, then the contract must be drafted either in German or French (for Luxembourg) or in the official language of the Member State in which the purchaser is resident (for Ireland).

The Commission considers that this deprives the purchaser of the choice of the language to which he is entitled, since the two sentences of the second indent of Article 4 must be seen as complementary and not as mutually exclusive.

c. concerning the translation

In transposing the Directive Spain omitted this obligation incumbent on the vendor (this is the subject of infringement proceedings in the pipeline)

Besides, a complaint has been lodged against Ireland which in its transposition measures provides that the vendor may be required to provide a translation of the contract in English or Gaelic, the purchaser's option.

The Irish transposition of the third indent, although irreproachable in the case of a property situated in Ireland or England, would be inadequate if the property were situated in another Member State. In such an eventuality, and providing Irish law is applicable to the contract, the vendor would not be obliged to provide the purchaser (contrary to Article 4, third indent) with a translation of the contract in the language of the Member State in which the property is situated (this complaint is the subject of a pending infringement procedure).

F. Rights of cancellation and withdrawal:

1. Text of the Directive

Pursuant to Article 5(1) of Directive 94/47/EC, *"the purchaser shall have the right:*

- to withdraw without giving any reason within 10 calendar days of both parties' signing the contract or of both parties' signing a binding preliminary contract...,

- if the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, at the time of both parties signing the contract or of both parties' signing a binding preliminary contract, to cancel the contract within three months thereof. If the information in question is provided within those three

months, the purchaser's withdrawal period provided for in the first indent, shall then start,

- if by the end of the three-month period provided for in the second indent the purchaser has not exercised the right to cancel and the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, to the withdrawal period provided for in the first indent from the day after the end of that three-month period

2. Comments on the right of withdrawal

As regards the right of withdrawal enshrined in the first indent, most Member States have adopted the 10 days cooling off period provided for in Article 5(1).

However, certain Member States have explicitly granted a longer cooling off period to the purchaser. Both Austria and the United Kingdom (which takes over the periods provided for in the Timeshares Act of 1992) grant the purchaser a cooling-off period of 14 days. For its part, Belgium gives the purchaser a period of 15 days.

Portugal, which provided for a 14-day cooling off period in its Decree of 1993, finally opted for the period provided for in the Directive.

Finally, France has adopted a system which offers considerable advantages for purchasers. French legislation provides that the professional's offer must be made in writing and that it cannot be revoked for a period of seven days. Hence, once the consumer receives this offer, he has a firm commitment from the professional during this period, which gives him an opportunity to analyse the different aspects of the offer.

If the consumer accepts the professional's offer, he signs it and returns it to him. It is only once he has notified his acceptance of the offer that the consumer's 10-day cooling off period begins to run.

Hence in this system the purchaser has more time to reconsider his decision.

3. Comments on the right of cancellation

The right of cancellation set out in the second indent of Article 5 penalises incorrect behaviour on the part of the vendor. The purchaser may rescind the contract within a maximum of three months if the contract does not include the particulars referred to in the annex of the Directive at the time of signature of the contract or preliminary binding contract.

Although the right of cancellation cannot be exercised if the professional rectifies his incorrect behaviour (within this three-month period), the purchaser still has ten days to withdraw from the contract once the infringement has been discontinued.

The vast majority of Member States have transposed this provision, except for France and Spain (who penalise incorrect behaviour on the part of the vendor by deeming the contract null and void), as well as Belgium (which provides that the right of cancellation vested in the purchaser shall apply for one year from the date of signature of the contract instead of the three months provided for in the Directive).

Sweden also allows the purchaser to cancel the contract if he has not been provided with a translation.

Besides, Austria has a unique system governing cases in which the information on the right of withdrawal is missing from the contract: the period of withdrawal does not begin to run, and so the purchaser may withdraw at any time following signature of the contract.

G. Notification of withdrawal and cancellation:

1. Text of the Directive

Pursuant to Article 5(2)(3) and (4) of Directive 94/47/EC "*if the purchaser intends to exercise the rights provided for in paragraph 1 he shall, before the expiry of the relevant deadline, notify the person whose name and address appear in the contract for that purpose by a means which can be proved in accordance with national law....*

where the purchaser exercises the right provided for in the first indent of paragraph 1, he may be required to defray, where appropriate, only those expenses which, in accordance with national law, are incurred as a result of the conclusion of and withdrawal from the contract

where the purchaser exercises the right of cancellation... he shall not be required to make any defrayal".

2. Comments

Only a few Member States have explicitly specified how the purchaser must notify the vendor. The notification must be made in writing (Germany and Austria) or by registered mail (Belgium, Italy and Luxembourg), or by notarial deed (Spain) or by returning a detachable coupon (France).

France provides for an original mechanism in that the professional's offer is sent or handed to the consumer in duplicate, one copy being reserved for the consumer; this copy includes a detachable coupon (bearing the identity and domicile or registered office of the professional) to facilitate exercise of the option of withdrawal. Let us recall that in the French system the period for exercising the right of withdrawal does not being to run until the purchaser has dispatched the signed offer to the professional.

3. Doubts as to interpretation

As regards the transposition of Article 5(2), certain Member States require compliance with certain formalities, such as the obligation to notify the vendor in writing or by registered mail.

However, Article 5(2) does not contain any particular requirements as regards the form of the notifications of withdrawal and cancellation. This article merely addresses the way in which the withdrawals and cancellations notified must be evidenced and hence confines itself to referring to a means which can be proved in accordance with national law.

This article has also been formulated differently than Article 5 of Directive 85/577 of 20 December 1995 (concerning protection of consumers in respect of contracts negotiated away from business premises), which explicitly provides that it is for the Member States to lay down the procedures and conditions for these notifications.

However, the Commission does not consider that these formal requirements to the effect that the notification must be made in writing or by registered mail constitute an infringement of this Directive.

In the case of Spain, however, the Commission considers that the requirement that withdrawal from a contract signed in the presence of a notary itself take the form of a notarial deed would largely defeat the object of Article 5(2), because this formal requirement would prevent the purchaser from notifying the vendor by any other means accepted as proof in accordance with national law (such as notification in writing or by registered mail).

This complaint is currently the subject of an infringement procedure.

4. Penalties

The Grand Duchy Luxembourg provides that a fine be imposed on the vendor if he requires the purchaser to pay certain fees (other than those linked to acts which are essential for withdrawal) in order to exercise his rights of withdrawal and cancellation.

H. Advance payments:

1. Text of the Directive

Pursuant to Article 6 of Directive 94/47/EC, "*Member States shall make provision in their legislation to prohibit any advance payments by a purchaser before the end of the period during which he may exercise the right of withdrawal.*"

2. Comments

The Member States have transposed Article 6, although the consequences arising from the prohibition differ from country to country.

3. Penalties

In the case of advance payments by the purchaser, the typical penalty in Austrian and Belgian legislation is a fine (reimbursement must be made within 30 days of notification of the purchaser's withdrawal), ditto in Danish, Finnish, French, Irish and Italian law (possible ban on carrying on business if he re-offends), Luxembourgish and Portuguese law (possible ban on carrying on business for two years and publication in his establishments and in a newspaper of the decision), and in British and Swedish law.

Spanish legislation provides that the contract shall be deemed null and void and obliges the vendor to reimburse the purchaser twice the sum of the advance payments.

Only two national legislations (German and Dutch) do not expressly stipulate penalties, merely requiring that the vendor reimburse the advance payments received.

However for these two Member States other types of penalties may be imposed under national law.

The Commission has in particular scrutinised the German system, which provides for certain mechanisms to protect consumers and to ensure compliance.

The German system protects purchasers who have made advance payments at the request of the vendor despite the ban. The purchaser not only has a right to reimbursement of the sums paid but may also seek damages in the event of a setback of interest. Besides, the purchaser may rescind the contract even if the withdrawal period has expired.

German law also protects the public in general against vendors who seek advance payments. The vendor may be banned from carrying on his business (and in the event of infringement of this ban he may be fined).

Besides, professional associations and consumer organisations may bring seek injunctions against vendors who, contrary to Article 6 of the Directive, accept or demand advanced payments.

I. Cancellation of the credit contract

1. Text of the Directive

Pursuant to Article 7 of Directive 94/47/EC, *"[t]he Member States shall make provision in their legislation to ensure that:*

- if the price is fully or partly covered by credit granted by the vendor, or

- if the price is fully or partly covered by credit granted to the purchaser by a third party on he basis of an agreement between the third party and the vendor, the credit agreement shall be cancelled, without any penalty, if the purchaser exercises his right to cancel or withdraw from the contract as provided for in Article 5.

2. Comments

All Member states have correctly transposed Article 7.

Only two Member States have spelled out the procedures governing cancellation of the credit contract: Luxembourg and Belgium provide that the contract must be cancelled in the form of a notification by registered mail.

J. Renouncement of the enjoyment of rights and exoneration from responsibilities:

1. Text of the Directive

Pursuant to Article 8 of Directive 94/47/EC, *"[t]he Member States shall make provision in their legislation to ensure that any clause whereby a purchaser renounces the enjoyment of rights under this Directive or whereby a vendor is freed from the responsibilities arising from this Directive shall not be binding on the purchaser, under conditions laid down by national law."*

2. Comments

Article 8 has been literally transposed by the Member States. Certain national transposition laws have also ordained express penalties, besides the unenforcability of the contract.

3. Penalties

Austria, France, Luxembourg, Belgium and Portugal penalise clauses pursuant to which purchasers renounce the enjoyment of their rights or whereby vendors are freed from their responsibilities, by deeming the clause in question null and void. Besides, Portugal also provides that professionals may be prohibited from carrying on business for two years and that the decision be published in his establishments and in a newspaper.

K. Rules of private international law:

1. Text of the Directive

Pursuant to Article 9 of Directive 94/47/EC, *"[t]he Member States shall take the measures necessary to ensure that, whatever the law applicable may be, the purchaser is not deprived of the protection afforded by this Directive, if the immovable property concerned is situated within the territory of a Member State."*

2. Comments

Certain Member States (Germany, Austria, Denmark, Finland, the Netherlands, the United Kingdom and Sweden) have extended the protection granted to the purchaser to include properties situated in the territory of a state belonging to the European Economic Area.

Other Member States (Belgium, France and Luxembourg) have also extended the protection afforded to the purchaser to properties situated outside the European Economic Area:

– France and Luxembourg afford this protection to purchasers resident in a Member State of the European Community, provided the contract has been concluded in the purchaser's state of residence or provided the criteria of Article 5.2 of the Rome Convention are satisfied;

– Belgium affords protection only to purchasers resident in Belgium in two circumstances. Belgian law applies if the contact has been concluded in Belgium or if the contract, although not concluded in Belgium, meets the criteria of Article 5.2 of the Rome Convention.

Although Directive 94/47/EC does not focus specifically on the choice of laws in timeshare contracts, certain Member States have included jurisdiction rules to protect purchasers in their transposition measures.

Three Member States (Belgium, Spain and France) prescribe penalties in cases in which the contract between the purchaser and vendor contains a clause governing jurisdiction.

Spain deems as null and void any clause which grants jurisdiction to an arbitration tribunal other than the Consumer Arbitration System or a joint body (with representatives of undertakings and of consumer associations).

France and Belgium also consider null and void any clause giving jurisdiction to the courts of any country that has not signed the 1968 Brussels Convention or the 1988 Lugano Convention, when the purchaser resides in France or in Belgium respectively or the property is situated in the signatory Member States.

3. Problems identified

Ireland has not transposed Article 9 of the Directive.

The Spanish, Portuguese and Italian transposition laws limit protection afforded to purchasers to property situated in their respective territories.

However, the purpose of Article 9 is to ensure, in cases in which a contract is subject to the law of a non-Member State of the European Community, that any purchaser (irrespective of whether he is a resident or national of a Member State) is afforded protection under the Directive when the property is situated on the territory of any Member State.

The provisions adopted by Spain, Portugal and Italy may be due to the fact that the courts of these Member States would have difficulties in recognising (as a function of the traditional rules of private international law) contracts concerning rights to immovable property situated outside their respective territories.

Indeed Article 16 of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters provides that the courts of the contracting state in which the property is situated shall have exclusive jurisdiction in regard to rights in rem in immovable property or tenancies in immovable property.

However, timeshare contracts are intrinsically of a highly complex nature.

The Court of Justice recently ascertained, in Travel vac SL v Antelm Sanchis (C-423/97 of 22 April 1999) that the contract submitted to it could concern both the right to use an immovable property and the right to the supply of specific services. Given that the services were of higher value than the right to use the property, the Court considers that this contract should not be considered as a contract mainly concerning property rights.

Hence it cannot be ruled out that a court of a Member State will pronounce on a dispute concerning a contract for a timeshare property situated in another Member State.

Belgium also restricts protection of the purchaser when the property is situated on the territory of another Member State of the European Community. Pursuant to Belgian legislation, only purchasers resident in Belgium may benefit from the protection afforded by Article 9 of the Directive.

Likewise Luxembourg restricts the protection under Article 9 to purchasers resident in the Grand Duchy, if the property is situated outside the country. However, Luxembourg law provides that if the contract has been concluded in the Grand Duchy, the protection of Article 9 shall be afforded to purchasers not resident in Luxembourg.

The Luxembourg authorities have recently informed the Commission that they intend to amend their transposition instrument in order to bring it fully into line with Article 9.

III. SOME REFLECTIONS AS TO HOW THE DIRECTIVE MIGHT BE AMENDED IN THE FUTURE

The problems experienced by consumers in their relations with timeshare developers and vendors have not disappeared with the adoption of Directive 94/47/EC.

In this regard the Commission departments responsible for consumer policy have received a large number of individual complaints (24% of the complaints received by the Commission in 1998), as well as many letters from MEPs.

Likewise, the 1998 report on the activities of the consumer Euroguichets records that there were almost 4 000 complaints or requests for information on timeshares (note that at the Montpellier Euroguichet alone, over half (52%) of the cases treated in 1998 concerned timeshares).

However, the vast majority of cases reported to the European institutions concern a series of problems and situations which Directive 94/47/EC cannot resolve as it stands.

The cases reported mainly concern unilateral actions on the part of vendors who, following conclusion of the contract, modify or fail to perform their contractual obligations. This mainly concerns the imposition of annual charges on the purchaser different to those initially set out in the contract, the impossibility for purchasers to resell their timeshare although this right was stipulated, the failure of vendors to follow up reservations and failure to enrol purchasers in the envisaged exchange or resale systems.

The purchaser's situation is made more precarious because often several companies are involved in managing the timeshare, although they are not formally parties to the initial contract. This situation makes it even more difficult for the purchaser to rely on his legal or contractual rights.

Directive 94/47/EC protects consumers only in certain very specific fields such as, notably, the vendor’s obligation to provide certain specific particulars prior to conclusion of the contract, the purchaser’s right to renounce or cancel the contract, and the ban on advance payments during the withdrawal period.

It is true that certain Member States (such as Portugal) have considerably enhanced consumer protection and hence their legislation would seem to address the new problems and situations that have cropped up in practice.

However, the fact remains that the great majority of Member States have not availed of the minimal clause in Article 11 and so consumer protection is limited to that afforded by the Directive.

Article 153 of the Treaty provides that the Community must contribute to protecting the interests of consumers and to ensuring a high level of consumer protection. The minimum harmonisation measures in these Directives are one of the means of achieving these goals. Article 153 provides for the interplay of Community and national actions.

The subsidiarity principle, which governs Community action in the field of consumer protection, is an evolving and dynamic concept that is flexible and pragmatic in its application. The Protocol on subsidiarity and proportionality annexed to the Amsterdam Treaty enshrines this dynamic vision.

Hence, for a Community action to be justified, there must be no way in which the Member States can adequately achieve its objectives; the objectives must be such that they can be better achieved by Community action.

Hence, when Community measures are deemed insufficient, a new Community measure cannot be justified if action by the Member States could achieve the object in question.

The fact is that the shortcomings of Directive 94/47/EC are also to be found in the bulk of the national legislations and hence adversely affect consumers.

Bearing this in mind, and in the light of the subsidiarity principle, the question arises as to whether a new Community action, in the form of an amendment of the existing Directive, should be envisaged.

In order to protect consumers and fulfil their aspirations, one might contemplate taking action in two key areas - namely, extension of the categories of contracts covered by Directive 94/47/EC, and the provision of greater protection than is currently afforded by the Directive.

A. The categories of contracts covered

1. Duration of the contract

In the second part of the report it was noted that the scope of most transposition laws is the same as that of Directive 94/47/EC. Hence, the national transposition rules apply only to contracts concluded for at least three years.

The minimum three-year period prescribed by Directive 94/47/EC was mainly justified by concern for market stability (COM (92)220 of 13 May 1992). Hence, the protection afforded by the Directive was not intended for purchasers seeking to buy timeshares for speculative purposes.

The Commission has ascertained that professionals and developers are now offering new timeshare contracts valid for a period of less than three years; the purpose often appears to be simply to circumvent the transposition laws.

For example, the Commission was recently informed about the marketing in Spain (after adoption of the Spanish transposition instrument, Act 42/98) of new products which in principle fall outside the scope of Directive 94/47/EC.

To obtain these new products the consumer must join a club which, on payment of an annual contribution, allows him to use them for 35 months.

At the end of the 35 months' membership period club members may either renew their membership (each renewal being for a period of 35 months) or purchase a timeshare from the club.

Since the initial membership period is 35 months, the consumers are not protected under Directive 94/47/EC, and so it would appear that the ulterior motive is to circumvent the legislation.

In order to learn more about the nature and operation of these new products, the Commission contacted a firm that sells products of this kind.

The Commission has not yet received a satisfactory reply, having regard to the requirements of the Directive.

Should one reconsider the limitation on the Directive's scope as regards the duration of the contract, so as to regulate all timeshare contracts in a single framework?

2. The annual period of use

By stipulating an annual utilisation period of at least seven days (because the week is the usual period in all forms of timeshares – COM(92)220 of 13 May 1999), Directive 94/47/EC also fails to protect purchasers who conclude a contract for timeshares whose annual period of use is less than one week.

In order to maximise protection, the majority of Member States decided either to cover all timeshare contracts irrespective of the minimum annual period of use or to outlaw contracts for a period of less than seven days. Only the Netherlands, Ireland and Italy followed the Directive's approach, hence leaving unprotected purchasers of timeshares used for a period of less than seven days annually.

Hence, certain national legislations cannot provide adequate protection to purchasers of contracts that specify a period of use of less than seven days (such as a timeshare for six days with one day devoted to upkeep of the property).

Should the limitations on the annual period of use be reconsidered with a view to extending protection to all timeshare contracts?

B. Extending protection

1. Towards extending the right of withdrawal

The Commission's original proposal (OJEC No C222/5 of 29 August 1992) foresaw that purchasers should have a cooling-off period of 14 days from signature of the contract. Indeed, this proposal extended the cooling-off period to 28 days from the signature of the contract in the case of timeshares situated in a Member State other than the purchaser's state of residence.

These periods were mainly justified by the fact that the great majority of timeshare contracts are concluded during holidays (i.e. at a time when the timeshare purchaser does not have the time and "tranquillity" needed to reflect on his decision) and the property is often situated in a Member State whose legislation is different to that of the purchaser.

The solution finally adopted by the Directive was to allow the purchaser to withdraw within ten days of signature of the contract.

Certain Member States have extended this period to 14 days (Austria and the United Kingdom) or 15 days (Belgium) from conclusion of the contract.

The complaints addressed to the Commission often relate to contracts concluded in great haste in circumstances in which the purchasers often had no opportunity, at their leisure, to elicit replies to their requests for information.

However, the days following signature of the contract are critical because purchasers have to decide whether or not to go ahead with the purchase – this decision depending mainly on how the vendor deals with the various requests for information made by the purchaser.

Should the right of withdrawal therefore be extended (following the example of Austria, Belgium and the United Kingdom) so as to give purchasers more time to assess their contractual obligations and associated rights?

2. New contractual guarantees

Although Directive 94/47/EC provides that vendors must offer certain guarantees (point d5 of the Annex), these are still not enough to ensure their compliance with their various obligations.

It is only when the timeshare concerns a property under construction that Directive 94/47/EC provides that the vendor must furnish guarantees concerning the state of completion of the property and, in the event of non-completion, guarantees regarding reimbursement of any payment made.

However, Directive 94/47/EC does not provide for guarantees covering other situations in which vendors may be accountable for shortcomings (only Spain, Portugal and Belgium have imposed additional guarantees on the professional).

Besides, the contracts covered by Directive 94/47/EC have one particular feature which might be an argument for imposing new guarantees on the vendor.

Specifically, there is a considerable time lag in the performance of the vendor's obligations, because although purchasers generally have to pay the full price in the month following signature of the contract, the vendor does not have to provide his services until later.

Considering also that the vendor’s services extend over very long periods, it might be useful to require vendors to show that they have the resources needed to observe their contractual obligations.

Such a system has already been established by the Community legislator for other contracts in which there is a time lag in performance. Article 7 of Directive 90/314/EC of 13 June 1990 on package travel, package holidays and package tours provides that the vendor must provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.

Although the system enshrined by Directive 90/314/EC concerns only two clearly defined situations, certain Member States (such as Greece and Portugal) decided, when transposing this Directive, to extend the scope of Article 7 to all the vendor’s contractual obligations.

Should one therefore contemplate imposing new contractual guarantees on the vendor or a similar system to the one established by Directive 90/314/EC?

3. The relevance of marketing techniques

The principle of outlawing advance payments provided for in Article 6 of Directive 94/47/EC, was put in place for various reasons – firstly, the prevalence of aggressive

selling practices in the business; secondly, the need to guarantee the purchasers' right of rescission, without pressure; and thirdly the need to avoid the practical problems associated with reimbursement of advance payments.

Exceptions to the principle of prohibiting advance payments might be considered in certain cases in which the contract is negotiated and concluded without undue pressure or aggressive selling on the part of the vendor. For example, a consumer might of his own motion contact the vendor in order to commence negotiations and finally conclude a contract with him. In such cases, the purchaser would have considerably less justification for rescinding the contract.

To redress the difficulties associated with the reimbursement of advances kept by the vendor, one might consider establishing a system whereby advance payments would be deposited with a fiduciary (for example a credit institution) who, in the case of timely exercise of the right of cancellation by the purchaser, would be legally obliged to effect an immediate refund.

Should one therefore consider introducing exceptions to the principle of prohibiting advance payments?

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Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit

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MORE INFO TEXT:

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COUNCIL DIRECTIVE
of 22 December 1986
for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
(87/102/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas wide differences exist in the laws of the Member States in the field of consumer credit;

Whereas these differences of law can lead to distortions of competition between grantors of credit in the common market;

Whereas these differences limit the opportunities the consumer has to obtain credit in other Member States; whereas they affect the volume and the nature of the credit sought, and also the purchase of goods and services;

Whereas, as a result, these differences have an influence on the free movement of goods and services obtainable by consumers on credit and thus directly affect the functioning of the common market;

Whereas, given the increasing volume of credit granted in the Community to consumers, the establishment of a common market in consumer credit would benefit alike consumers, grantors of credit, manufacturers, wholesalers and retailers of goods and providers of services;

Whereas the programmes of the European Economic Community for a consumer protection and information policy (4) provide, inter alia, that the consumer should be protected against unfair credit terms and that a harmonization of the general conditions governing consumer credit should be undertaken as a priority;

Whereas differences of law and practice result in unequal consumer protection in the field of consumer credit from one Member State to another;

Whereas there has been much change in recent years in the types of credit available to and used by consumers; whereas new forms of consumer credit have emerged and continue to develop;

Whereas the consumer should receive adequate information on the conditions and cost of credit and on his obligations; whereas this information should include, inter alia, the annual percentage rate of charge for credit, or, failing that, the total amount that the consumer must pay for credit; whereas, pending a decision on a Community method or methods of calculating the annual percentage rate of

charge, Member States should be able to retain existing methods or practices for calculating this rate, or failing that, should establish provisions for indicating the total cost of the credit to the consumer;
Whereas the terms of credit may be disadvantageous to the consumer; whereas better protection of consumers can be achieved by adopting certain requirements which are to apply to all forms of credit;
Whereas, having regard to the character of certain credit agreements or types of transaction, these agreements or transactions should be partially or entirely excluded from the field of application of this Directive;
Whereas it should be possible for Member States, in consultation with the Commission, to exempt from the Directive certain forms of credit of a non-commercial character granted under particular conditions;
Whereas the practices existing in some Member States in respect of authentic acts drawn up before a notary or judge are such as to render the application of certain provisions of this Directive unnecessary in the case of such acts; whereas it should therefore be possible for Member States to exempt such acts from those provisions;
Whereas credit agreements for very large financial amounts tend to differ from the usual consumer credit agreements; whereas the application of the provisions of this Directive to agreements for very small amounts could create unnecessary administrative burdens both for consumers and grantors of credit; whereas therefore, agreements above or below specified financial limits should be excluded from the Directive;
Whereas the provision of information on the cost of credit in advertising and at the business premises of the creditor or credit broker can make it easier for the consumer to compare different offers;
Whereas consumer protection is further improved if credit agreements are made in writing and contain certain minimum particulars concerning the contractual terms;
Whereas, in the case of credit granted for the acquisition of goods, Member States should lay down the conditions in which goods may be repossessed, particularly if the consumer has not given his consent; whereas the account between the parties should upon repossession be made up in such manner as to ensure that the repossession does not entail any unjustified enrichment;
Whereas the consumer should be allowed to discharge his obligations before the due date; whereas the consumer should then be entitled to an equitable reduction in the total cost of the credit;
Whereas the assignment of the creditor's rights arising under a credit agreement should not be allowed to weaken the position of the consumer;
Whereas those Member States which permit consumers to use bills of exchange, promissory notes or cheques in connection with credit agreements should ensure that the consumer is suitably protected when so using such instruments;
Whereas, as regards goods or services which the consumer has contracted to acquire on credit, the consumer should, at least in the circumstances defined below, have rights vis-à-vis the grantor of credit which are in addition to his normal contractual rights against him and against the supplier of the goods or services; whereas the circumstances referred to above are those where the grantor of credit and the supplier of goods or services have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the purpose of enabling the consumer to acquire goods or services from the latter;
Whereas the ECU is as defined in Council Regulation (EEC) No 3180/78 (1), as last amended by Regulation (EEC) No 2626/84 (2); whereas Member States should to a limited extent be at liberty to round off the amounts in national currency resulting from the conversion of amounts of this Directive expressed in ECU; whereas the amounts in this Directive should be periodically re-examined in the light of economic and monetary trends in the Community, and, if need be,

revised;
Whereas suitable measures should be adopted by Member States for authorizing persons offering credit or offering to arrange credit agreements or for inspecting or monitoring the activities of persons granting credit or arranging for credit to be granted or for enabling consumers to complain about credit agreements or credit conditions;
Whereas credit agreements should not derogate, to the detriment of the consumer, from the provisions adopted in implementation of this Directive or corresponding to its provisions; whereas those provisions should not be circumvented as a result of the way in which agreements are formulated;
Whereas, since this Directive provides for a certain degree of approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and for a certain level of consumer protection, Member States should not be prevented from retaining or adopting more stringent measures to protect the consumer, with due regard for their obligations under the Treaty;
Whereas, not later than 1 January 1995, the Commission should present to the Council a report concerning the operation of this Directive,
HAS ADOPTED THIS DIRECTIVE:
Article 1
1. This Directive applies to credit agreements.
2. For the purpose of this Directive:
(a) 'consumer' means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;
(b) 'creditor' means a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons;
(c) 'credit agreement' means an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation.
Agreements for the provision on a continuing basis of a service or a utility, where the consumer has the right to pay for them, for the duration of their provision, by means of instalments, are not deemed to be credit agreements for the purpose of this Directive;
(d) 'total cost of the credit to the consumer' means all the costs of the credit including interest and other charges directly connected with the credit agreement, determined in accordance with the provisions or practices existing in, or to be established by, the Member States.
(e) 'annual percentage rate of charge' means the total cost of the credit to the consumer expressed as an annual percentage of the amount of the credit granted and calculated according to existing methods of the Member States.
Article 2
1. This Directive shall not apply to:
(a) credit agreements or agreements promising to grant credit:
- intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building,
- intended for the purpose of renovating or improving a building as such;
(b) hiring agreements except where these provide that the title will pass ultimately to the hirer;
(c) credit granted or made available without payment of interest or any other charge;
(d) credit agreements under which no interest is charged provided the consumer agrees to repay the credit in a single payment;
(e) credit in the form of advances on a current account granted by a credit institution or financial institution other than on credit card accounts.
Nevertheless, the provisions of Article 6 shall apply to such credits;
(f) credit agreements involving amounts less than 200 ECU or more than 20 000

ECU;
(g) credit agreements under which the consumer is required to repay the credit:
- either, within a period not exceeding three months,
- or, by a maximum number of four payments within a period not exceeding 12 months.
2. A Member State may, in consultation with the Commission, exempt from the application of this Directive certain types of credit which fulfil the following conditions:
- they are granted at rates of charge below those prevailing in the market, and
- they are not offered to the public generally.
3. The provisions of Article 4 and of Articles 6 to 12 shall not apply to credit agreements or agreements promising to grant credit, secured by mortgage on immovable property, in so far as these are not already excluded from the Directive under paragraph 1 (a) of this Article.
4. Member States may exempt from the provisions of Articles 6 to 12 credit agreements in the form of an authentic act signed before a notary or judge.
Article 3
Without prejudice to Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (1), and to the rules and principles applicable to unfair advertising, any advertisement, or any offer which is displayed at business premises, in which a person offers credit or offers to arrange a credit agreement and in which a rate of interest or any figures relating to the cost of the credit are indicated, shall also include a statement of the annual percentage rate of charge, by means of a representative example if no other means is practicable.
Article 4
1. Credit agreements shall be made in writing. The consumer shall receive a copy of the written agreement.
2. The written agreement shall include:
(a) a statement of the annual percentage rate of charge;
(b) a statement of the conditions under which the annual percentage rate of charge may be amended.
In cases where it is not possible to state the annual percentage rate of charge, the consumer shall be provided with adequate information in the written agreement. This information shall at least include the information provided for in the second indent of Article 6 (1).
3. The written agreement shall further include the other essential terms of the contract.
By way of illustration, the Annex to this Directive contains a list of terms which Member States may require to be included in the written agreement as being essential.
Article 5
By way of derogation from Articles 3 and 4 (2), and pending a decision on the introduction of a Community method or methods of calculating the annual percentage rate of charge, those Member States which, at the time of notification of this Directive, do not require the annual percentage rate of charge to be shown or which do not have an established method for its calculation, shall at least require the total cost of the credit to the consumer to be indicated.
Article 6
1. Notwithstanding the exclusion provided for in Article 2 (1) (e), where there is an agreement between a credit institution or financial institution and a consumer for the granting of credit in the form of an advance on a current account, other than on credit card accounts, the consumer shall be informed at the time or before the agreement is concluded:
- of the credit limit, if any,
- of the annual rate of interest and the charges applicable from the time the

agreement is concluded and the conditions under which these may be amended,
- of the procedure for terminating the agreement.
This information shall be confirmed in writing.
2. Furthermore, during the period of the agreement, the consumer shall be informed of any change in the annual rate of interest or in the relevant charges at the time it occurs. Such information may be given in a statement of account or in any other manner acceptable to Member States.
3. In Member States where tacitly accepted overdrafts are permissible, the Member States concerned shall ensure that the consumer is informed of the annual rate of interest and the charges applicable, and of any amendment thereof, where the overdraft extends beyond a period of three months.

Article 7

In the case of credit granted for the acquisition of goods, Member States shall lay down the conditions under which goods may be repossessed, in particular if the consumer has not given his consent. They shall further ensure that where the creditor recovers possession of the goods the account between the parties shall be made up so as to ensure that the repossession does not entail any unjustified enrichment.

Article 8

The consumer shall be entitled to discharge his obligations under a credit agreement before the time fixed by the agreement. In this event, in accordance with the rules laid down by the Member States, the consumer shall be entitled to an equitable reduction in the total cost of the credit.

Article 9

Where the creditor's rights under a credit agreement are assigned to a third person, the consumer shall be entitled to plead against that third person any defence which was available to him against the original creditor, including set-off where the latter is permitted in the Member State concerned.

Article 10

The Member States which, in connection with credit agreements, permit the consumer:
(a) to make payment by means of bills of exchange including promissory notes;
(b) to give security by means of bills of exchange including promissory notes and cheques,
shall ensure that the consumer is suitably protected when using these instruments in those ways.

Article 11

1. Member States shall ensure that the existence of a credit agreement shall not in any way affect the rights of the consumer against the supplier of goods or services purchased by means of such an agreement in cases where the goods or services are not supplied or are otherwise not in conformity with the contract for their supply.
2. Where:
(a) in order to buy goods or obtain services the consumer enters into a credit agreement with a person other than the supplier of them;
and
(b) the grantor of the credit and the supplier of the goods or services have a pre-existing agreement whereunder credit is made available exclusively by that grantor of credit to customers of that supplier for the acquisition of goods or services from that supplier; and
(c) the consumer referred to in subparagraph (a) obtains his credit pursuant to that pre-existing agreement; and
(d) the goods or services covered by the credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for supply of them; and
(e) the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled,

the consumer shall have the right to pursue remedies against the grantor of credit. Member States shall determine to what extent and under what conditions these remedies shall be exercisable.

3. Paragraph 2 shall not apply where the individual transaction in question is for an amount less than the equivalent of 200 ECU.

Article 12

1. Member States shall:

(a) ensure that persons offering credit or offering to arrange credit agreements shall obtain official authorization to do so, either specifically or as suppliers of goods and services; or

(b) ensure that persons granting credit or arranging for credit to be granted shall be subject to inspection or monitoring of their activities by an institution or official body; or

(c) promote the establishment of appropriate bodies to receive complaints concerning credit agreements or credit conditions and to provide relevant information or advice to consumers regarding them.

2. Member States may provide that the authorization referred to in paragraph 1 (a) shall not be required where persons offering to conclude or arrange credit agreements satisfy the definition in Article 1 of the first Council Directive of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (1) and are authorized in accordance with the provisions of that Directive.

Where persons granting credit or arranging for credit to be granted have been authorized both specifically, under the provisions of paragraph 1 (a) and also under the provisions of the aforementioned Directive, but the latter authorization is subsequently withdrawn, the competent authority responsible for issuing the specific authorization to grant credit under paragraph 1 (a) shall be informed and shall decide whether the persons concerned may continue to grant credit, or arrange for credit to be granted, or whether the specific authorization granted under paragraph 1 (a) should be withdrawn.

Article 13

1. For the purposes of this Directive, the ECU shall be that defined by Regulation (EEC) No 3180/78, as amended by Regulation (EEC) No 2626/84. The equivalent in national currency shall initially be calculated at the rate obtaining on the date of adoption of this Directive.

Member States may round off the amounts in national currency resulting from the conversion of the amounts in ECU provided such rounding off does not exceed 10 ECU.

2. Every five years, and for the first time in 1995, the Council, acting on a proposal from the Commission, shall examine and, if need be, revise the amounts in this Directive, in the light of economic and monetary trends in the Community.

Article 14

1. Member States shall ensure that credit agreements shall not derogate, to the detriment of the consumer, from the provisions of national law implementing or corresponding to this Directive.

2. Member States shall further ensure that the provisions which they adopt in implementation of this directive are not circumvented as a result of the way in which agreements are formulated, in particular by the device of distributing the amount of credit over several agreements.

Article 15

This Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty.

Article 16

1. Member States shall bring into force the measures necessary to comply with this Directive not later than 1 January 1990 and shall forthwith inform the

Commission thereof.
2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.
Article 17
Not later than 1 January 1995 the Commission shall present a report to the Council concerning the operation of this Directive.
Article 18
This Directive is addressed to the Member States.
Done at Brussels, 22 December 1986.
For the Council
The President
G. SHAW
(1) OJ No C 80, 27. 3. 1979, p. 4 and
OJ No C 183, 10. 7. 1984, p. 4.
(2) OJ No C 242, 12. 9. 1983, p. 10.
(3) OJ No C 113, 7. 5. 1980, p. 22.
(4) OJ No C 92, 25. 4. 1975, p. 1 and
OJ No C 133, 3. 6. 1981, p. 1.
(1) OJ No L 379, 30. 12. 1978, p. 1.
(2) OJ No L 247, 16. 9. 1984, p. 1.
(1) OJ No L 250, 19. 9. 1984, p. 17.
(1) OJ No L 322, 17. 12. 1977, p. 30.
ANNEX
LIST OF TERMS REFERRED TO IN ARTICLE 4 (3)
1. Credit agreements for financing the supply of particular goods or services:
1.2 // (i) // a description of the goods or services covered by the agreement; // (ii) // the cash price and the price payable under the credit agreement; // (iii) // the amount of the deposit, if any, the number and amount of instalments and the dates on which they fall due, or the method of ascertaining any of the same if unknown at the time the agreement is concluded; // (iv) // an indication that the consumer will be entitled, as provided in Article 8, to a reduction if he repays early; // (v) // who owns the goods (if ownership does not pass immediately to the consumer) and the terms on which the consumer becomes the owner of them; // (vi) // a description of the security required, if any; // (vii) // the cooling-off period, if any; // (viii) // an indication of the insurance (s) required, if any, and, when the choice of insurer is not left to the consumer, an indication of the cost thereof.
2. Credit agreements operated by credit cards:
1.2 // (i) // the amount of the credit limit, if any; // (ii) // the terms of repayment or the means of determining them; // (iii) // the cooling-off period, if any.
3. Credit agreements operated by running account which are not otherwise covered by the Directive:
1.2 // (i) // the amount of the credit limit, if any, or the method of determining it; // (ii) // the terms of use and repayment; // (iii) // the cooling-off period, if any.
4. Other credit agreements covered by the Directive:
1.2 // (i) // the amount of the credit limit, if any; // (ii) // an indication of the security required, if any; // (iii) // the terms of repayment; // (iv) // the cooling-off period, if any; // (v) // an indication that the consumer will be entitled, as provided in Article 8, to a reduction if he repays early.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.9.2002
COM(2002) 443 final

2002/0222 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. GENERAL POINTS

1.1. Background

Directive 87/102/EEC concerning consumer credit[1], amended in 1990 and 1998[2], established the Community framework for consumer credit with a view to promoting the setting-up of a common market for credit and establishing minimum Community rules to protect consumers.

In 1995 the Commission presented a report on the operation of the 1987 directive[3], following which the Commission undertook a very broad consultation of the parties involved. In 1996 the Commission presented a report on the operation of Directive 90/88/EEC amending Directive 87/102/EEC, concerning the annual percentage rate of charge (APR)[4]. In 1997 the Commission presented a summary report of reactions and comments[5].

The reports and the consultations show that there are enormous differences between the laws of the various Member States in relation to credit for natural persons in general and consumer credit in particular. Directive 87/102/EEC no longer reflects the current situation on the consumer credit market and is therefore in need of revision[6].

To this end the Commission ordered a series of studies on various specific issues[7] and carried out a detailed and comparative study of all the Member States' national transposal legislation.

A number of Member States have meanwhile made it known that they were also planning to revise their national legislation. This proposal for a directive is an opportunity for the

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1 Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.

2 Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 061, 10/03/1990 p. 14-18, itself amended by Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 101, 01/04/1998 p. 17-23.

3 European Commission, report on the operation of Directive 87/102/EEC, COM(95)117 final.

4 European Commission, report on the operation of Directive 90/88/EEC, COM(96) 79 final of 12.04.96.

5 COM(97) 465 final of 24.09.97.

6 Communication from the Commission – Financial services: enhancing consumer confidence – follow-up to the Green Paper on "Financial services: meeting consumers' expectations", COM(97)309 final.

7 LEA, M.J., WELTER, R., DÜBEL, A., « Study on the mortgage credit in the European Economic Area. Structure of the sector and application of the rules in the directives 87/102 and 90/88. Final report on tender n° XXIV/96/U6/21 SECKELMANN, R., « Methods of calculation, in the European Economic Area, of the annual percentage rate of charge, Final Report 31 October 1995, Contract n° AO 2600/94/00101, REIFNER, U., 'Harmonisation of cost elements of the annual percentage rate of charge, APR', Hamburg 1998, Project n° AO-2600/97/000169. DOMONT-NAERT, F., et LACOSTE, A.-C., « Etude sur le problème de l'usure dans certains états membres de l'espace économique européen, Louvain-la-Neuve 1997, Contrat n° AO-2600/96/000260 ; DOMONT-NAERT, F., et DEJEMEPPE, P, 'Etude sur le rôle et les activités des intermédiaires de crédit aux consommateurs', contrat n° AO-2600/95/000254, 1996, BALATE, E., et DEJEMEPPE, P., "Conséquences de l'inexécution des contrats de crédit à la consommation." Etude AO-2600/95/000270 Commission européenne, rapport final.

Commission to anticipate these reforms and to incorporate them in a harmonised Community system.

The Commission departments concerned presented a discussion paper on 8 June 2001 setting out six guidelines for a revision of Directive 87/102/EEC and in early July 2001 they held consultations with parties representing the Member States as well as the sector and consumers. The texts proposed in this proposal for a directive take account of these consultations.

1.2. Overall assessment

Generally speaking, the first point to be made is that the concept of "consumer credit" has undergone substantial change since the time that this legislation was initially conceived. In the 1960s and '70s we lived in a "cash society" with credit playing a very small part and involving essentially two products, namely the "hire-purchase" agreement or "instalment plan" to fund the purchase of moveable property and the traditional form of credit, the personal loan. Today credit is made available to consumers via a wide range of financial instruments and it has become the lubricant of economic life. Between 50 and 65 %[8] of consumers currently use consumer credit for to fund the purchase of a vehicle, for example, or other goods or services and 30% of consumers enjoy an overdraft facility on their current account. This latter credit instrument was not even in use in the 1970s to meet consumers' needs.

In macroeconomic terms the amount of credit circulating in the 15 Member States of the European Union exceeds EUR 500 000 million, corresponding to more than 7% of GDP. The annual growth rate is overall around 7%[9].

Although credit remains a driving force for economic growth and the well-being of consumers it nevertheless represents a risk for credit providers and, for a growing number of consumers, also the threat of being surcharged and suffering insolvency.

It is hardly surprising, therefore, that the Member States have found the level of protection available under the existing directives to be inadequate and have made provision in their legislation to include other types of credit and/new credit agreements which were not covered by the directives. There have also been signs that national legislation is to be amended along the same lines.

The result has been a distortion of competition between creditors in the internal market and restricted scope for consumers to obtain credit in other Member States.

Such distortions and restrictions in turn affect the volume and type of credit sought as well as the purchase of goods and services. Differences in legislation and banking/financial practices also mean that the consumer is unable to enjoy the same degree of protection in all the Member States as regards consumer credit.

Consequently, the legal framework currently in place needs to be revised so that consumers and businesses can benefit fully from the single market.

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8 cf. Eurobarometer 54, February 2001 "Les Européens et les services financiers" and EB 56, December 2001: "Europeans and the financial services".

9 See monthly BEU bulletins.

This would also be a response to concerns expressed repeatedly by consumers. The data gathered for the Eurobarometer since 1997 reveal a considerable degree of dissatisfaction with the quality of national consumer protection legislation in connection with financial services:

– more than 40% consider that the legislation does not ensure enough transparency with regard to financial services, credit included;

– 40% consider that the legislation does not provide adequate scope for seeking remedy against banks;

– more than 35% consider that the legislation does not protect their rights.

Moreover, no less than 70% of consumers are calling for greater, European-level harmonisation of the regulations that protect consumers.

2. SUBSIDIARITY AND PROPORTIONALITY ASSESSMENT

2.1. The aims of the directive as regards Community obligations

Various factors can explain the sluggish development of the European cross-border credit market and these include, as the main contributing factors:

– technical problems in connection with accessing another market,

– a lack of adequate harmonisation as regards national legislation,

– the changes to the methods and styles of credit that have occurred since the 1980s.

A revision of the directive calls for:

– changes to the legal framework to reflect new methods of credit,

– a realignment of the rights and obligations both of consumers and credit providers to redress the balance,

– a high degree of consumer protection.

The aim is to pave the way for a more transparent market, a more effective market and to offer such a degree of protection for consumers that the free movement of offers of credit can occur under the best possible conditions both for those who offer credit and those who require it.

To achieve these objectives the directive would need to be revised in a way that takes account of the following six guidelines:

(1) a redefinition of the scope of the directive in order to ensure that it reflects the new situation on the market and is better able to draw the line between consumer credit and housing credit;

(2) the inclusion of new arrangements that take account not only of creditors but also of credit intermediaries;

(3) the introduction of a structured information framework for the credit provider in order to allow him to assess more fully the risks involved;

(4) a specification requiring more comprehensive information for the consumer and any guarantors;

(5) a fairer sharing of responsibilities between the consumer and the professional;

(6) the improvement of the arrangements and practices that determine how professionals deal with payment defaults, both for the consumer and for the credit provider.

2.2. The measure falls within the Community's competence

The aim of the measure is to establish and ensure the operation of the internal market. The measure will be conducive to achieving the objective of protecting consumers by harmonising practice within the Single Market. It is for this reason that Article 95 has been selected as the measure's legal basis. As a result, the Commission's proposal is presented to the Council and to the European Parliament for adoption under the Codecision Procedure provided by Article 251 of the Treaty. Article 95 also requires the consultation of the Economic and Social Committee.

By resorting to the minimum clause provided by Article 15 of Directive 87/102/EEC and in order to protect their consumers, Member States have adopted in respect of most aspects of consumer credit provisions that are more detailed, more precise and more stringent than those contained in the directive . These differences will probably make it more difficult to conclude cross-border agreements, to the detriment of consumers and creditors alike.

The scope of the various national laws transposing Directive 87/102/EEC generally exceeds that of the directive and it also differs from one Member State to another. Legislation governing consumer credit in a number of Member States regulates leasing to private individuals with a purchase option, in other words even the lease itself for movable property held by consumers, whereas other Member States have included no such agreements in the scope of their legislation.

This means that the various styles of credit agreement calculate rates and costs in a way which differs from one style of credit to another and from one Member State to another. Directive 87/102/EEC, as amended by Directives 90/88/EEC and 98/7/EC, therefore introduced the calculation of an annual percentage rate of charge that covered all interest and costs to be borne by the consumer, allowing him more easily to compare them. However, there were two recurrent problems affecting the introduction of the APR: first, the calculation conventions for expressing both the time periods and the rounding of amounts and second, the fixing of cost – "the cost base" – to be taken into account. To make sure that the APR is completely reliable and serviceable throughout the Community the Member States must calculate it in a uniform way and include in the same way all the cost elements linked to the credit agreement. However, despite the changes introduced by Directive 98/7/EC this is not always the case.

There are signs, for example, of difficulties with substantiating the "obligatory" nature of insurance and sureties covering the repayment of the credit. The fact that they are obligatory means that they have to be included as costs in the cost base and

this prompted a number of Member States to regulate this area beyond the requirements of the directive by use of the minimum clause. The exclusion of certain types of costs from the directive serves no (or no longer any) purpose and several Member States have therefore included these costs in their national cost bases. There are also a number of cases where the directive is not sufficiently clear, for example with regard to the effect of the commissions payable to intermediaries or taxes due when the credit agreement is concluded or performed. All of the foregoing means that there can be differences of ten, twenty or more percent depending on how strictly a Member State defines the composition of its cost base.

This proposal for a directive contains a reassessment both of the calculation conventions and of the inclusion or exclusion of certain costs on the basis of their economic justification so that a minimum of credit costs will be excluded and a maximum of clarity achieved. This should, as a rule, bring about the maximum possible harmonisation of the national cost bases and a greater degree of uniformity as regards calculation.

These measures for comparing costs are only feasible if implemented on a European scale. They will only have sufficient impact if the directive is applicable to all credit agreements offered to consumers.

Further examples can be provided: for example, the Member States' legislations use different procedures and apply different time limits for "withdrawal", "cooling-off" and "cancellation" in connection with a credit agreement. These differences in terms of periods of time and procedure create obstacles for creditors who would like to offer credit in other Member States but face a waiting period of three days in Luxembourg, a period of seven days in Belgium and in the case of France they are not permitted to take any action on the credit agreement for the duration of the cooling-off period, while in other cases the credit agreement must include references to any time periods or procedures involved. The various legislations do not lay down the conditions governing the drawing up, conclusion and cancellation of credit agreements in a uniform way and distortion of competition is the result.

Some Member States absolutely forbid the door-to-door selling of credit agreements to consumers while others require a cooling-off period or even take particular steps when aggressive marketing is detected. Something that is perfectly legal in one Member State may lead to conviction in another. A creditor working in a very strictly regulated Member State could access the market more easily in another Member State that is less strictly regulated and would consequently have an advantage over his competitors.

In the event of the non-performance of a credit agreement or surety agreement a creditor will be faced with different procedures and time limits for injunctions depending on whether the consumer is a resident of one Member State or of another. The legislations of the Member States differ considerably with regard to waiting periods before any action can be taken in respect of consumers, guarantors or the repossession of goods. Longer periods and special procedures entail extra costs for creditors, who must run the risk of the agreement remaining unperformed and they may be at a disadvantage compared with a competing creditor who has no extra costs or operates in a less strictly regulated environment while all the time having granted credit to the same consumer.

Measures offering a high degree of consumer protection have been drawn up in accordance with Article 153 (1) (3) (a) of the Treaty in conjunction with Article 95, as mentioned earlier. The aim of these protective measures is to strengthen the provisions put in place to establish the single market and they should enable the Member States to accept maximum harmonisation with no need for a general resort to further protective measures.

It is with this aim in view that this directive encourages recourse to out-of-court arrangements before initiating recovery procedures, the consistency of such recovery procedures with the content of the agreement, the striking of a balance between the interests both of the creditor and the consumer when payments are late, the defence of the interests of both parties when agreeing the repossession of goods financed with the credit and the possibility for the consumer to change to a different creditor, if necessary, without having to pay an unjustifiable indemnity.

2.3. The instrument most suited to the aims pursued

The measure proposed is aimed at satisfying the needs of the single market by establishing common and harmonised rules applicable to all actors – creditors, credit intermediaries etc., – thus allowing creditors to make their services more easily available and consumers to enjoy the high degree of protection.

The idea of introducing uniform legislation in the shape of a regulation that would be directly applicable under the national legislation of the Member States without transposal was studied but rejected. A directive will enable the Member States to amend the legislation in force subsequent to the transposal of Directive 87/102/EEC to the extent that is needed to ensure compliance. In drawing up its proposal for a directive the Commission has endeavoured to strike a balance reflecting the maximum possible extension of the scope of the directive to include all styles of credit and surety agreements and the desire to contain the impact of such a reform on the Member States' legislative systems. In view of the new approach to harmonisation and the many substantial changes that have been made, this new proposal will replace Directive 87/102/EEC as amended by Directives 90/88/EEC and 98/7/EEC.

2.4. Advantages of the directive being proposed

Harmonising the rules applicable to consumer credit will improve the operation and stability of European credit markets.

The proposed directive will improve the operation of the market because the scope for cross-border activities within the Single Market will be extended and competition on the market will increase. Although the rules are the same both with regard to creditors, credit intermediaries, consumers and guarantors the latter should feel more confident about credit that in some cases is unfamiliar and provided at rates or in forms that are very interesting and offered by creditors or intermediaries based in other Member States.

The directive will improve stability by putting in place a raft of provisions on responsible lending, on providing information and protection both when the credit agreement is concluded and during its performance (or in the event of its possible non-performance) that will reduce the probability of a creditor or credit intermediary

being able to mislead consumers in another Member State or jeopardise their financial situation or even of acting irresponsibly. The directive being proposed, and in particular its provisions relating to the prevention of overindebtedness, together with the rules on consulting central databases, will further improve the quality of loans and lessen the risk of consumers falling victim to disproportionate commitments that they are unable to meet, resulting in their economic exclusion and costly action on the part of Member States' social services.

3. EXAMINATION OF THE ARTICLES

Article 1 (aim)

The aim of this directive is to secure maximum harmonisation with regard to the credit on offer to consumers by guaranteeing them a high level of protection. All types and forms of credit that are available to private individuals will, in principle, be harmonised. It is for this reason that the title of the directive is worded 'credit for consumers' rather than 'consumer credit'. The few exceptions to the scope of the directive, which is very broad compared with that of Directive 87/102/EEC, are listed in Article 3.

The directive also covers surety agreements. The harmonisation being sought for these agreements will centre mainly on the information to be provided to consumers concluding such agreements, even if they guarantee credit that is granted for employment-related purposes.

Article 2 (definitions)

This article defines a number of the terms used in the directive. In principle, the terminology is identical to that of Directive 87/102/EEC. A number of changes have been introduced to cover the broader scope of the directive or to clarify some concepts. A number of new definitions have been included to cover recent additions to the text.

The definitions of "creditor", "consumer" and "credit agreement" have undergone no change compared with the text of the original directive, with the exception of an improvement to the manner in which the concept of "agreement promising to grant credit" is included. All credit transactions are covered, including promises to conclude agreements.

Credit agreements for the supply of services are also covered.

The second sentence of the definition is not intended to create an exemption. The sentence clarifies cases, such as the supply of gas water or electricity where the – continuous – supply of the services is in step with a corresponding payment but where no "credit" is granted.

The concept of "credit intermediary" is a general concept which could cover several types of activity and several categories of intermediary:

– an agent who is delegated and authorised to sign – exclusively – on behalf of the creditor;

– a credit broker, in other words a self-employed person working under his own name who submits credit applications to a number of different creditors;

– a "supplier of goods or provider of services", in other words a person, (such as a salesman) who can be either a delegated agent or a credit broker, even a creditor who immediately

transfers his rights to another creditor/principal funds provider who will (co)decide on the granting of credit and whose role as broker is no more than an activity supporting his principal one, namely the sale of products or services.

The definition proposed covers any person who assists in the conclusion of a credit agreement, in other words not only the credit broker but also the delegated agents or bank agents as well as the suppliers of goods and the providers of services, main or subsidiary business undertakings, including marketing assistants.

The directive thus covers any person who provides a creditor with information to identify a consumer and directs the latter, for a fee, to a creditor for the conclusion of a credit agreement. This fee may take the form of cash or some other agreed form of consideration, such as computer support, access to the creditor's business network or overdraft facilities, for example. In principle, lawyers and notaries are not covered even if a consumer approaches them for advice about the scope of a credit agreement or if they provide assistance in the drafting of an agreement or authenticate it, as long as their role is limited to providing legal advice and they do not direct their clients to particular creditors.

The "surety" agreement covers all sureties, both personal and in material form: bonds, joint and several liability, mortgages and sureties etc. The agreement must be signed by a consumer, known as the "guarantor" in order to distinguish him from the consumer who has concluded the credit agreement. The surety agreement may relate to any credit transaction undertaken for private or employment-related reasons provided that the guarantor is not acting in a professional capacity.

The "total cost of credit to the consumer" must include all costs linked to the credit, including interest and other indemnities, commissions, taxes and charges of any kind that the consumer is required to pay for the credit, whether or not these costs are payable to the creditor, to the credit intermediary, to the authority responsible for levying taxes on a particular style of credit or to any other third party authorised to demand payment for services as an intermediary or in connection with the conclusion of a credit agreement or surety agreement. Although Directive 87/102/EEC already includes this interpretation, the definition has been amended slightly to clarify the inclusion of some costs but without producing a positive and exhaustive list of all cost elements.

The concepts of "sums levied by the creditor" and "total lending rate" are new compared with Directive 87/102/EEC and will make it possible clearly to identify the costs that are specific to the credit service offered and are payable to the creditor as distinct from all other associated charges payable to third parties, such as notary's fees, surety charges, commissions due to credit intermediaries, optional insurance charges and the like.

The borrowing rate is the interest rate used to calculate a regular payment reflecting the amount of credit drawn down and the duration of the drawdown and it excludes all other costs. An indication of this rate will enable consumers to check the interest that they are required to pay for a given period. Article 6 of Directive 87/102/EEC used the term "annual rate of interest" but gave no other details. Some Member States opted for an annual percentage rate in conjunction with the equivalent method for conversion, where the credit was long-term credit, possibly involving a mortgage. There was a need for them to avoid the periodic rate being calculated in an infinite number of ways using different *pro rata temporis* rules that are only very vaguely linked to the linear nature of time. Other Member States permit a nominal periodic rate using a proportional conversion method. This directive seeks to make a distinction between any further regulation of the interest rates and the annual rates and

indicate only the rate that is used. However, the term "borrowing rate" has been kept in order to distinguish it from a lending rate or the rate of interest earned by savings.

The borrowing rate is thus a rate that on the basis of a particular method devised by the creditor allows the interest due on capital drawn down to be calculated periodically. This rate is different from the rate known as the “charge” rate, that some Member States use, which is a rate calculated on the net price of goods or services to be financed but one that does not provide added value for the consumer. The annual percentage rate of charge will make it possible to pinpoint the true "weight" of the method used to calculate this borrowing rate.

The term "residual value" is frequently used in connection with leasing. The payment of the residual value when the option to purchase is taken up or when the credit agreement expires must enable the consumer to become the owner of the goods financed.

The expression "credit drawdown" refers to the amount that a consumer may draw down or has drawn down as a single transaction at any given time. It represents the overall amount of credit that may be drawn down and in principle it marks the upper limit, in other words "the total amount of credit".

The definition of the "durable medium" is the same as that used in the Directive of the European Parliament and of the Council of {...} on the protection of consumers in respect of distance contracts and amending Directives 97/7/EC and 98/27/EC.

The term “third party providing constitution of capital” identifies the person other than the creditor or the consumer who undertakes in respect of the consumer, and where necessary the creditor, to constitute the capital due under the terms of a credit agreement so that the consumer is able to reimburse the creditor in accordance with the conditions of the credit agreement. This person will normally be an insurer or an investment fund.

Article 3 (scope)

This article defines the types of agreements to which the directive applies. Directive 87/102/EEC applied only to credit agreements[10]. It thus covered an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, a loan or other similar financial accommodation. This proposal for a directive is intended to extend the scope to include any guarantor, and thus any consumer, who stands surety, whether in person or in material terms and regardless of whether it covers credit granted to a consumer or to a trader. These persons must be provided with a minimum amount of information and protection similar to that enjoyed by the consumer/borrower[11].

The exemptions permitted by Article 2 of Directive 87/102/EEC concerning minimum and maximum amounts, free credit or credit at a reduced rate of interest, hiring agreements with an option to purchase goods or services, credit agreements in the form of an authentic act, credit in the form of advances on a current account, authorised, non-authorised or tacit overdraft as well as any other form of short-term credit involving charges or interest to the consumer need to be removed.[12]

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10 Court of Justice. Judgment of 23 March 2000, Case C-208/98, Berliner Kindl Brauerei AG.

11 Similar or comparable legislation in the M S – non-exhaustive list for F, UK, L, B, IRL, and S.

12 The Member States have comprehensively stretched the limit of scope of Directive 87/102/EEC. Similar or comparable legislation in the Member States – a non-exhaustive list grouped by exemption:

There is, however, a case for exempting credit agreements, the purpose of which is to grant credit for the purchase or transformation of a private immovable property as covered by a Commission recommendation. However, the directive will apply to such credit agreements if their purpose is to finance, possibly by means of a new drawdown of credit, transactions other than the purchase or transformation of private immovable property.

There should also be exemptions in respect of agreements with provision for deferred payment or similar financial accommodation, possibly involving the use of a payment or debit card, where such transactions are free of charge and completed within three months.

This directive is not intended to cover situations where an employer occasionally, and not as part of his or her main business or professional activities, grants credit or an advance on his or her salary to a member of his or her staff. However, there is no case for allowing Member States to exempt from the scope of this directive certain forms of credit that are made available to particular groups of people or at a reduced rate of interest under special circumstances, where such credit is offered systematically as part of business or professional activities either to members of a cooperative created specifically for the purpose or whenever an employer sets up a "credit" facility within his or her undertaking. In such cases the credit must be granted with the same degree of caution as that required under this directive and be accompanied by the same amount of information, advice and measures aimed at protecting consumers.

Lastly, there is a case for exempting credit agreements concluded between investment firms such as those referred to in Article 1 (2) of Directive 93/22/EEC and investors[13]. Such agreements cover credit of a very specific type to which similar provisions apply, in particular as regards information and advice.

Article 4 (advertising)

Article 3 of Directive 87/102/EEC states that: "*any advertisement, or any offer which is displayed at business premises, in which a person offers credit or offers to arrange a credit agreement and in which a rate of interest or any figures relating to the cost of the credit are indicated, shall also include a statement of the annual percentage rate of charge, by means of a representative example if no other means is practicable*". The purpose here was to avoid unfair or misleading advertising based on the display of a rate of interest or of a cost without the consumer being advised of the real cost of, or rate for, the credit agreement.

Art.2 (1) (a) IRL, F (in part), NL, A. (moreover, several MS, including Belgium, have clear cut protective legislation);
Art.2 (1) (b) IRL, F, L, UK, B, NL ;
Art.2 (1) (c) DK, NL, F, IRL, B ;
Art.2 (1) (d) DK, NL, F, IRL, B ; Art.2 (1) (e) D, F, P, B, DK, A, UK ;
Art.2 (1) (f) D, A, DK, IRL no upper limit; B and S very fragmentary upper limit, F and NL fragmentary upper limit, L and UK higher upper limit IRL, F, NL no lower limit, S and B fragmentary lower limit, L lower minimum.
Art.2 (1) (g) B, F, IRL, L, NL
Art.2 (2) Exception cited only by IRL, UK (Credit Unions), NL, B (social loans), and D (credit from employers). New text covers NL, B and D
Art. 2 (3) A, IRL, in part NL and L
Art. 2 (4) Exclusion linked to and to be compared with 2,1, a)

[13] OJ L 141, 11.06.1993, p. 27

The wording of Articles 1 (a) (3) and (3) shows that from the outset the Member States were in doubt as to the scope and methods for calculating the annual percentage rate of charge (APR). A number of derogations were therefore accepted that would allow the reference to the APR to be replaced by an approximate method using a representative example wherever it was impossible to state the APR in clear and simple terms without, however, explaining either the exact circumstances under which the representative example was to be used or how it was made up. It was, in fact, always possible to calculate an APR but this involved using the assumptions listed in Article 1 (2) (7) of Directive 87/102/EEC as replaced by Article 12 of this proposal for a directive.

The advantage of a reference to the APR compared with a separate reference to the various cost elements – annual or periodical – is that the APR takes account of the "periods" at which the creditor requires payment. The APR is thus the prime indicator par excellence of the weight of the cost to be met during a given period in connection with the repayment of any kind of credit agreement. However, it was not always clear beforehand in connection with advertising what the frequency of drawdown and/or repayment would be and this explains the need for the use of assumptions. It is possible, however, that in certain circumstances, such as the case of advances on current accounts, that three or four assumptions might be applicable at the same time: immediate drawdown, repayment after one year, fixed rate for a given period. Imposing a requirement that similar information in a representative example should be made available via audiovisual advertising could be seen as disproportionate and the prohibiting of any reference to cost or rate in the cases covered by Article 3 appears equally inconceivable.

The most flexible solution proposed in Article 4 of this proposal for a directive is to include a reference to the provisions of Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising. An assessment of the misleading content will depend on the type of credit agreement and on the factual information accompanying the advertising.

Article 5 (ban on negotiation of credit and surety agreements outside business premises)

A number of Member States[14] found the active door-to-door selling of credit agreements unthinkable in a normal commercial relationship between a creditor or credit intermediary and a consumer, in particular given the impact of door-to-door selling on consumers' commitments. Door-to-door selling of credit agreements may have particularly serious consequences for consumers who, in the situation referred to in Directive 85/577/EEC[15] and in spite of the protection afforded by the said directive, are unable to assess the full financial impact of any credit agreement that is concluded. The impact will not be felt until the first repayment is made. In view of the specific nature of the credit and the attendant financial consequences it has been deemed necessary to adopt a stricter approach than that required by Directive 85/577/EEC and to ban any unsolicited door-to-door selling of credit of the type to which this directive refers. It is therefore proposed that there should be a ban on credit agreements and surety agreements concluded under circumstances that are similar to those for agreements described in Article 1 of the said directive with provision for the fact that the term "trader" can relate both to a creditor and to a credit intermediary.

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14 Similar or comparable legislation in the MS – non-exhaustive list: UK, B and L; partial legislation in respect of certain effects or door-to-door selling situations: IRL and NL.

15 See Court of Justice. Judgment of 13 December 2001, Case C-481/99.

Article 6 (exchange of information in advance and duty to provide advice

This article regulates the information to be provided for consumers in advance and the duty on the part of the creditor or credit intermediary to provide advice[16].

The creditor and, where appropriate, the credit intermediary may only ask information of the consumer or garantor that under the terms of Article 6 of the directive is appropriate, relevant and does not exceed that which is required for the purpose for which the information is collected and processed. The consumer and the garantor are required to answer sincerely the precise questions put by the creditor and, where appropriate, the credit intermediary.

Before the credit agreement is concluded the consumer must be provided with enough information about the cost of the credit and his obligations. The rules proposed mainly reflect that which was stipulated concerning information in advance in the Commission's recommendation of 1 March 2001 on pre-contractual information to be given to consumers by creditors offering home loans[17]. The information must therefore cover all aspects of the credit agreement (whether it is a fixed-rate or variable-rate credit agreement, what conditions govern variations in the rate, drawdown, repayment etc.) and some of this information must constitute the compulsory information to be included in the credit agreement. As regards distance contracts the preliminary information must be provided in a way that is consistent with the requirements of Article 5 of Directive …/…/EC of the European Parliament and of the Council on the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC.

The tailored information must include a reference to the annual percentage rate of charge. The APR mentioned in the said information must be the same as the final APR shown in the credit agreement unless it is based on contractual elements that are unknown when the information is provided. The consumer should at least know that assumptions have been used and what they are so that he can be notified and is able to check the components of the APR and, by extension, of the credit being offered: amounts to be drawn down, amounts to be repaid and the periods. The same argument must apply to the total lending rate. Any reference to a rate or a cost that does not feature in any such assumption is considered to be misleading. It is with this aim in view that for distance credit agreements the preliminary information is given over the voice telephone as referred to in Article 3 (3) of Directive …/…/EC must include the APR and the total lending rate as well as their respective components.

The use of assumptions is limited. Article 1 (a) (7) of Directive 87/102/EEC already imposed strict conditions which have been incorporated into this proposal for a directive. Replacing the timetable by the assumed full repayment after one year, for example, is only possible if the said timetable is not shown in the text of the agreement or is not evident from the means by which the credit granted is to be paid.

As regards the creditor and, where appropriate, the credit intermediary, there is a need to ensure that they have a general duty to provide advice so that the consumer can choose the best type of credit from the range normally offered by the latter. This advice must take account of the consumer's ability to repay, the risk entailed, the existence or not of a fixed

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16 Similar or comparable legislation in the MS – non-exhaustive list: paragraph 1 and paragraph 2: most of the MS, for example, F and B: offer in advance, NL: prospectus; IRL and L: information relating to advertising, the activities pursued by the credit provider, UK: the duty to provide information and to specify this information for each credit agreement etc. paragraph 3: B

17 JO L 69, 10/03/2001 p. 0025 - 0029

timetable, the scope for drawing down the credit and the purpose for which the credit sought is to be used.

Article 28 of the directive regulates the status of credit intermediaries who, without being registered, work for a licensed creditor or a credit intermediary who assumes responsibility for them. Here, the credit intermediary must provide the information and advice but responsibility is assumed by the licensed creditor or credit intermediary. Article 6 (4) regulates the case where a credit intermediary is a supplier of goods or a provider of services that are only subsidiary in terms of their impact on the procedure for offering and concluding the credit agreement. The duty to provide information and advice is thus fully that of the creditor or the credit intermediary for whom this supplier acts when concluding credit agreements, possibly acting as a marketing assistant.

Article 7 (collection and processing of data)

Highly personal information that the consumer or the guarantor provides in connection with the conclusion, management or performance of a credit agreement or surety agreement is frequently collected for the purpose of processing it for applications other than risk assessment: advertising, marketing, offers of insurance contracts, marketing and sales of such data to third parties etc. The consumer's agreement is often obtained using the credit application form or a clause featuring in the credit or surety agreement that under certain circumstances do not allow the consumer really to refuse in view of the risk he would run in having the credit or the financial accommodation withheld. In most cases the consumer is even unaware that he has put his signature to such a clause.

This article authorises the collection and, *a fortiori*, the processing of this information by persons acting in the transactions covered by this directive only in order to assess the financial circumstances of the consumer or of any guarantor and of their ability to repay. It is, in other words, a formal obligation that rules out any purpose linked to marketing or the sale of personal data collected under the terms of this directive. The directive must offer an assurance that the obligation, referred to in Article 6, namely without prejudice to the application of Directive 95/46/EC, to provide data that in some cases are highly personal and sensitive, to the creditor and the credit intermediary is complied with. However, this clearly defined objective applies equally to information collected during the management of the credit or surety agreement and this includes non-performance. The persons concerned are therefore not only creditors and credit intermediaries but also information bureaux as well as credit insurers whom the creditor contacts in his information search in accordance with Article 9. The list could be extended to include debt recovery agencies and in general any person who takes over the debt owed to the creditor.

Article 8 (central database)

The avoidance of overindebtedness, both on the part of the consumer and of the guarantor, is a matter of general interest. The setting-up of centralised databases can to an extent solve this problem and at the same time the creditor could be made responsible by the imposition of civil and trade sanctions if on the basis of the information he obtained he ought to have decided not to grant new credit. The Member States[18] should make it compulsory to maintain

[18] Similar or comparable legislation in the MS - non-exhaustive list: the situation differs widely from one MS to another: NL and B: virtually similar legislation but extended to include positive files, D, A and I: positive files that go beyond the positive recording of data on credit and surety agreements with no consultation requirement; F and DK: only negative files with no consultation requirement. By way of

a central database holding negative, neutral and reliable data recording late payments, containing identification of consumers and guarantors and covering at least the territory of the Member State in question with guaranteed access to all creditors.

Article 8 makes the existence of such a database compulsory and introduces a common platform for accessing, processing and consulting the data.

The final paragraph in Article 8 has provision for the Member States to go further by setting up central positive databases recording all consumer commitments relating to credit. The creditor would thus have at his disposal an instrument that is more reliable than a negative database and which would offer him scope for checking whether a consumer, or possibly a guarantor, had concluded other credit or surety agreements that have not been the subject of litigation but where the associated total financial burden rules out the receipt of any further credit.

The concept of "responsible lending" as it appears in Article 9, obliges the creditor to consult the central database before the consumer can conclude a credit agreement or a guarantor has undertaken to guarantee repayment of the credit in question. Clearly, consulting this central database is for the creditor no more than an initial and helpful indication that must be backed up by other measures, as described in Article 9. Nevertheless it is considered appropriate that for the sake of transparency the creditor should inform the consumer, at his behest, of the results of this consultation of the centralised data base. This information must enable the consumer and the garantor, if necessary, to require the controller of the file to carry out any corrections that are necessary.

The database may only be consulted on a case-by-case basis. The data released by the database may be used only for assessing the risk of non-performance of the credit or surety agreement and any marketing or sales application is prohibited. The personal data may be held only for the time needed to assess the risk and must be then immediately destroyed once the credit or surety agreement has been completed or the credit application turned down. The controller of the file at the central database may, however, retain a record of the consultation and if required may make it available to the person concerned in court if, for example, the responsibility of the creditor were to be called into question or contested under the provisions governing "responsible lending".

Article 9 (responsible lending)

Some Member States[19] have a number of rules in connection with credit requiring creditors to apply caution or to act as "good creditors". This article is intended to establish a similar principle on a European scale, not only in the interests of all consumers or guarantors but also of all creditors. The latter are at risk of seeing their clients' solvency diminished because their competitors subsequently conclude credit agreements under circumstances that seriously jeopardise the consumer's or the guarantor's ability to repay.

The principle of "responsible lending" represents an obligation to consult centralised databases and to examine the replies provided by the consumer or the guarantor, to request the provision of sureties, to check the data supplied by credit intermediaries and to select the type of credit to be offered. It is not an obligation targeted at obtaining results such as the existence

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contrast, UK: no central database, virtually unrestricted freedom to set up private decentralised databases with no common criteria or consultation requirement.

[19] Similar or comparable legislation in MS - non-exhaustive list: NL, B and for guarantors F and S.

or otherwise of fault on the part of the consumer. Similar rules requiring caution call, moreover, for an assessment of the facts and for an examination on a case-by-case basis, preferably by the legal authorities. Any assessment by the creditor of a consumer's ability to repay is, however, in no way impartial: he is contractually bound and it is matter of some importance that the link should be made clear between the conclusion of the credit agreement and the preliminary assessment..

This provision is without prejudice to the obligation on the consumer to act with prudence when he looks for credit and to respect his contractual obligations.

Article 10 (information that must be included in credit and surety agreements)

As regards the information that must appear in the credit agreement, Article 4 (2) of Directive 87/102/EEC indicates that only a minimum of information is to appear. The third paragraph of this Article makes a reference to the Directive's Annex I that lists the "essential" conditions which the Member States *may* require to be mentioned in the written agreement. Almost all the Member States have therefore regulated the form and content of credit agreements in a general manner and other specific credit agreements in a variety of ways.

The first paragraph of Article 10 contains a paragraph common to credit agreements and surety agreements alike. All the parties must receive a copy of the credit agreement, including the credit intermediary who, strictly speaking, is not a "party", but who needs to be kept informed, in particular regarding the payment of his salary. Both the credit agreement and the surety agreement must contain an indication of any extrajudiciary procedures that might apply.

Article 10 of this directive proposes that there should be a complete and compulsory list of information, essentially the information referred to in Article 6. If a minimum of compulsory information in the credit agreement is required, there is also a need for this information to be relevant, legible and accurate and for it to be consistent with the information that was provided prior to the conclusion of the credit agreement. The general conditions, in particular those governing the operation of an account or that regulate a variable rate of interest, form an integral part of the credit agreement.

The total amount of credit must always be shown (since no creditor grants limitless credit) and this amount cannot be changed without a new agreement (novation). The words "if any" appearing in the Annex to Article 4 of Directive 87/102/EEC have therefore to be deleted. Some creditors set intermediate upper limits and raise (or lower) these upper or lower limits unilaterally depending, *inter alia*, on whether the consumer makes regular repayments or not, whether or not he uses his credit line, whether the credit is profitable or not or whether the national maximum rates have changed.

If one of the parties seeks to increase the total amount of credit (i.e. raise the upper limit), he must request a new contract and the creditor is obliged to carry out a new solvency check (which implies that "intermediate upper limits" are not, or no longer, permitted.

The reference to the "amount drawn down" in the credit agreement is pointless and has been removed. On the other hand, additional information relating to Article 6 of this proposal for a directive is required and this information should include the amortisation table, a reference to the object being financed in the case of an "assigned credit", any cash downpayment required if it relates to hire purchase and the rates and charges applicable should the credit agreement not be performed.

Surety agreements must also contain a minimum amount of data, namely a reference to the "amount guaranteed" and the charges associated with the non-performance of the surety agreement that are quite separate from those of the credit agreement. Charges associated with the conclusion of the surety agreement are in practice payable by the consumer and should therefore be included in the annual percentage rate of charge. Even if the guarantor were required to pay them himself he would under national law in all the Member States be entitled to seek remedy against the consumer, which means that the payment of any such debt should also be included in the total cost of the credit.

Article 11 (right of withdrawal)

The cooling-off period and the option to withdraw are well-established traditions[20] by means of which the consumer may release himself from an ill-considered commitment and change a decision taken at a time when the pressure applied by the salesman outweighed the consumer's free and enlightened will to choose. This article proposes there should be the option of withdrawal under circumstances similar to those referred to in the Directive of the European Parliament and of the Council {…} on the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC. The Commission has selected this approach in order to harmonise the procedures for exercising the right to withdrawal in similar situations. The Commission is aware of existing differences in other directives on consumers' rights. As it reported in its Strategy for Consumers 2002-2006 the Commission is planning a revision of the matter to follow up its Communication on European Contract Law.

The article is not an obstacle to the immediate drawing-down of credit. The creditor may in this instance require a consumer who is exercising his right to withdrawal to pay a maximum indemnity that is consistent with the amount obtained by applying the annual percentage rate of charge to the amount drawn down with effect from the date of drawdown and up until such time as the APR ceases to apply following the repayment of the funds or the return of the goods. Any such indemnity would be very small in the case of small amounts of credit but it should at least help to stem abuse and speculation in the case of larger amounts. Moreover, the consumer will be required to return the goods that he obtained in connection with the credit agreement to the creditor whenever the credit agreement stipulates that the goods are to be returned. Where there is a legal difference between a credit agreement and a purchase agreement the consumer will be required to honour the purchase agreement unless it was concluded as a resolutive condition linked to the conclusion of the credit agreement.

Article 12 (annual percentage rate of charge)

Article 12 shows how the annual percentage rate of charge is calculated. It replaces and extends Article 1(a) of Directive 87/102/EEC as inserted by Directive 90/88/EEC.

The formula for the annual percentage rate of charge, to which reference in made in Annex 1, is retained with the exception that different terminology is used to reflect the new definitions appearing in the proposal for a directive. The proposal is for complete standardisation in respect of rounding-off and what is understood by a year. Only the method for calculating

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[20] Almost all the MS have something similar. Similar or comparable legislation in the MS - non-exhaustive list: B: right of "renonciation" during a period of seven working days, R: "rétractation" period lasting seven days, IRL right to "withdraw" for 10 calendar days, L: right "à se départir" but only for credit agreements granted by a supplier and within two days. UK: "cooling-off period" various arrangements, D and A: "Widerrufsrecht".

fractions of a year has been retained. Annex 2 shows a number of examples of calculations that cover all types of credit agreement.

The total cost of the credit must include all costs, including borrowing rate plus all the other indemnities, commissions, taxes and charges of any kind that the consumer is required to pay for the credit regardless of whether these costs are payable to the creditor, to the credit intermediary, to the competent authority levying the taxes or to any other third party authorised to receive payments following the brokering or conclusion of a credit agreement or surety agreement.

Directive 90/88/EEC established two exemptions and these have been retained in paragraph 2: the charges for non-performance and the charges payable in cash or by credit. Clarification is provided regarding some "media" associated with the credit agreement: cards and accounts. Charges linked to these media must be included in the total cost of the credit and thus also in the APR unless the creditor has clearly and distinctly defined in connection with these media the costs that are linked to credit transactions and the costs that are linked to other payment transactions.

Clearly, any insurance guaranteeing repayment of the credit reduces the level of risk to which the creditor is exposed and the premium in such cases must be viewed as a constituent element of the cost of the credit. This principle has been kept for certain types of insurance in exemption v) of Article 1(a) of Directive 87/102/EEC. Some Member States[21] have broadened the "freedom of choice" aspect to include other types of insurance and have widened the concept of "total cost of the credit" to include any compulsory insurance, the premium for which must be included in the calculation of the APR. These countries have noted that there was in practice no freedom of choice for consumers and that the creditor, acting with circumspection or with a view to his profits, preferred to negotiate — automatically — insurance cover even if the consumer had not initially asked for such insurance. The Member States also had problems proving the "compulsory" aspect of the insurance and sureties covering repayment of the credit as the compulsory nature of such was the condition governing their inclusion as cost elements in the base. This proposal for a directive aims to end this discussion by proposing to include automatically any insurance premium in the total cost of the credit, provided that the insurance is taken out at the time that the credit agreement is concluded.

On the other hand, the gains resulting from insurance covering death, invalidity, sickness and unemployment, namely the amount corresponding to early repayment of the capital and early repayment indemnity or the commitment fee, are not to be included in the APR. The payment of these amounts is not agreed on an exact date shown in the credit agreement and the consumer, in point of fact, has no plans to effect such transactions.

However, the gains from life assurance covering reconstitution of the capital when the credit agreement comes to term amounts to an obligation within a period and on an agreed date even if the conditions are described in an additional agreement annexed to the credit agreement.

Whenever necessary, a number of the assumptions referred to in paragraphs 3, 4 and 5 should be used to calculate the annual percentage rate of charge. The consumer should be notified of these assumptions every time that a calculation is carried out that is based on them. They may

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[21] Similar or comparable legislation in the MS with regulations that in general terms exceed the directive by guaranteeing a fuller base: B, E, F, NL, A, S; MS with unique solutions or which include the insurance charges: B, DK, E, F, NL, A, S, UK.

only be used if the constituents of the calculation in question are not known at the time of the advertising, at the time the information is provided or are not evident from clauses in the agreement or from the means of payment used to access the credit granted.

The assumption based on the absence of any credit limits, as shown in the first indent of Article 1(a)(7) of Directive 87/102/EEC has been abandoned. This proposal for a directive provides for a total amount of credit always remaining and being mentioned. However, an assumption has been included in respect of credit drawdowns. Where a consumer may draw down credit at any time and in any amount — but within the limits imposed by the credit agreement — the creditor would be unable, when calculating the APR, to include such aspects in advance. He must therefore presume that the whole amount of credit has been drawn down immediately so that a credit agreement of this type can be compared to a traditional loan.

Paragraph 6 regulates the special case of leasing. Credit agreements of this type generally have provision for parameters on which the residual value of the goods financed can be determined, this residual value being payable when the consumer opts to purchase the goods. In this case, either the credit agreement has an arrangement whereby this amount can be calculated in advance down to the last euro-cent, and these figures are used to calculate the annual percentage rate of charge, or else the contract includes parameters that do not allow an ex-post calculation and, accordingly, the assumption of the linear amortisation of the goods applies.

Lastly, Annex III shows a formula and some examples for working out the impact of compulsory, front-end saving on the annual percentage rate of charge.

Article 13 (total lending rate)

The total lending rate is a rate showing what is payable to the creditor for his "credit service" and it excludes all charges payable to third parties. It is calculated in the same way as the APR and its one base reflects only the costs payable to the creditor. These costs include the interest payable, administration and management charges, credit insurance premiums, and in general terms the insurance premiums payable by the consumer upon conclusion of a credit agreement provided that it is the creditor who stipulates the insurance requirement and chooses the insurer. In other words the premium is not a component of the base if the insurance – like all other associated services – is optional. All charges relating to sureties, notaries' services, taxes and registration fees and the like are similarly not taken into account for the purpose of establishing the total lending rate.

Article 14 (borrowing rate)

Article 2(k) has defined the concept of borrowing rate as an interest rate that excludes all other costs. This proposal for a directive essentially lays down rules governing how the borrowing rate may vary. The periods during which the borrowing rate may vary must be indicated in the credit agreement. Indices or reference rates may be chosen freely on condition that they are governed by objective rules that are clear and cannot be influenced by what the parties prefer.

It is only this rate that may be varied. No other charge may be varied and it is unthinkable that "costs" may vary. It would be very difficult to allow the costs associated with the conclusion or the management of a credit agreement (commissions, stamp duty, postal charges etc.) to vary, either downwards or upwards. It is, in fact, only the cost of money that can vary over time. It is for this reason that the charge rate cannot be allowed to vary. The price of goods or

of a service is fixed in advance and payments are staggered over time. The possible cost of refinancing this transaction by the creditor is already included in the rate of charge and is therefore, by its very nature, not subject to variations of any kind.

The consumer must be advised of any change to this rate, for example by providing a statement of account. A reference to a new annual percentage rate of charge will allow the consumer to know whether his credit, following application of the rules governing variations in rates, has not become too expensive compared with the market rate.

Article 15 (unfair terms)

The list of unfair terms contained in this article should be seen as a “black list” of specific clauses that should not appear in any credit or surety agreement. It should not be understood as a special list to replace the (grey) list or the general clause in Directive 93/13/EEC on unfair terms. It is for this reason that there is a mention to the effect that the article applies “without prejudice to the application of Directive 93/13/EEC to the agreement as a whole”.

The ban referred to in point a) covers practices that require or reserve some part of the sums borrowed, for example, to constitute a surety, deposit or bond, or to purchase shares in a bonding company or a financing company, as these are practices that would double the profits of the creditor or, where applicable, the credit intermediary.

The provision of point b) is to regulate the joint offer of a credit agreement and another agreement that most frequently relates to the provision of some ancillary service — insurance, maintenance, current account, etc. without the consumer being given the choice of declining the service or selecting a different provider. Where there is no freedom of choice the related charges must form part of the total cost of the credit.

The provision of point c) requires any change to the APR to apply only to variations in the borrowing rate and to no other charges. It is difficult to imagine costs relating to stamps, customer records, account statements and management etc. being subject to rules on variability. For any unilateral raising of costs a new credit agreement must be drawn up.

The provision of point d) relates to a ban on any condition permitting disproportionate variability vis-à-vis the consumer where such a condition uses, for example, different calculations depending on whether the rate rises or falls, uses rates or indices for variability that are not quite neutral or even depend on the creditor’s personal preferences etc.

The ban referred to in point e) relates to a practice that takes the form of applying initially a call-in rate or a discounted rate that are then followed by a cost base that is higher and subject to the rules on variability. The rate advertised must be the cost base and any discount must be advised separately.

The provision of point f) relates to agreements known as "balloon agreements". It has been noted that this type of "timetable", the last payment under which – the residual value – is fairly high, is made available by captive companies, the purpose of whose trade is to retain consumers for their particular make of car. These agreements frequently involve refinancing or a return of the object financed as a deposit for a second purchase of a car that includes a new credit agreement. Such business practice appears questionable in that it is likely to prevent consumers changing the make of car owing to the final financial burden involved.

Article 16 (early repayment)

Article 8 of Directive 87/102/EEC grants the consumer the right "*to discharge his obligations under a credit agreement before the time fixed by the agreement*". This right was amended and the article then read as follows: "*in this event, in accordance with the rules laid down by the Member States, the consumer shall be entitled to an equitable reduction in the total cost of the credit*". Accordingly, the creditor is also entitled to require an early repayment indemnity – a fair one – to offset his charges and lost investment.

A number of Member States have specified, even banned, this indemnity[22]. It is difficult nowadays, given the scope for reinvesting capital on the international capital market, to justify any indemnity or financial compensation. The proposal is therefore first and foremost to confirm the right to early repayment, either in part or in full.

By seeking to strike a balance between the advantages for the consumer and the disadvantages for the creditor – relating to the management of the early repayment and the reinvestment of the capital received – the proposal is therefore to include provision for an early repayment indemnity for creditors only if it is objective, fair and calculated on the basis of actuarial principles. In other words, the method used must be objective and must pinpoint cases where an indemnity is not called for, for example when market rates are on the rise, which would make the indemnity negative and in fact offer a profit to the consumer. The principle of "actuarial fairness" is fully respected so that the points of view of both parties can be given the best possible consideration.

The proposal is nonetheless to exempt the consumer from the payment of an indemnity for any credit agreement whose conditions do not justify an indemnity:

- point a) is therefore aimed at excluding credits at variable borrowing rates where the cost of early repayment is largely passed on through the rate. However, the variable rate must apply to periods of less than one year.

- point b) excludes credits covered by insurance. None of the parties concerned is interested in maintaining the credit – quite the contrary, for the sums paid under the terms of an insurance agreement should allow the contractual relationship to be terminated.

- point c) concerns credits without capital amortisation, such as advances on current accounts, and in general any form of credit where the interest is calculated ex post to reflect the duration of the drawdowns that occurred. The absence of any obligation to repay "in instalments" or by periods means, moreover, that there is no "early" repayment. Credit agreements with provision for constitution of capital, to which Article 20 refers, are not covered by point c) because they have special procedural methods for repayment at the end of periods and special conditions apply to the calculation of interest.

Article 17 (assignment of rights)

This article corresponds to Article 9 of Directive 87/102/EEC. The wording was changed only to incorporate new definitions and enhanced protection for the guarantor. An assignee is

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[22] Similar or comparable legislation in the MS – non-exhaustive list: (1) with restrictions regarding the calculation and/or the amount of the indemnity: IRL, NL, B, L, UK, (2) with ban: F

understood as any person to whom the creditor's rights have been assigned, in other words a credit insurer, debt collection agency, a rediscounting company or securitisation company etc. without reference having been made to the legal procedure followed – assignment of credit, subrogation, delegation etc.

Article 18 (ban on the use of bills of exchange and other securities)

This article replaces Article 10 of Directive 87/102/EEC and completely abandons the use of bills of exchange, promissory notes or cheques as a means of payment and/or form of personal surety.

Article 19 (joint and several liability)

This article replaces Article 11 of Directive 87/102/EEC. Article 11 was based on the concept of joint and several liability under common law, i.e. the responsibility of a number of people who, in law, are held jointly and severally responsible for the discharge of an obligation. The wording ultimately used for Directive 87/102/EEC, termed "subsidiary responsibility", is a compromise with provision for the "consumer" under certain circumstances being able to claim payment from the creditor if his complaint against the vendor is justified and the latter refuses to pay. A number of Member States simply transposed Article 11 and created legislation that was ineffective. Other Member States went beyond the requirements of the provision and deleted the concept of "exclusive link" in relations between the creditor and the supplier or provider[23].

The consumer needs to be given a right to act directly against the creditor when the creditor enjoys trade benefits by working with specific suppliers and is able to seek remedy against them. Whenever the creditor has close trade links with the supplier of the goods or the provider of the service the damage, in the event that the consumer receives only faulty goods or services, or only some of the goods or services he ordered or even receives none at all, should not be borne by the consumer but by the creditor or the supplier. The consumer should have the option of going to court against one or the other or both in order to recover the amount of his damage.

The proposal is therefore to adopt comprehensively the joint and several liability solution when the credit supplier and the supplier of the goods or services are joint market operators. A case in question would therefore be where the supplier has acted, even in an ancillary capacity, as a credit intermediary. An existing agreement and effective checks by the creditor can be taken for granted in such cases and the consumer should not be required to provide proof. This possibility covers not only the credit that has been assigned in the strict sense but also any other form of credit availability or debit account that the supplier proposes to the consumer on the occasion of the first purchase. It will be remembered in this respect that this proposal for a directive contains a provision requiring the identity of the intermediary to be shown in the credit agreement.

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[23] Similar or comparable legislation in the MS – non-exhaustive list: in the UK there is a system of "pure" joint and several liability without any exclusive link but which has now a lower and an upper limit. Other MS such as F and D have developed "independent" systems. The B, IRL, F and L have not kept a lower limit. NL has a lower limit..

Article 20 (credit agreement providing constitution of capital)

For some years now the range of credit available has been growing to include new mortgage-linked credit tied to either life assurance or to investment funds, the latter being generally known, in the UK, as endowment mortgages. Up until quite recently only traditional life assurance was used for the constitution of credit. However, the new method, which uses a fund, is not without its risks for consumers. As in the case of variable-capital investment companies or shareholdings, the sums constituted are dependent on how the financial markets behave. It is possible, therefore, that when the main credit agreement comes to term there is not enough capital to repay the credit, something that is not permissible in connection with a product that is offered to the general public. Moreover, a similar situation has arisen on the UK market with the result that consumers have encountered difficulties with repayments. It is therefore appropriate that where there is no constitution of capital the creditor should assume one way or another responsibility for its repayment, possibly using an additional insurance for this purpose. Paragraphs 1 and 2 are intended to regulate such situations.

Paragraph 3 sets out special rules governing the calculation of the APR and the total lending rate that include all payments to be made by the consumer both in respect of the main credit agreement and the additional contract covering the reconstitution of capital.

Article 21 (credit agreement in the form of an advance on a current account or a debit account)

This article proposes the establishment of a standard method for providing information during the term of the credit agreement so that the consumer is able to check the accuracy of the credit drawdowns that have occurred, the borrowing rate applied, the costs to be paid etc., in particular in connection with credit agreements linked to the operation of an account for which the borrowing rates are calculated ex post.

Article 22 (open-end credit agreement)

This article proposes that the consumer – and the creditor – should be entitled to terminate an open-end credit agreement by giving three months' notice. It is felt that a period of three months is the minimum period for the consumer, who must be able to repay the total amount of credit he drew down. The consumer retains the right to seek damages and interest if such termination by the creditor is to the prejudice of the consumer.

Article 23 (performance of a surety agreement)

The first paragraph prohibits surety agreements that relate to open-end credit agreements. A guarantor frequently only has a brief look at a consumer's solvency. Requiring a guarantor to provide a "lifelong" surety must be considered excessive from the point of view of his own interests and may risk leading him into debt.

The second and third paragraphs place restrictions on the action that can be taken against the guarantor. The provisions of this directive place the emphasis on risk assessment relating to the consumer whereas the guarantor's solvency and risk assessment in his case are of no more than secondary importance.

The proposal is therefore that the creditor may not approach the guarantor until a period of "insolvency" has passed. The creditor must alert the guarantor – in good time – if the

consumer is defaulting on payments so that the guarantor can, if necessary, take steps to ensure that the consumer's indebtedness does not deteriorate further.

Lastly, the proposal is that the amount guaranteed by the surety may relate only to the outstanding balance of the total amount of credit owed by the consumer and to any arrears or possible charges with the exclusion of any form of penalty or non-performance indemnities payable by the consumer. These indemnities, that in principle are the consumer's responsibility, may be limited to this amount on condition that the guarantor immediately meets his obligations. It would indeed be unfair if the guarantor were required to pay additional penalties owing to the consumer's inability to discharge his obligations. If, on the other hand, the guarantor were late in meeting his own obligations the creditor could seek arrears and additional penalties in line with the amount that was guaranteed but not paid.

Article 24 (default notice and enforceability)

Paragraph 1 a) of this article should be seen as the principal element linking all the articles in this chapter covering the non-performance of credit agreements. It establishes a general principle of proportionality in respect of the recovery of debts arising out of a credit agreement or surety agreement.

The aim of Paragraph 1 b) is to prevent the consumer or the guarantor being required to repay immediately the total amount of the credit without previously having been invited to make good any delay or to submit a proposal for reaching an amicable agreement on the rescheduling of the debt. The Member States must encourage the parties concerned to seek out-of-court agreements or settlements. Two exceptions to this principle are envisaged: manifest fraud and the particular case of the disposal of the property financed, which must be likened to fraud if the consumer has been properly informed in good time concerning the rights to property and privilege enjoyed by the creditor. The fact that the consumer has moved away without leaving an address, even gone abroad, is in itself not enough reason for withholding the default notice. Examples would be hospitalisation or admission to an institution for a long stay, clerical errors by the local authorities, problems with postal deliveries etc.

Paragraph 1 c) covers the suspending of the consumer's rights by the creditor in respect of future credit drawdown. Similar measures may prove indispensable for the creditor in order to rule out fraud or even the manifest indebtedness of the consumer, who might have concealed other credit or who might be facing a court appearance for bankruptcy. In any event the creditor must alert the consumer of his decision, setting out the reasons that prompted him to take the measure in question so that the consumer can, if necessary, contest it before the appropriate courts.

Paragraph 1 d) regulates the provision of statements of account

Article 25 (overrunning of the total amount of credit and tacit overdraft)

The overrunning to which this directive refers implies that a credit agreement already exists. Overrunning or an overdraft where there is no initial agreement runs counter to the general principles of caution and information referred to in this directive. In contrast to the requirements of Article 6 of Directive 87/102/EEC, the charges and rates applicable must be shown in the credit agreement.

The first paragraph deals with the question of authorised overrunning. Tacit overrunning is considered to be the same thing. The conditions are identical to those shown in the credit agreement in relation to the borrowing rate and attendant charges except as regards the total amount of credit that is temporarily overrun.

Paragraph 2 covers unauthorised overrunning. In line with the requirements of Article 10, the additional charges must be shown in the agreement in the form of a statement of cost factors that are not included in the calculation of the annual percentage rate of charge but that are payable by the consumer under certain circumstances.

In both these cases the consumer must be alerted when the account is overrun and advised of the conditions that apply. The situation must be rectified within three months either on the basis of a new credit agreement indicating a higher total amount of credit, by returning to the "normal" situation or by otherwise terminating the contract or temporarily suspending drawdown.

Article 26 (repossession of goods)

Article 7 of Directive 87/102/EEC makes the recovery of goods a matter for an optional, but not compulsory, court decision. The involvement of a court is necessary to check whether it is appropriate to repossess goods that have been financed when the consumer has shown willingness to repay. A similar check was proposed in the report on the operation of Directive 87/102/EEC[24]. Even if the situation may differ depending on the legal interpretation used ("hire-purchase", loan with subrogation in the rights of the vendor who has expressed a reservation of title, leasing etc.) and the resultant civil and judicial procedures, it is nevertheless proposed that Article 7 should be extended to include provisions guaranteeing the involvement of a third party[25] for all credit agreements when the market value of the goods and the financial interest of the creditor have clearly become less important than the interests of the consumer and the latter has not consented to the repossession of the goods financed.

Article 27 (recovery)

This article refers to any person responsible for enforcing a credit agreement, in other words creditors, credit insurers, recovery agencies etc. but excepts any persons who are responsible for the recovery of money as part of a judicial procedure or for initiating repossession procedures, namely bailiffs. The intention is not to regulate the profession of the "collection agencies" or "debt counsellors" but to prohibit certain practices in connection with the non-performance of credit agreements.

The first paragraph confirms a principle that is already established by Article 10: the charges relating to non-performance must be specified in the credit agreement or surety agreement and the persons responsible for collection may not demand more than that which was fixed in the agreement.

Paragraph 2 lists illegal practices.

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[24] Report on the operation of Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit – COM (95) 117 final of 11.05.95 paragraphs 184 -188. Summary report of reactions and comments COM (97) 465 final of 24.09.97, No II.5.

[25] Similar or comparable legislation in the MS – non-exhaustive list: B, IRL, NL, L, UK.

– the use of envelopes showing words or logos etc. that give the impression that the letter concerned is from an official body, i.e. a judicial authority or a debt counsellor;

– letters threatening the consumer or the guarantor with repossession or prosecution in circumstances where such action is not an option;

– recoveries that disregard the procedures for recovery of goods such as referred to in Article 26 or that entail extra charges that were not detailed in the credit agreement;

– any action that can be likened to a violation of a consumer's or guarantor's privacy, for example harassment in cases where the debt is contested or no longer exists, as well as indirect harassment by contacting a consumer's or guarantor's neighbours, relatives or employers etc. This type of “doorstep” activity, to which point f) refers, must involve questions relating to personal data, such the consumer’s “solvency”, that are similar in type to the data to which Article 7 of this directive applies. In principle, information in the public domain relating to changes of address is not considered here.

Article 28 (registration of creditors and credit intermediaries)

This article replaces and extends Article 12 of Directive 87/102/EEC. The proposal is to make it compulsory to take all the steps referred to in Article 12 (1)[26]. The introduction of more stringent checks on creditors and credit intermediaries implies that these persons are registered from the outset, that checks are carried out in the first place, that the registration can be suspended or withdrawn (where necessary) and that any complaints are made known. Creditors and credit intermediaries are required, pursuant to this article, to be registered by an official institute or body that will supervise them, in particular monitoring their compliance with the provisions of this directive that are applicable to them.

There is another serious problem in connection with the information that is to be provided for consumers by the "vendors". These people frequently do not have the basic knowledge that is required to sell the financial products that they distribute while supervision and statutory requirements in the Member States relating to the quality of the information to be provided by these people and on their suitability to distribute credit are frequently lacking. The solution proposed is to consider them as credit intermediaries and at the same time to make creditors aware of their responsibilities when they resort to vendors as distribution channels for their credit agreements, in particular as regards the provision of information in advance and the duty to offer advice as referred to in Article 6 of this directive and with which credit intermediaries are required to comply. The same status is envisaged for freelance "delegated agents". It is still possible for a vendor to work without being under the direct supervision of a creditor, but in this case he must be licensed.

Exceptions are envisaged – as in Directive 87/102/EEC – in relation to creditors and credit intermediaries who are to be considered as credit establishments within the meaning of Article 1 (1) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions.

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[26] Similar or comparable legislation in the MS – non-exhaustive list: IRL, UK, and B have merged the three options. NL has provision for a licensing and monitoring system in respect of creditors and this includes a description of their distribution channels plus a separate law on financial intermediaries.

Article 29 (obligations of credit intermediaries)

This article contains provisions for special measures in relation to credit intermediaries.

The provision in point a) establishes the definition of a credit intermediary. Accurate information for consumers must be ensured in relation to the quality and extent of the credit intermediary's powers and on any possible exclusive business connection he has with the creditor so that the consumer does not confuse the intermediary with the creditor.

The provision in point b) is aimed at preventing situations where the intermediary encourages the consumer to contract credit beyond his ability to repay or to opt for a grouping of debts that would be prejudicial to the consumer, in particular by submitting simultaneously two or three credit applications to secure a total amount of credit from several creditors, where each application relates to a small amount which, in itself, may well be acceptable to the creditors individually. However, no creditor would accept funding the total amount of credit being sought. The proposal in point b) is therefore that intermediaries are to be obliged to inform all creditors that they have previously contacted in connection with an offer or a credit agreement about the total amount of credit being sought.

The provisions in point c) relate to the regulation of an intermediary's remuneration. It should be remembered that a credit intermediary's commission must be included in the APR. A credit intermediary should not be authorised to contact consumers directly in order to request payment in connection with a credit application or the provision of information unless three conditions are all met:

- the creditor must be informed by a reference to the amount of the fee shown in the credit agreement;
- the credit intermediary shall not be entitled to receive commission from the consumer if he is paid by the creditor;
- the credit agreement must be concluded.

Article 30 (maximum harmonisation and imperative nature of the directive’s provisions)

Paragraph 1 confirms the principle of total harmonisation. Member States shall not be entitled to have in place other provisions in relation to the areas covered by this directive unless otherwise stipulated. A similar exception is possible in relation to Article 33 in respect of the burden of proof and in relation to Article 8 (4) in connection with the setting-up of a database for positive data. National-level provisions covering maximum or exorbitant APRs or any other type of setting or evaluation of maximum or exorbitant rates may continue to apply. This directive does regulate this area.

Paragraph 2 replaces Article 14 (1) of Directive 87/102/EEC and includes the concept of "guarantor".

Paragraph 3 retains Article 14 (2) and adds another example. The original example spread the total amount of credit over a number of contracts, the lower limit of which allowed an exemption whereas in this current proposal for a directive any reference to lower limits in relation to the scope of the directive has been removed. On the other hand, it must be ensured that the exemptions referred to in Article 3, namely for housing credit and lease agreements, can not be circumvented so that the transactions covered by this directive can be included in such contracts. In other words, if a consumer requests a credit drawdown under the terms of

his housing credit or if, under the terms of his lease contract, he has a tacit option to purchase and the drawdown in question is to allow him to finance the purchase of a car, the directive will apply. Member States are requested to ensure that no such distortion occurs.

Paragraphs 4 and 5 make it clear that the provisions of the directive are imperative. Paragraph 4 lays down that the rights granted to consumers and provided by the directive may under no circumstances be surrendered by consumers.

Paragraph 5 is intended to ensure that consumers' enjoyment of the rights conferred by this directive cannot be denied to them on the grounds that the legislation applicable to the credit agreement or the surety agreement is that of a third country. However, for this rule to apply, it is important that the agreement should have a close link with the jurisdiction of one or more Member States. Similar, identically worded provisions are contained in Directives 93/13/EC relating to unfair terms and 97/7/EC on distance contracts as well as in the Directive of the European Parliament and of the Council of {…} on the distance marketing of consumer financial services modifying Council Directives 90/619/EEC, 97/7/EC and 98/27/EC.

Article 31 (penalties)

The new Article 31 of this proposal for a directive provides that the Member States may impose appropriate penalties on the creditors, etc. concerned who fail to comply with the provisions of national legislation implemented pursuant to this directive. Possibilities include a loss of interest and/or penalties as well as the withdrawal of their licence.

Article 32 (out-of-court redress)

This article is aimed at easing the out-of-court settlement of cross-border disputes by inviting Member States to encourage the bodies responsible for the out-of-court settlement of disputes to cooperate. A cooperation arrangement that could be envisaged is for consumers to contact the out-of-court settlement body in their country of residence which, in turn, would contact its counterpart in the supplier's country. In this way the consumer would not have to pursue the dispute in another Member State. Article 32 is worded in a similar way to the provisions of other directives, such as Article 14 of the Directive of the European Parliament and of the Council of {…} on the distance marketing of consumer financial services modifying Council Directives 90/619/EEC, 97/7/EC and 98/27/EC and which encourages out-of-court settlement in the interests of all concerned.

Article 33 (burden of proof)

Article 33, which is new, is worded in a similar way to the provisions of other directives, such as Article 15 of the Directive of the European Parliament and of the Council of {…} on the distance marketing of consumer financial services modifying Council Directives 90/916/EEC, 97/7/EC and 98/27/EC. The points that have been inserted are necessary to clarify, *inter alia*, the concept of "credit intermediary". It has been presumed that the latter works for payment and Member States are free to decide that the burden of proof does not lie with the consumer.

Articles 34 (existing agreements)

This article establishes a transitional arrangement aimed at ensuring that this directive does not apply to existing agreements, specifically long-term credit agreements and open-end credit agreements. Although compulsory references cannot be imposed ex post on a credit agreement, on the rules governing responsibility or in relation to the pre-contractual information requirement, it nevertheless remains that a major part of the provisions can and

must be applied to existing credit agreements, in particular as regards the information to be given to consumers and guarantors during the performance or in the event of the non-performance of a credit agreement or surety agreement.

Article 36 (repeal)

Article 36 contains formal provisions repealing Directive 87/102/EEC as amended by Directives 90/88/EEC and 98/7/EEC since this directive replaces it.

Articles 35, 37 and 38 (transposition – entry into force – addressees)

These articles contain standard provisions and formulae and require no special comment.

Directive 97/5/EC of the European Parliament and of the Council the Councilthe CouncilJanuary 1997 on cross-border credit transfers

January 1997 on cross-border credit transfers

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Having regard to the opinion of the European Monetary Institute,

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3) in the light of the joint text approved on 22 November 1996 by the Conciliation Committee,

(1) Whereas the volume of cross-border payments is growing steadily as completion of the internal market and progress towards full economic and monetary union lead to greater trade and movement of people within the Community; whereas cross-border credit transfers account for a substantial part of the volume and value of cross-border payments;

(2) Whereas it is essential for individuals and businesses, especially small and medium-sized enterprises, to be able to make credit transfers rapidly, reliably and cheaply from one part of the Community to another; whereas, in conformity with the Commission Notice on the application of the EC competition rules to cross-border credit transfers (4), greater competition in the market for cross-border credit transfers should lead to improved services and reduced prices;

(3) Whereas this Directive seeks to follow up the progress made towards completion of the internal market, in particular towards liberalization of capital movements, with a view to the implementation of economic and monetary union; whereas its provisions must apply to credit transfers in the currencies of the Member States and in ecus;

(4) Whereas the European Parliament, in its resolution of 12 February 1993 (5), called for a Council Directive to lay down rules in the area of transparency and performance of cross-border payments;

(5) Whereas the issues covered by this Directive must be dealt with separately from the systemic issues which remain under consideration within the Commission; whereas it may become necessary to make a further proposal to cover these systemic issues, particularly the problem of settlement finality;

(6) Whereas the purpose of this Directive is to improve cross-border credit transfer services and thus assist the European Monetary Institute (EMI) in its task of promoting the efficiency of cross-border payments with a view to the preparation of the third stage of economic and monetary union;

(7) Whereas, in line with the objectives set out in the second recital, this Directive should apply to any credit transfer of an amount of less than ECU 50 000;

(8) Whereas, having regard to the third paragraph of Article 3b of the Treaty, and with a view to ensuring transparency, this Directive lays down the minimum requirements needed to ensure an adequate level of customer information both before and after the execution of a cross-border credit transfer; whereas these requirements include indication of the complaints and redress procedures offered to customers, together with the arrangements for access thereto; whereas this Directive lays down minimum execution requirements, in particular in terms of performance, which institutions offering cross-border credit transfer services should adhere to, including the obligation

to execute a cross-border credit transfer in accordance with the customer's instructions; whereas this Directive fulfils the conditions deriving from the principles set out in Commission Recommendation 90/109/EEC of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions (6); whereas this Directive is without prejudice to Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (7);

(9) Whereas this Directive should contribute to reducing the maximum time taken to execute a cross-border credit transfer and encourage those institutions which already take a very short time to do so to maintain that practice;

(10) Whereas the Commission, in the report it will submit to the European Parliament and the Council within two years of implementation of this Directive, should particularly examine the time-limit to be applied in the absence of a time-limit agreed between the originator and his institution, taking into account both technical developments and the situation existing in each Member State;

(11) Whereas there should be an obligation upon institutions to refund in the event of a failure to successfully complete a credit transfer; whereas the obligation to refund imposes a contingent liability on institutions which might, in the absence of any limit, have a prejudicial effect on solvency requirements; whereas that obligation to refund should therefore be applicable up to ECU 12 500;

(12) Whereas Article 8 does not affect the general provisions of national law whereby an institution has responsibility towards the originator when a cross-border credit transfer has not been completed because of an error committed by that institution;

(13) Whereas it is necessary to distinguish, among the circumstances with which institutions involved in the execution of a cross-border credit transfer may be confronted, including circumstances relating to insolvency, those caused by force majeure; whereas for that purpose the definition of force majeure given in Article 4 (6) of Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (8) should be taken as a basis;

(14) Whereas there need to be adequate and effective complaints and redress procedures in the Member States for the settlement of possible disputes between customers and institutions, using existing procedures where appropriate,

HAVE ADOPTED THIS DIRECTIVE:

SECTION I

SCOPE AND DEFINITIONS

Article 1

Scope

The provisions of this Directive shall apply to cross-border credit transfers in the currencies of the Member States and the ECU up to the equivalent of ECU 50 000 ordered by persons other than those referred to in Article 2 (a), (b) and (c) and executed by credit institutions or other institutions.

Article 2

Definitions

For the purposes of this Directive:

(a) 'credit institution` means an institution as defined in Article 1 of Council Directive 77/780/EEC (9), and includes branches, within the meaning of the third indent of that Article and located in the Community, of credit institutions which have their head offices outside the Community and which by way of business execute cross-border credit transfers;

(b) 'other institution` means any natural or legal person, other than a credit institution, that by way of business executes cross-border credit transfers;

(c) 'financial institution` means an institution as defined in Article 4 (1) of Council Regulation (EC) No 3604/93 of 13 December 1993 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty (10);

(d) 'institution` means a credit institution or other institution; for the purposes of Articles 6, 7 and 8, branches of one credit institution situated in different Member States which participate in the execution of a cross-border credit transfer shall be regarded as separate institutions;

(e) 'intermediary institution` means an institution which is neither that of the originator nor that of the beneficiary and which participates in the execution of a cross-border credit transfer;

(f) 'cross-border credit transfer` means a transaction carried out on the initiative of an originator via an institution or its branch in one Member State, with a view to making available an amount of money to a beneficiary at an institution or its branch in another Member State; the originator and the beneficiary may be one and the same person;

(g) 'cross-border credit transfer order` means an unconditional instruction in any form, given directly by an originator to an institution to execute a cross-border credit transfer;

(h) 'originator` means a natural or legal person that orders the making of a cross-border credit transfer to a beneficiary;

(i) 'beneficiary` means the final recipient of a cross-border credit transfer for whom the corresponding funds are made available in an account to which he has access;

(j) 'customer` means the originator or the beneficiary, as the context may require;

(k) 'reference interest rate` means an interest rate representing compensation and established in accordance with the rules laid down by the Member State in which the establishment which must pay the compensation to the customer is situated;

(l) 'date of acceptance` means the date of fulfilment of all the conditions required by the institution as to the execution of the cross-border credit transfer order and relating to the availability of adequate financial cover and the information required to execute that order.

SECTION II

TRANSPARENCY OF CONDITIONS FOR CROSS-BORDER CREDIT TRANSFERS

Article 3

Prior information on conditions for cross-border credit transfers

The institutions shall make available to their actual and prospective customers in writing, including where appropriate by electronic means, and in a readily comprehensible form, information on conditions for cross-border credit transfers. This information shall include at least:

- indication of the time needed, when a cross-border credit transfer order given to the institution is executed, for the funds to be credited to the account of the beneficiary's institution; the start of that period must be clearly indicated,
- indication of the time needed, upon receipt of a cross-border credit transfer, for the funds credited to the account of the institution to be credited to the beneficiary's account,
- the manner of calculation of any commission fees and charges payable by the customer to the institution, including where appropriate the rates,
- the value date, if any, applied by the institution,
- details of the complaint and redress procedures available to the customer and arrangements for access to them,
- indication of the reference exchange rates used.

Article 4

Information subsequent to a cross-border credit transfer

The institutions shall supply their customers, unless the latter expressly forgo this, subsequent to the execution or receipt of a cross-border credit transfer, with clear information in writing, including where appropriate by electronic means, and in a readily comprehensible form. This information shall include at least:

- a reference enabling the customer to identify the cross-border credit transfer,
- the original amount of the cross-border credit transfer,
- the amount of all charges and commission fees payable by the customer,
- the value date, if any, applied by the institution.

Where the originator has specified that the charges for the cross-border credit transfer are to be wholly or partly borne by the beneficiary, the latter shall be informed thereof by his own institution.

Where any amount has been converted, the institution which converted it shall inform its customer of the exchange rate used.

SECTION III

MINIMUM OBLIGATIONS OF INSTITUTIONS IN RESPECT OF CROSS-BORDER CREDIT TRANSFERS

Article 5

Specific undertakings by the institution

Unless it does not wish to do business with that customer, an institution must at a customer's

request, for a cross-border credit transfer with stated specifications, give an undertaking concerning the time needed for execution of the transfer and the commission fees and charges payable, apart from those relating to the exchange rate used.

Article 6

Obligations regarding time taken

1. The originator's institution shall execute the cross-border credit transfer in question within the time limit agreed with the originator.

Where the agreed time limit in not complied with or, in the absence of any such time limit, where, at the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer order, the funds have not been credited to the the account of the beneficiary's institution, the originator's institution shall compensate the originator.

Compensation shall comprise the payment of interest calculated by applying the reference rate of interest to the amount of the cross-border credit transfer for the period from:

- the end of the agreed time limit or, in the absence of any such time limit, the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer order, to
- the date on which the funds are credited to the account of the beneficiary's institution.

Similarly, where non-execution of the cross-border credit transfer within the time limit agreed or, in the absence of any such time limit, before the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer is attributable to an intermediary institution, that institution shall be required to compensate the originator's institution.

2. The beneficiary's institution shall make the funds resulting from the cross-border credit transfer available to the beneficiary within the time limit agreed with the beneficiary.

Where the agreed time limit is not complied with or, in the absence of any such time limit, where, at the end of the banking business day following the day on which the funds were credited to the account of the beneficiary's institution, the funds have not been credited to the beneficiary's account, the beneficiary's institution shall compensate the beneficiary.

Compensation shall comprise the payment of interest calculated by applying the reference rate of interest to the amount of the cross-border credit transfer for the period from:

- the end of the agreed time limit or, in the absence of any such time limit, the end of the banking business day following the day on which the funds were credited to the account of the beneficiary's institution, to
- the date on which the funds are credited to the beneficiary's account.

3. No compensation shall be payable pursuant to paragraphs 1 and 2 where the originator's institution or, as the case may be, the beneficiary's institution can establish that the delay is attributable to the originator or, as the case may be, the beneficiary.

4. Paragraphs 1, 2 and 3 shall be entirely without prejudice to the other rights of customers and institutions that have participated in the execution of a cross-border credit transfer order.

Article 7

Obligation to execute the cross-border transfer in accordance with instructions

1. The originator's institution, any intermediary institution and the beneficiary's institution, after the date of acceptance of the cross-border credit transfer order, shall each be obliged to execute that credit transfer for the full amount thereof unless the originator has specified that the costs of the cross-border credit transfer are to be borne wholly or partly by the beneficiary.

The first subparagraph shall be without prejudice to the possibility of the beneficiary's institution levying a charge on the beneficiary relating to the administration of his account, in accordance with the relevant rules and customs. However, such a charge may not be used by the institution to avoid the obligations imposed by the said subparagraph.

2. Without prejudice to any other claim which may be made, where the originator's institution or an intermediary institution has made a deduction from the amount of the cross-border credit transfer in breach of paragraph 1, the originator's institution shall, at the originator's request, credit, free of all deductions and at its own cost, the amount deducted to the beneficiary unless the originator requests that the amount be credited to him.

Any intermediary institution which has made a deduction in breach of paragraph 1 shall credit the amount deducted, free of all deductions and at its own cost, to the originator's institution or, if the originator's institution so requests, to the beneficiary of the cross-border credit transfer.

3. Where a breach of the duty to execute the cross-border credit transfer order in accordance with the originator's instructions has been caused by the beneficiary's institution, and without prejudice to any other claim which may be made, the beneficiary's institution shall be liable to credit to the beneficiary, at its own cost, any sum wrongly deducted.

Article 8

Obligation upon institutions to refund in the event of non-execution of transfers

1. If, after a cross-border credit transfer order has been accepted by the originator's institution, the relevant amounts are not credited to the account of the beneficiary's institution, and without prejudice to any other claim which may be made, the originator's institution shall credit the originator, up to ECU 12 500, with the amount of the cross-border credit transfer plus:

- interest calculated by applying the reference interest rate to the amount of the cross-border credit transfer for the period between the date of the cross-border credit transfer order and the date of the credit, and
- the charges relating to the cross-border credit transfer paid by the originator.

These amounts shall be made available to the originator within fourteen banking business days following the date of his request, unless the funds corresponding to the cross-border credit transfer have in the meantime been credited to the account of the beneficiary's institution.

Such a request may not be made before expiry of the time limit agreed between the originator's institution and the originator for the execution of the cross-border credit transfer order or, in the absence of any such time limit, before expiry of the time limit laid down in the second subparagraph of Article 6 (1).

Similarly, each intermediary institution which has accepted the cross-border credit transfer order owes an obligation to refund at its own cost the amount of the credit transfer, including the related costs and interest, to the institution which instructed it to carry out the order. If the cross-border credit transfer was not completed because of errors or omissions in the instructions given by that institution, the intermediary institution shall endeavour as far as possible to refund the amount of the transfer.

2. By way of derogation from paragraph 1, if the cross-border credit transfer was not completed because of its non-execution by an intermediary institution chosen by the beneficiary's institution, the latter institution shall be obliged to make the funds available to the beneficiary up to ECU 12 500.

3. By way of derogation from paragraph 1, if the cross-border credit transfer was not completed because of an error or omission in the instructions given by the originator to his institution or because of non-execution of the cross-border credit transfer by an intermediary institution expressly chosen by the originator, the originator's institution and the other institutions involved shall endeavour as fas as possible to refund the amount of the transfer.

Where the amount has been recovered by the originator's institution, it shall be obliged to credit it to the originator. The institutions, including the originator's institution, are not obliged in this case to refund the charges and interest accruing, and can deduct the costs arising from the recovery if specified.

Article 9

Situation of force majeure

Without prejudice to the provisions of Directive 91/308/EEC, institutions participating in the execution of a cross-border credit transfer order shall be released from the obligations laid down in this Directive where they can adduce reasons of force majeure, namely abnormal and unforeseeable circumstances beyond the control of the person pleading force majeure, the consequences of which would have been unavoidable despite all efforts to the contrary, which are relevant to its provisions.

Article 10

Settlement of disputes

Member States shall ensure that there are adequate and effective complaints and redress procedures for the settlement of disputes between an originator and his institution or between a beneficiary and his institution, using existing procedures where appropriate.

SECTION IV

FINAL PROVISIONS

Article 11

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 August 1999 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main laws, regulations or administrative provisions which they adopt in the field governed by this Directive.

Article 12

Report to the European Parliament and the Council

No later than two years after the date of implementation of this Directive, the Commission shall submit a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.

This report shall, in the light of the situation existing in each Member State and of the technical developments that have taken place, deal particularly with the question of the time limit set in Article 6 (1).

Article 13

Entry into force

This Directive shall enter into force on the date of its publication in the Official Journal of the European Communities.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 January 1997.

For the European Parliament

The President

J. M. GIL-ROBLES

For the Council

The President

G. ZALM

(1) OJ No C 360, 17. 12. 1994, p. 13, and OJ No C 199, 3. 8. 1995, p. 16.

(2) OJ No C 236, 11. 9. 1995, p. 1.

(3) Opinion of the European Parliament of 19 May 1995 (OJ No C 151, 19. 6. 1995, p. 370), Council common position of 4 December 1995 (OJ No C 353, 30. 12. 1995, p. 52) and Decision of the European Parliament of 13 March 1996 (OJ No C 96, 1. 4. 1996, p. 74). Decision of the Council of 19 December 1996 and Decision of the European Parliament of 16 January 1997.

(4) OJ No C 251, 27. 9. 1995, p. 3.

(5) OJ No C 72, 15. 3. 1993, p. 158.

(6) OJ No L 67, 15. 3. 1990, p. 39.

(7) OJ No L 166, 28. 6. 1991, p. 77.

(8) OJ No L 158, 23. 6. 1990, p. 59.

(9) OJ No L 322, 17. 12. 1977, p. 30. Directive as last amended by Directive 95/26/EC (OJ No L 168, 18. 7. 1995, p. 7).

(10) OJ No L 332, 31. 12. 1993, p. 4.

JOINT STATEMENT - BY THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE COMMISSION

The European Parliament, the Council and the Commission note the determination of the Member States to implement the laws, regulations and administrative provisions required to comply with this Directive by 1 January 1999.

January 1997 on cross-border credit transfers

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Having regard to the opinion of the European Monetary Institute,

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3) in the light of the joint text approved on 22 November 1996 by the Conciliation Committee,

(1) Whereas the volume of cross-border payments is growing steadily as completion of the internal market and progress towards full economic and monetary union lead to greater trade and movement of people within the Community; whereas cross-border credit transfers account for a substantial part of the volume and value of cross-border payments;

(2) Whereas it is essential for individuals and businesses, especially small and medium-sized enterprises, to be able to make credit transfers rapidly, reliably and cheaply from one part of the Community to another; whereas, in conformity with the Commission Notice on the application of the EC competition rules to cross-border credit transfers (4), greater competition in the market for cross-border credit transfers should lead to improved services and reduced prices;

(3) Whereas this Directive seeks to follow up the progress made towards completion of the internal market, in particular towards liberalization of capital movements, with a view to the implementation of economic and monetary union; whereas its provisions must apply to credit transfers in the currencies of the Member States and in ecus;

(4) Whereas the European Parliament, in its resolution of 12 February 1993 (5), called for a Council Directive to lay down rules in the area of transparency and performance of cross-border payments;

(5) Whereas the issues covered by this Directive must be dealt with separately from the systemic issues which remain under consideration within the Commission; whereas it may become necessary to make a further proposal to cover these systemic issues, particularly the problem of settlement finality;

(6) Whereas the purpose of this Directive is to improve cross-border credit transfer services and thus assist the European Monetary Institute (EMI) in its task of promoting the efficiency of cross-border payments with a view to the preparation of the third stage of economic and monetary union;

(7) Whereas, in line with the objectives set out in the second recital, this Directive should apply to any credit transfer of an amount of less than ECU 50 000;

(8) Whereas, having regard to the third paragraph of Article 3b of the Treaty, and with a view to ensuring transparency, this Directive lays down the minimum requirements needed to ensure an adequate level of customer information both before and after the execution of a cross-border credit transfer; whereas these requirements include indication of the complaints and redress procedures offered to customers, together with the arrangements for access thereto; whereas this Directive lays down minimum execution requirements, in particular in terms of performance, which institutions offering cross-border credit transfer services should adhere to, including the obligation to execute a cross-border credit transfer in accordance with the customer's instructions; whereas this Directive fulfils the conditions deriving from the principles set out in Commission Recommendation 90/109/EEC of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions (6); whereas this Directive is without prejudice to Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (7);

(9) Whereas this Directive should contribute to reducing the maximum time taken to execute a cross-border credit transfer and encourage those institutions which already take a very short time to do so to maintain that practice;

(10) Whereas the Commission, in the report it will submit to the European Parliament and the Council within two years of implementation of this Directive, should particularly examine the time-limit to be applied in the absence of a time-limit agreed between the originator and his institution, taking into account both technical developments and the situation existing in each Member State;

(11) Whereas there should be an obligation upon institutions to refund in the event of a failure to successfully complete a credit transfer; whereas the obligation to refund imposes a contingent liability on institutions which might, in the absence of any limit, have a prejudicial effect on solvency requirements; whereas that obligation to refund should therefore be applicable up to ECU 12 500;

(12) Whereas Article 8 does not affect the general provisions of national law whereby an institution has responsibility towards the originator when a cross-border credit transfer has not been completed because of an error committed by that institution;

(13) Whereas it is necessary to distinguish, among the circumstances with which institutions involved in the execution of a cross-border credit transfer may be confronted, including circumstances relating to insolvency, those caused by force majeure; whereas for that purpose the definition of force majeure given in Article 4 (6) of Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (8) should be taken as a basis;

(14) Whereas there need to be adequate and effective complaints and redress procedures in the Member States for the settlement of possible disputes between customers and institutions, using existing

procedures where appropriate,

HAVE ADOPTED THIS DIRECTIVE:

SECTION I

SCOPE AND DEFINITIONS

Article 1

Scope

The provisions of this Directive shall apply to cross-border credit transfers in the currencies of the Member States and the ECU up to the equivalent of ECU 50 000 ordered by persons other than those referred to in Article 2 (a), (b) and (c) and executed by credit institutions or other institutions.

Article 2

Definitions

For the purposes of this Directive:

(a) 'credit institution` means an institution as defined in Article 1 of Council Directive 77/780/EEC (9), and includes branches, within the meaning of the third indent of that Article and located in the Community, of credit institutions which have their head offices outside the Community and which by way of business execute cross-border credit transfers;

(b) 'other institution` means any natural or legal person, other than a credit institution, that by way of business executes cross-border credit transfers;

(c) 'financial institution` means an institution as defined in Article 4 (1) of Council Regulation (EC) No 3604/93 of 13 December 1993 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty (10);

(d) 'institution` means a credit institution or other institution; for the purposes of Articles 6, 7 and 8, branches of one credit institution situated in different Member States which participate in the execution of a cross-border credit transfer shall be regarded as separate institutions;

(e) 'intermediary institution` means an institution which is neither that of the originator nor that of the beneficiary and which participates in the execution of a cross-border credit transfer;

(f) 'cross-border credit transfer` means a transaction carried out on the initiative of an originator via an institution or its branch in one Member State, with a view to making available an amount of money to a beneficiary at an institution or its branch in another Member State; the originator and the beneficiary may be one and the same person;

(g) 'cross-border credit transfer order` means an unconditional instruction in any form, given directly by an originator to an institution to execute a cross-border credit transfer;

(h) 'originator` means a natural or legal person that orders the making of a cross-border credit transfer to a beneficiary;

(i) 'beneficiary` means the final recipient of a cross-border credit transfer for whom the corresponding

funds are made available in an account to which he has access;

(j) 'customer` means the originator or the beneficiary, as the context may require;

(k) 'reference interest rate` means an interest rate representing compensation and established in accordance with the rules laid down by the Member State in which the establishment which must pay the compensation to the customer is situated;

(l) 'date of acceptance` means the date of fulfilment of all the conditions required by the institution as to the execution of the cross-border credit transfer order and relating to the availability of adequate financial cover and the information required to execute that order.

SECTION II

TRANSPARENCY OF CONDITIONS FOR CROSS-BORDER CREDIT TRANSFERS

Article 3

Prior information on conditions for cross-border credit transfers

The institutions shall make available to their actual and prospective customers in writing, including where appropriate by electronic means, and in a readily comprehensible form, information on conditions for cross-border credit transfers. This information shall include at least:

- indication of the time needed, when a cross-border credit transfer order given to the institution is executed, for the funds to be credited to the account of the beneficiary's institution; the start of that period must be clearly indicated,
- indication of the time needed, upon receipt of a cross-border credit transfer, for the funds credited to the account of the institution to be credited to the beneficiary's account,
- the manner of calculation of any commission fees and charges payable by the customer to the institution, including where appropriate the rates,
- the value date, if any, applied by the institution,
- details of the complaint and redress procedures available to the customer and arrangements for access to them,
- indication of the reference exchange rates used.

Article 4

Information subsequent to a cross-border credit transfer

The institutions shall supply their customers, unless the latter expressly forgo this, subsequent to the execution or receipt of a cross-border credit transfer, with clear information in writing, including where appropriate by electronic means, and in a readily comprehensible form. This information shall include at least:

- a reference enabling the customer to identify the cross-border credit transfer,
- the original amount of the cross-border credit transfer,
- the amount of all charges and commission fees payable by the customer,

- the value date, if any, applied by the institution.

Where the originator has specified that the charges for the cross-border credit transfer are to be wholly or partly borne by the beneficiary, the latter shall be informed thereof by his own institution.

Where any amount has been converted, the institution which converted it shall inform its customer of the exchange rate used.

SECTION III

MINIMUM OBLIGATIONS OF INSTITUTIONS IN RESPECT OF CROSS-BORDER CREDIT TRANSFERS

Article 5

Specific undertakings by the institution

Unless it does not wish to do business with that customer, an institution must at a customer's request, for a cross-border credit transfer with stated specifications, give an undertaking concerning the time needed for execution of the transfer and the commission fees and charges payable, apart from those relating to the exchange rate used.

Article 6

Obligations regarding time taken

1. The originator's institution shall execute the cross-border credit transfer in question within the time limit agreed with the originator.

Where the agreed time limit in not complied with or, in the absence of any such time limit, where, at the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer order, the funds have not been credited to the the account of the beneficiary's institution, the originator's institution shall compensate the originator.

Compensation shall comprise the payment of interest calculated by applying the reference rate of interest to the amount of the cross-border credit transfer for the period from:

- the end of the agreed time limit or, in the absence of any such time limit, the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer order, to
- the date on which the funds are credited to the account of the beneficiary's institution.

Similarly, where non-execution of the cross-border credit transfer within the time limit agreed or, in the absence of any such time limit, before the end of the fifth banking business day following the date of acceptance of the cross-border credit transfer is attributable to an intermediary institution, that institution shall be required to compensate the originator's institution.

2. The beneficiary's institution shall make the funds resulting from the cross-border credit transfer available to the beneficiary within the time limit agreed with the beneficiary.

Where the agreed time limit is not complied with or, in the absence of any such time limit, where, at the end of the banking business day following the day on which the funds were credited to the account of the beneficiary's institution, the funds have not been credited to the beneficiary's

account, the beneficiary's institution shall compensate the beneficiary.

Compensation shall comprise the payment of interest calculated by applying the reference rate of interest to the amount of the cross-border credit transfer for the period from:

- the end of the agreed time limit or, in the absence of any such time limit, the end of the banking business day following the day on which the funds were credited to the account of the beneficiary's institution, to
- the date on which the funds are credited to the beneficiary's account.

3. No compensation shall be payable pursuant to paragraphs 1 and 2 where the originator's institution or, as the case may be, the beneficiary's institution can establish that the delay is attributable to the originator or, as the case may be, the beneficiary.

4. Paragraphs 1, 2 and 3 shall be entirely without prejudice to the other rights of customers and institutions that have participated in the execution of a cross-border credit transfer order.

Article 7

Obligation to execute the cross-border transfer in accordance with instructions

1. The originator's institution, any intermediary institution and the beneficiary's institution, after the date of acceptance of the cross-border credit transfer order, shall each be obliged to execute that credit transfer for the full amount thereof unless the originator has specified that the costs of the cross-border credit transfer are to be borne wholly or partly by the beneficiary.

The first subparagraph shall be without prejudice to the possibility of the beneficiary's institution levying a charge on the beneficiary relating to the administration of his account, in accordance with the relevant rules and customs. However, such a charge may not be used by the institution to avoid the obligations imposed by the said subparagraph.

2. Without prejudice to any other claim which may be made, where the originator's institution or an intermediary institution has made a deduction from the amount of the cross-border credit transfer in breach of paragraph 1, the originator's institution shall, at the originator's request, credit, free of all deductions and at its own cost, the amount deducted to the beneficiary unless the originator requests that the amount be credited to him.

Any intermediary institution which has made a deduction in breach of paragraph 1 shall credit the amount deducted, free of all deductions and at its own cost, to the originator's institution or, if the originator's institution so requests, to the beneficiary of the cross-border credit transfer.

3. Where a breach of the duty to execute the cross-border credit transfer order in accordance with the originator's instructions has been caused by the beneficiary's institution, and without prejudice to any other claim which may be made, the beneficiary's institution shall be liable to credit to the beneficiary, at its own cost, any sum wrongly deducted.

Article 8

Obligation upon institutions to refund in the event of non-execution of transfers

1. If, after a cross-border credit transfer order has been accepted by the originator's institution,

the relevant amounts are not credited to the account of the beneficiary's institution, and without prejudice to any other claim which may be made, the originator's institution shall credit the originator, up to ECU 12 500, with the amount of the cross-border credit transfer plus:

- interest calculated by applying the reference interest rate to the amount of the cross-border credit transfer for the period between the date of the cross-border credit transfer order and the date of the credit, and
- the charges relating to the cross-border credit transfer paid by the originator.

These amounts shall be made available to the originator within fourteen banking business days following the date of his request, unless the funds corresponding to the cross-border credit transfer have in the meantime been credited to the account of the beneficiary's institution.

Such a request may not be made before expiry of the time limit agreed between the originator's institution and the originator for the execution of the cross-border credit transfer order or, in the absence of any such time limit, before expiry of the time limit laid down in the second subparagraph of Article 6 (1).

Similarly, each intermediary institution which has accepted the cross-border credit transfer order owes an obligation to refund at its own cost the amount of the credit transfer, including the related costs and interest, to the institution which instructed it to carry out the order. If the cross-border credit transfer was not completed because of errors or omissions in the instructions given by that institution, the intermediary institution shall endeavour as far as possible to refund the amount of the transfer.

2. By way of derogation from paragraph 1, if the cross-border credit transfer was not completed because of its non-execution by an intermediary institution chosen by the beneficiary's institution, the latter institution shall be obliged to make the funds available to the beneficiary up to ECU 12 500.

3. By way of derogation from paragraph 1, if the cross-border credit transfer was not completed because of an error or omission in the instructions given by the originator to his institution or because of non-execution of the cross-border credit transfer by an intermediary institution expressly chosen by the originator, the originator's institution and the other institutions involved shall endeavour as fas as possible to refund the amount of the transfer.

Where the amount has been recovered by the originator's institution, it shall be obliged to credit it to the originator. The institutions, including the originator's institution, are not obliged in this case to refund the charges and interest accruing, and can deduct the costs arising from the recovery if specified.

Article 9

Situation of force majeure

Without prejudice to the provisions of Directive 91/308/EEC, institutions participating in the execution of a cross-border credit transfer order shall be released from the obligations laid down in this Directive where they can adduce reasons of force majeure, namely abnormal and unforeseeable circumstances beyond the control of the person pleading force majeure, the consequences of which would have been unavoidable despite all efforts to the contrary, which are relevant to its provisions.

Article 10

Settlement of disputes

Member States shall ensure that there are adequate and effective complaints and redress procedures for the settlement of disputes between an originator and his institution or between a beneficiary and his institution, using existing procedures where appropriate.

SECTION IV

FINAL PROVISIONS

Article 11

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 August 1999 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main laws, regulations or administrative provisions which they adopt in the field governed by this Directive.

Article 12

Report to the European Parliament and the Council

No later than two years after the date of implementation of this Directive, the Commission shall submit a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.

This report shall, in the light of the situation existing in each Member State and of the technical developments that have taken place, deal particularly with the question of the time limit set in Article 6 (1).

Article 13

Entry into force

This Directive shall enter into force on the date of its publication in the Official Journal of the European Communities.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 January 1997.

For the European Parliament

The President

J. M. GIL-ROBLES

For the Council

The President

G. ZALM

(1) OJ No C 360, 17. 12. 1994, p. 13, and OJ No C 199, 3. 8. 1995, p. 16.

(2) OJ No C 236, 11. 9. 1995, p. 1.

(3) Opinion of the European Parliament of 19 May 1995 (OJ No C 151, 19. 6. 1995, p. 370), Council common position of 4 December 1995 (OJ No C 353, 30. 12. 1995, p. 52) and Decision of the European Parliament of 13 March 1996 (OJ No C 96, 1. 4. 1996, p. 74). Decision of the Council of 19 December 1996 and Decision of the European Parliament of 16 January 1997.

(4) OJ No C 251, 27. 9. 1995, p. 3.

(5) OJ No C 72, 15. 3. 1993, p. 158.

(6) OJ No L 67, 15. 3. 1990, p. 39.

(7) OJ No L 166, 28. 6. 1991, p. 77.

(8) OJ No L 158, 23. 6. 1990, p. 59.

(9) OJ No L 322, 17. 12. 1977, p. 30. Directive as last amended by Directive 95/26/EC (OJ No L 168, 18. 7. 1995, p. 7).

(10) OJ No L 332, 31. 12. 1993, p. 4.

JOINT STATEMENT - BY THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE COMMISSION

The European Parliament, the Council and the Commission note the determination of the Member States to implement the laws, regulations and administrative provisions required to comply with this Directive by 1 January 1999.

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DESPNPR	19/0/5//1999 ES01/;2/7/05/1999 LU01/;
BELPROV	NO REFERENCE AVAILABLE
DEUPROV	1. - Bundesgesetz mit dem ein Bundesgesetz über grenzüberschreitende Überweisungen und ein Bundesgesetz über die Wirksamkeit von Abrechnungen in Zahlungs-sowie Wertpapierliefer- und -abrechnungssystemen erlassen und mit dem die Konkursordnung, die Asgleichsordnung, das Börsegesetz 1989, das Wertpapieraufsichtsgesetz und das Bankwesengesetz geändert werden. 2. - Überweisunggesetz. BGBl, 26/07/1999, nr 39, s. 1642. SG(1999)A/14402 3. - Verordnung uber Kundeninformationspflichten BGBl, 06/08/1999, nr 41, s. 1730. SG(1999)A/14402 4. - Verordnung uber das Verfahren der Schlichtungsstellen für Überweisungen. BGBl, 29/10/1999, nr 48, s. 2068. SG(1999)A/15667
DNKPROV	1. - Lov om graenseoverskridende pengeoverforsler.
ESPPROV	1. - Ley 9/1999, de 12 de abril, por la que se regula el regimen juridico de las transferencias entre Estados miembros de la Union europea.
FRAPROV	1. - Règlement n° 99-09 relatif au montant global des cotisations au fonds de garantie des dépôts. 2. - Règlement n° 99-10 du Comité de la réglementation bancaire et financière. JORF: 27/07/1999, p. 11160. SG(1999)A/13852
GRCPROV	NO REFERENCE AVAILABLE
IRLPROV	NO REFERENCE AVAILABLE
ITAPROV	NO REFERENCE AVAILABLE
LUXPROV	1. - Loi du 29 avril 1999 portant transposition de la directive 97/5/CE concernant les virements transfrontaliers dans la loi modifiée du 5avril 1993 relative au secteur financier.
NLDPROV	1. - Wet van 12 november 1998, houdende bepalingen met betrekking tot de dienstverlening op het gebied van grensoverschrijdende over makingen.
PRTPROV	NO REFERENCE AVAILABLE
GBRPROV	1. - The Cross-Border Credit TRansfers REgulations 1999. 2. - The Cross-Border Credit TRansfers REgulations 1999. SI n° 231/1999

Implementing SIs
['*' indicates information added by Context]

- *The Cross-Border Credit Transfers Regulations 1999, SI 1999/1876

AUTPROV NO REFERENCE AVAILABLE

SVEPROV 1. - Lag om betalningöverföringar inom Europeiska ekonomiska samarbetsomradet.

FINPROV 1. - Lag om betalningöverföringar.

REGULATION (EC) No 2560/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 December 2001 on cross-border payments in euro

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95(1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Having regard to the opinion of the European Central Bank [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4],

Whereas:

(1) Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers [5] sought to improve cross-border credit transfer services and notably their efficiency. The aim was to enable in particular consumers and small and medium-sized enterprises to make credit transfers rapidly, reliably and cheaply from one part of the Community to another. Such credit transfers and cross-border payments in general are still extremely expensive compared to payments at national level. It emerges from the findings of a study undertaken by the Commission and released on 20 September 2001 that consumers are given insufficient or no information on the cost of transfers, and that the average cost of cross-border credit transfers has hardly changed since 1993 when a comparable study was carried out.

(2) The Commission's Communication to the European Parliament and the Council of 31 January 2000 on Retail Payments in the Internal Market, together with the European Parliament Resolutions of 26 October 2000 on the Commission Communication and of 4 July 2001 on means to assist economic actors in switching to the euro, and the reports of the European Central Bank of September 1999 and September 2000 on improving cross-border payment services have each underlined the urgent need for effective improvements in this field.

(3) The Commission's Communication to the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and the European Central Bank of 3 April 2001 on the preparations for the introduction of euro notes and coins announced that the Commission would consider using all the instruments at its disposal and would take all the steps necessary to ensure that the costs of cross-border transactions were brought more closely into line with the costs of domestic transactions, thus making the concept of the euro zone as a 'domestic payment area' tangible and transparently clear to citizens.

(4) Compared with the objective that was reaffirmed when euro book money was introduced, namely to achieve an, if not uniform, at least similar charge structure for the euro, there have been no significant results in terms of reducing the cost of cross-border payments compared to internal payments.

(5) The volume of cross-border payments is growing steadily as completion of the internal market takes place. In this area without borders, payments have been further facilitated by the introduction of the euro.

(6) The fact that the level of charges for cross-border payments continues to remain higher than the level of charges for internal payments is hampering cross-border trade and therefore constitutes an obstacle to the proper functioning of the internal market. This is also likely to affect confidence in the euro. Therefore, in order to facilitate the functioning of the internal market, it is necessary to ensure that charges for cross-border payments in euro are the same as charges for payments made in euro within a Member State, which will also bolster confidence in the euro.

(7) For cross-border electronic payment transactions in euro, the principle of equal charges should apply, taking account of the adjustment periods and the institutions' extra workload relating to the transition to the euro, as from 1 July 2002. In order to allow the implementation of the necessary infrastructure and conditions, a transitional period for cross-border credit transfers should apply until 1 July 2003.

(8) At present, it is not advisable to apply the principle of uniform charges for paper cheques as by nature they cannot be processed as efficiently as the other means of payment, in particular electronic payments. However, the principle of transparent charges should also apply to cheques.

[1] OJ C 270 E, 25.9.2001, p. 270.
[2] Opinion delivered on 10 December 2001 (not yet published in the Official Journal).
[3] OJ C 308, 1.11.2001, p. 17.
[4] Opinion of the European Parliament of 15 November 2001 (not yet published in the Official Journal), Council Common Position of 7 December 2001 (OJ C 363, 19.12.2001, p. 1) and Decision of the European Parliament of 13 December 2001.
[5] OJ L 43, 14.2.1997, p. 25.

(9) In order to allow a customer to assess the cost of a cross-border payment, it is necessary that he be informed of the charges applied and any modification to them. The same holds for the case that a currency other than the euro is involved in the cross-border euro-payment transaction.

(10) This Regulation does not affect the possibility for institutions to offer an all-inclusive fee for different payment services, provided that this does not discriminate between cross-border and national payments.

(11) It is also important to provide for improvements to facilitate the execution of cross-border payments by payment institutions. In this respect, standardisation should be promoted as regards, in particular, the use of the International Bank Account Number (IBAN) [1] and the Bank Identifier Code (BIC) [2] necessary for automated processing of cross-border credit transfers. The widest use of these codes is considered to be essential. In addition, other measures which entail extra costs should be removed in order to lower the charges to customers for cross-border payments.

(12) To lighten the burden on institutions that carry out cross-border payments, it is necessary to gradually remove the obligations concerning regular national declarations for the purposes of balance-of-payments statistics.

(13) In order to ensure that this Regulation is observed, the Member States should ensure that there are adequate and effective procedures for lodging complaints or appeals for settling any disputes between the originator and his institution or between the beneficiary and his institution, where applicable using existing procedures.

(14) It is desirable that not later than 1 July 2004 the Commission should present a report on the application of this Regulation.

(15) Provision should be made for a procedure whereby this Regulation can also be applied to cross-border payments made in a currency of another Member State where that Member State so decides,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

This Regulation lays down rules on cross-border payments in euro in order to ensure that charges for those payments are the same as those for payments in euro within a Member State. It shall apply to cross-border payments in euro up to EUR 50 000 within the Community.

This Regulation shall not apply to cross-border payments made between institutions for their own account.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) 'cross-border payments' means:

(i) 'cross-border credit transfers' being transactions carried out on the initiative of an originator via an institution or its branch in one Member State, with a view to making an amount of money available to a beneficiary at an institution or its branch in another Member State; the originator and the beneficiary may be one and the same person,

(ii) 'cross-border electronic payment transactions' being:

— the cross-border transfers of funds effected by means of an electronic payment instrument, other than those ordered and executed by institutions,

— cross-border cash withdrawals by means of an electronic payment instrument and the loading (and unloading) of an electronic money instrument at cash dispensing machines and automated teller machines at the premises of the issuer or an institution under contract to accept the payment instrument,

(iii) 'cross-border cheques' being those paper cheques defined in the Geneva Convention providing uniform laws for cheques of 19 March 1931 drawn on an institution located within the Community and used for cross-border transactions within the Community;

(b) 'electronic payment instrument' means a remote access payment instrument and electronic money instrument that enables its holder to effect one or more electronic payment transactions;

(c) 'remote access payment instrument' means an instrument enabling a holder to access funds held on his/her account at an institution, whereby payment may be made to a payee and normally requires a personal identification code and/or any other similar proof of identity. The remote access payment instrument includes in particular payment cards (whether credit, debit, deferred debit or charge cards) and cards having phone- and home-banking applications. This definition does not include cross-border credit transfers;

[1] ISO Standard No 13613.
[2] ISO Standard No 9362.

(d) 'electronic money instrument' means a reloadable payment instrument, whether a stored-value card or a computer memory, on which value units are stored electronically;

(e) 'institution' means any natural or legal person which, by way of business, executes cross-border payments;

(f) 'charges levied' means any charge levied by an institution and directly linked to a cross-border payment transaction in euro.

Article 3

Charges for cross-border electronic payment transactions and credit transfers

1. With effect from 1 July 2002, charges levied by an institution in respect of cross-border electronic payment transactions in euro up to EUR 12 500 shall be the same as the charges levied by the same institution in respect of corresponding payments in euro transacted within the Member State in which the establishment of that institution executing the cross-border electronic payment transaction is located.

2. With effect from 1 July 2003 at the latest, charges levied by an institution in respect of cross-border credit transfers in euro up to EUR 12 500 shall be the same as the charges levied by the same institution in respect of corresponding credit transfers in euro transacted within the Member State in which the establishment of that institution executing the cross-border transfer is located.

3. With effect from 1 January 2006 the amount EUR 12 500 shall be raised to EUR 50 000.

Article 4

Transparency of charges

1. An institution shall make available to its customers in a readily comprehensible form, in writing, including, where appropriate, in accordance with national rules, by electronic means, prior information on the charges levied for cross-border payments and for payments effected within the Member State in which its establishment is located.

Member States may stipulate that a statement warning consumers of the charges relating to the cross-border use of cheques must appear on cheque books.

2. Any modification of the charges shall be communicated in the same way as indicated in paragraph 1 in advance of the date of application.

3. Where institutions levy charges for exchanging currencies into and from euro, institutions shall provide their customers with:

(a) prior information on all the exchange charges which they propose to apply; and

(b) specific information on the various exchange charges which have been applied.

Article 5

Measures for facilitating cross-border transfers

1. An institution shall, where applicable, communicate to each customer upon request his International Bank Account Number (IBAN) and that institution's Bank Identifier Code (BIC).

2. The customer shall, upon request, communicate to the institution carrying out the transfer the IBAN of the beneficiary and the BIC of the beneficiary's institution. If the customer does not communicate the above information, additional charges may be levied on him by the institution. In this case, the institution must provide customers with information on the additional charges in accordance with Article 4.

3. With effect from 1 July 2003, institutions shall indicate on statements of account of each customer, or in an annex thereto, his IBAN and the institution's BIC.

4. For all cross-border invoicing of goods and services in the Community, a supplier who accepts payment by transfer shall communicate his IBAN and the BIC of his institution to his customers.

Article 6

Obligations of the Member States

1. Member States shall remove with effect from 1 July 2002 at the latest any national reporting obligations for cross-border payments up to EUR 12 500 for balance-of-payment statistics.

2. Member States shall remove with effect from 1 July 2002 at the latest any national obligations as to the minimum information to be provided concerning the beneficiary which prevent automation of payment execution.

Article 7

Compliance with this Regulation

Compliance with this Regulation shall be guaranteed by effective, proportionate and deterrent sanctions.

Article 8

Review clause

Not later than 1 July 2004, the Commission shall submit to the European Parliament and to the Council a report on the application of this Regulation, in particular on:

— changes in cross-border payment system infrastructures,

— the advisability of improving consumer services by strengthening the conditions of competition in the provision of cross-border payment services,

— the impact of the application of this Regulation on charges levied for payments made within a Member State,
— the advisability of increasing the amount provided for in Article 6(1) to EUR 50 000 as from 1 January 2006, taking into account any consequences for undertakings.

This report shall be accompanied, where appropriate, by proposals for amendments.

Article 9

Entry into force

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall also apply to cross-border payments made in the currency of another Member State when the latter notifies the Commission of its decision to extend the Regulation's application to its currency. The notification shall be published in the Official Journal by the Commission. The extension shall take effect 14 days after the said publication.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19 December 2001.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	A. NEYTS-UYTTEBROECK

DIRECTIVE 2002/65/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 23 September 2002

concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2), Article 55 and Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) It is important, in the context of achieving the aims of the single market, to adopt measures designed to consolidate progressively this market and those measures must contribute to attaining a high level of consumer protection, in accordance with Articles 95 and 153 of the Treaty.

(2) Both for consumers and suppliers of financial services, the distance marketing of financial services will constitute one of the main tangible results of the completion of the internal market.

(3) Within the framework of the internal market, it is in the interest of consumers to have access without discrimination to the widest possible range of financial services available in the Community so that they can choose those that are best suited to their needs. In order to safeguard freedom of choice, which is an essential consumer right, a high degree of consumer protection is required in order to enhance consumer confidence in distance selling.

(4) It is essential to the smooth operation of the internal market for consumers to be able to negotiate and conclude contracts with a supplier established in other Member States, regardless of whether the supplier is also established in the Member State in which the consumer resides.

(5) Because of their intangible nature, financial services are particularly suited to distance selling and the establishment of a legal framework governing the distance marketing of financial services should increase consumer confidence in the use of new techniques for the distance marketing of financial services, such as electronic commerce.

(6) This Directive should be applied in conformity with the Treaty and with secondary law, including Directive 2000/31/EC [4] on electronic commerce, the latter being applicable solely to the transactions which it covers.

(7) This Directive aims to achieve the objectives set forth above without prejudice to Community or national law governing freedom to provide services or, where applicable, host Member State control and/or authorisation or supervision systems in the Member States where this is compatible with Community legislation.

(8) Moreover, this Directive, and in particular its provisions relating to information about any contractual clause on law applicable to the contract and/or on the competent court does not affect the applicability to the distance marketing of consumer financial services of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [5] or of the 1980 Rome Convention on the law applicable to contractual obligations.

(9) The achievement of the objectives of the Financial Services Action Plan requires a higher level of consumer protection in certain areas. This implies a greater convergence, in particular, in non harmonised collective investment funds, rules of conduct applicable to investment services and consumer credits. Pending the achievement of the above convergence, a high level of consumer protection should be maintained.

(10) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [6], lays down the main rules applicable to distance contracts for goods or services concluded between a supplier and a consumer. However, that Directive does not cover financial services.

[1] OJ C 385, 11.12.1998, p. 10 and OJ C 177 E, 27.6.2000, p. 21.
[2] OJ C 169, 16.6.1999, p. 43.
[3] Opinion of the European Parliament of 5 May 1999 (OJ C 279, 1.10.1999, p. 207), Council Common Position of 19 December 2001 (OJ C 58 E, 5.3.2002, p. 32) and Decision of the European Parliament of 14 May 2002 (not yet published in the Official Journal). Council Decision of 26 June 2002 (not yet published in the Official Journal).
[4] OJ L 178, 17.7.2000, p. 1.
[5] OJ L 12, 16.1.2001, p. 1.
[6] OJ L 144, 4.6.1997, p. 19.

(11) In the context of the analysis conducted by the Commission with a view to ascertaining the need for specific measures in the field of financial services, the Commission invited all the interested parties to transmit their comments, notably in connection with the preparation of its Green Paper entitled 'Financial Services — Meeting Consumers' Expectations'. The consultations in this context showed that there is a need to strengthen consumer protection in this area. The Commission therefore decided to present a specific proposal concerning the distance marketing of financial services.

(12) The adoption by the Member States of conflicting or different consumer protection rules governing the distance marketing of consumer financial services could impede the functioning of the internal market and competition between firms in the market. It is therefore necessary to enact common rules at Community level in this area, consistent with no reduction in overall consumer protection in the Member States.

(13) A high level of consumer protection should be guaranteed by this Directive, with a view to ensuring the free movement of financial services. Member States should not be able to adopt provisions other than those laid down in this Directive in the fields it harmonises, unless otherwise specifically indicated in it.

(14) This Directive covers all financial services liable to be provided at a distance. However, certain financial services are governed by specific provisions of Community legislation which continue to apply to those financial services. However, principles governing the distance marketing of such services should be laid down.

(15) Contracts negotiated at a distance involve the use of means of distance communication which are used as part of a distance sales or service-provision scheme not involving the simultaneous presence of the supplier and the consumer. The constant development of those means of communication requires principles to be defined that are valid even for those means which are not yet in widespread use. Therefore, distance contracts are those the offer, negotiation and conclusion of which are carried out at a distance.

(16) A single contract involving successive operations or separate operations of the same nature performed over time may be subject to different legal treatment in the different Member States, but it is important that this Directive be applied in the same way in all the Member States. To that end, it is appropriate that this Directive should be considered to apply to the first of a series of successive operations or separate operations of the same nature performed over time which may be considered as forming a whole, irrespective of whether that operation or series of operations is the subject of a single contract or several successive contracts.

(17) An 'initial service agreement' may be considered to be for example the opening of a bank account, acquiring a credit card, concluding a portfolio management contract, and 'operations' may be considered to be for example the deposit or withdrawal of funds to or from the bank account, payment by credit card, transactions made within the framework of a portfolio management contract. Adding new elements to an initial service agreement, such as a possibility to use an electronic payment instrument together with one's existing bank account, does not constitute an 'operation' but an additional contract to which this Directive applies. The subscription to new units of the same collective investment fund is considered to be one of 'successive operations of the same nature'.

(18) By covering a service-provision scheme organised by the financial services provider, this Directive aims to exclude from its scope services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts.

(19) The supplier is the person providing services at a distance. This Directive should however also apply when one of the marketing stages involves an intermediary. Having regard to the nature and degree of that involvement, the pertinent provisions of this Directive should apply to such an intermediary, irrespective of his or her legal status.

(20) Durable mediums include in particular floppy discs, CD-ROMs, DVDs and the hard drive of the consumer's computer on which the electronic mail is stored, but they do not include Internet websites unless they fulfil the criteria contained in the definition of a durable medium.

(21) The use of means of distance communications should not lead to an unwarranted restriction on the information provided to the client. In the interests of transparency this Directive lays down the requirements needed to ensure that an appropriate level of information is provided to the consumer both before and after conclusion of the contract. The consumer should receive, before conclusion of the contract, the prior information needed so as to properly appraise the financial service offered to him and hence make a well-informed choice. The supplier should specify how long his offer applies as it stands.

(22) Information items listed in this Directive cover information of a general nature applicable to all kinds of financial services. Other information requirements concerning a given financial service, such as the coverage of an insurance policy, are not solely specified in this Directive. This kind of information should be provided in accordance, where applicable, with relevant Community legislation or national legislation in conformity with Community law.

(23) With a view to optimum protection of the consumer, it is important that the consumer is adequately informed of the provisions of this Directive and of any codes of conduct existing in this area and that he has a right of withdrawal.

(24) When the right of withdrawal does not apply because the consumer has expressly requested the performance of a contract, the supplier should inform the consumer of this fact.

(25) Consumers should be protected against unsolicited services. Consumers should be exempt from any obligation in the case of unsolicited services, the absence of a reply not being construed as signifying consent on their part. However, this rule should be without prejudice to the tacit renewal of contracts validly concluded between the parties whenever the law of the Member States permits such tacit renewal.

(26) Member States should take appropriate measures to protect effectively consumers who do not wish to be contacted through certain means of communication or at certain times. This Directive should be without prejudice to the particular safeguards available to consumers under Community legislation concerning the protection of personal data and privacy.

(27) With a view to protecting consumers, there is a need for suitable and effective complaint and redress procedures in the Member States with a view to settling potential disputes between suppliers and consumers, by using, where appropriate, existing procedures.

(28) Member States should encourage public or private bodies established with a view to settling disputes out of court to cooperate in resolving cross-border disputes. Such cooperation could in particular entail allowing consumers to submit to extra-judicial bodies in the Member State of their residence complaints concerning suppliers established in other Member States. The establishment of FIN-NET offers increased assistance to consumers when using cross-border services.

(29) This Directive is without prejudice to extension by Member States, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs.

(30) This Directive should also cover cases where the national legislation includes the concept of a consumer making a binding contractual statement.

(31) The provisions in this Directive on the supplier's choice of language should be without prejudice to provisions of national legislation, adopted in conformity with Community law governing the choice of language.

(32) The Community and the Member States have entered into commitments in the context of the General Agreement on Trade in Services (GATS) concerning the possibility for consumers to purchase banking and investment services abroad. The GATS entitles Member States to adopt measures for prudential reasons, including measures to protect investors, depositors, policy-holders and persons to whom a financial service is owed by the supplier of the financial service. Such measures should not impose restrictions going beyond what is required to ensure the protection of consumers.

(33) In view of the adoption of this Directive, the scope of Directive 97/7/EC and Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1] and the scope of the cancellation period in Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services [2] should be adapted.

(34) Since the objectives of this Directive, namely the establishment of common rules on the distance marketing of consumer financial services cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Object and scope

1. The object of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning the distance marketing of consumer financial services.

2. In the case of contracts for financial services comprising an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time, the provisions of this Directive shall apply only to the initial agreement.

[1] OJ L 166, 11.6.1998, p. 51. Directive as last amended by Directive 2000/31/EC (OJ L 178, 17.7.2001, p. 1).
[2] OJ L 330, 29.11.1990, p. 50. Directive as last amended by Directive 92/96/EEC (OJ L 360, 9.12.1992, p. 1).

In case there is no initial service agreement but the successive operations or the separate operations of the same nature performed over time are performed between the same contractual parties, Articles 3 and 4 apply only when the first operation is performed. Where, however, no operation of the same nature is performed for more than one year, the next operation will be deemed to be the first in a new series of operations and, accordingly, Articles 3 and 4 shall apply.

Article 2

Definitions

For the purposes of this Directive:

(a) 'distance contract' means any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

(b) 'financial service' means any service of a banking, credit, insurance, personal pension, investment or payment nature;

(c) 'supplier' means any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts;

(d) 'consumer' means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;

(e) 'means of distance communication' refers to any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of a service between those parties;

(f) 'durable medium' means any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(g) 'operator or supplier of a means of distance communication' means any public or private, natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers.

Article 3

Information to the consumer prior to the conclusion of the distance contract

1. In good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning:

(1) the supplier

(a) the identity and the main business of the supplier, the geographical address at which the supplier is established and any other geographical address relevant for the customer's relations with the supplier;

(b) the identity of the representative of the supplier established in the consumer's Member State of residence and the geographical address relevant for the customer's relations with the representative, if such a representative exists;

(c) when the consumer's dealings are with any professional other than the supplier, the identity of this professional, the capacity in which he is acting vis-à-vis the consumer, and the geographical address relevant for the customer's relations with this professional;

(d) where the supplier is registered in a trade or similar public register, the trade register in which the supplier is entered and his registration number or an equivalent means of identification in that register;

(e) where the supplier's activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(2) the financial service

(a) a description of the main characteristics of the financial service;

(b) the total price to be paid by the consumer to the supplier for the financial service, including all related fees, charges and expenses, and all taxes paid via the supplier or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it;

(c) where relevant notice indicating that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed or whose price depends on fluctuations in the financial markets outside the supplier's control and that historical performances are no indicators for future performances;

(d) notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him;

(e) any limitations of the period for which the information provided is valid;

(f) the arrangements for payment and for performance;

(g) any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged;

(3) the distance contract

(a) the existence or absence of a right of withdrawal in accordance with Article 6 and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1), as well as the consequences of non-exercise of that right;

(b) the minimum duration of the distance contract in the case of financial services to be performed permanently or recurrently;

(c) information on any rights the parties may have to terminate the contract early or unilaterally by virtue of the terms of the distance contract, including any penalties imposed by the contract in such cases;

(d) practical instructions for exercising the right of withdrawal indicating, *inter alia*, the address to which the notification of a withdrawal should be sent;

(e) the Member State or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract;

(f) any contractual clause on law applicable to the distance contract and/or on competent court;

(g) in which language, or languages, the contractual terms and conditions, and the prior information referred to in this Article are supplied, and furthermore in which language, or languages, the supplier, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract;

(4) redress

(a) whether or not there is an out-of-court complaint and redress mechanism for the consumer that is party to the distance contract and, if so, the methods for having access to it;

(b) the existence of guarantee funds or other compensation arrangements, not covered by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes [1] and Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor compensation schemes [2].

2. The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.

3. In the case of voice telephony communications

(a) the identity of the supplier and the commercial purpose of the call initiated by the supplier shall be made explicitly clear at the beginning of any conversation with the consumer;

(b) subject to the explicit consent of the consumer only the following information needs to be given:

— the identity of the person in contact with the consumer and his link with the supplier,

— a description of the main characteristics of the financial service,

— the total price to be paid by the consumer to the supplier for the financial service including all taxes paid via the supplier or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it,

— notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him,

— the existence or absence of a right of withdrawal in accordance with Article 6 and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1).

The supplier shall inform the consumer that other information is available on request and of what nature this information is. In any case the supplier shall provide the full information when he fulfils his obligations under Article 5.

4. Information on contractual obligations, to be communicated to the consumer during the pre-contractual phase, shall be in conformity with the contractual obligations which would result from the law presumed to be applicable to the distance contract if the latter were concluded.

Article 4

Additional information requirements

1. Where there are provisions in the Community legislation governing financial services which contain prior information requirements additional to those listed in Article 3(1), these requirements shall continue to apply.

2. Pending further harmonisation, Member States may maintain or introduce more stringent provisions on prior information requirements when the provisions are in conformity with Community law.

3. Member States shall communicate to the Commission national provisions on prior information requirements under paragraphs 1 and 2 of this Article when these requirements are additional to those listed in Article 3(1). The Commission shall take account of the communicated national provisions when drawing up the report referred to in Article 20(2).

4. The Commission shall, with a view to creating a high level of transparency by all appropriate means, ensure that information, on the national provisions communicated to it, is made available to consumers and suppliers.

Article 5

Communication of the contractual terms and conditions and of the prior information

1. The supplier shall communicate to the consumer all the contractual terms and conditions and the information referred to in Article 3(1) and Article 4 on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer.

[1] OJ L 135, 31.5.1994, p. 5.
[2] OJ L 84, 26.3.1997, p. 22.

2. The supplier shall fulfil his obligation under paragraph 1 immediately after the conclusion of the contract, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the contractual terms and conditions and the information in conformity with paragraph 1.

3. At any time during the contractual relationship the consumer is entitled, at his request, to receive the contractual terms and conditions on paper. In addition, the consumer is entitled to change the means of distance communication used, unless this is incompatible with the contract concluded or the nature of the financial service provided.

Article 6

Right of withdrawal

1. The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason. However, this period shall be extended to 30 calendar days in distance contracts relating to life insurance covered by Directive 90/619/EEC and personal pension operations.

The period for withdrawal shall begin:

— either from the day of the conclusion of the distance contract, except in respect of the said life assurance, where the time limit will begin from the time when the consumer is informed that the distance contract has been concluded, or

— from the day on which the consumer receives the contractual terms and conditions and the information in accordance with Article 5(1) or (2), if that is later than the date referred to in the first indent.

Member States, in addition to the right of withdrawal, may provide that the enforceability of contracts relating to investment services is suspended for the same period provided for in this paragraph.

2. The right of withdrawal shall not apply to:

(a) financial services whose price depends on fluctuations in the financial market outside the suppliers control, which may occur during the withdrawal period, such as services related to:

— foreign exchange,

— money market instruments,

— transferable securities,

— units in collective investment undertakings,

— financial-futures contracts, including equivalent cash-settled instruments,

— forward interest-rate agreements (FRAs),

— interest-rate, currency and equity swaps,

— options to acquire or dispose of any instruments referred to in this point including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates;

(b) travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration;

(c) contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.

3. Member States may provide that the right of withdrawal shall not apply to:

(a) any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building, or for the purpose of renovating or improving a building, or

(b) any credit secured either by mortgage on immovable property or by a right related to immovable property, or

(c) declarations by consumers using the services of an official, provided that the official confirms that the consumer is guaranteed the rights under Article 5(1).

This paragraph shall be without prejudice to the right to a reflection time to the benefit of the consumers that are resident in those Member States where it exists, at the time of the adoption of this Directive.

4. Member States making use of the possibility set out in paragraph 3 shall communicate it to the Commission.

5. The Commission shall make available the information communicated by Member States to the European Parliament and the Council and shall ensure that it is also available to consumers and suppliers who request it.

6. If the consumer exercises his right of withdrawal he shall, before the expiry of the relevant deadline, notify this following the practical instructions given to him in accordance with Article 3(1)(3)(d) by means which can be proved in accordance with national law. The deadline shall be deemed to have been observed if the notification, if it is on paper or on another durable medium available and accessible to the recipient, is dispatched before the deadline expires.

7. This Article does not apply to credit agreements cancelled under the conditions of Article 6(4) of Directive 97/7/EC or Article 7 of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis ([1]).

([1]) OJ L 280, 29.10.1994, p. 83.

If to a distance contract of a given financial service another distance contract has been attached concerning services provided by the supplier or by a third party on the basis of an agreement between the third party and the supplier, this additional distance contract shall be cancelled, without any penalty, if the consumer exercises his right of withdrawal as provided for in Article 6(1).

8. The provisions of this Article are without prejudice to the Member States' laws and regulations governing the cancellation or termination or non-enforceability of a distance contract or the right of a consumer to fulfil his contractual obligations before the time fixed in the distance contract. This applies irrespective of the conditions for and the legal effects of the winding-up of the contract.

Article 7

Payment of the service provided before withdrawal

1. When the consumer exercises his right of withdrawal under Article 6(1) he may only be required to pay, without any undue delay, for the service actually provided by the supplier in accordance with the contract. The performance of the contract may only begin after the consumer has given his approval. The amount payable shall not:

— exceed an amount which is in proportion to the extent of the service already provided in comparison with the full coverage of the contract,

— in any case be such that it could be construed as a penalty.

2. Member States may provide that the consumer cannot be required to pay any amount when withdrawing from an insurance contract.

3. The supplier may not require the consumer to pay any amount on the basis of paragraph 1 unless he can prove that the consumer was duly informed about the amount payable, in conformity with Article 3(1)(3)(a). However, in no case may he require such payment if he has commenced the performance of the contract before the expiry of the withdrawal period provided for in Article 6(1) without the consumer's prior request.

4. The supplier shall, without any undue delay and no later than within 30 calendar days, return to the consumer any sums he has received from him in accordance with the distance contract, except for the amount referred to in paragraph 1. This period shall begin from the day on which the supplier receives the notification of withdrawal.

5. The consumer shall return to the supplier any sums and/or property he has received from the supplier without any undue delay and no later than within 30 calendar days. This period shall begin from the day on which the consumer dispatches the notification of withdrawal.

Article 8

Payment by card

Member States shall ensure that appropriate measures exist to allow a consumer:

— to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts,

— in the event of such fraudulent use, to be re-credited with the sum paid or have them returned.

Article 9

Unsolicited services

Without prejudice to Member States provisions on the tacit renewal of distance contracts, when such rules permit tacit renewal, Member States shall take the necessary measures to:

— prohibit the supply of financial services to a consumer without a prior request on his part, when this supply includes a request for immediate or deferred payment,

— exempt the consumer from any obligation in the event of unsolicited supplies, the absence of a reply not constituting consent.

Article 10

Unsolicited communications

1. The use by a supplier of the following distance communication techniques shall require the consumer's prior consent:

(a) automated calling systems without human intervention (automatic calling machines);

(b) fax machines.

2. Member States shall ensure that means of distance communication other than those referred to in paragraph 1, when they allow individual communications:

(a) shall not be authorised unless the consent of the consumers concerned has been obtained, or

(b) may only be used if the consumer has not expressed his manifest objection.

3. The measures referred to in paragraphs 1 and 2 shall not entail costs for consumers.

Article 11

Sanctions

Member States shall provide for appropriate sanctions in the event of the supplier's failure to comply with national provisions adopted pursuant to this Directive.

They may provide for this purpose in particular that the consumer may cancel the contract at any time, free of charge and without penalty.

These sanctions must be effective, proportional and dissuasive.

Article 12

Imperative nature of this Directive's provisions

1. Consumers may not waive the rights conferred on them by this Directive.

2. Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract, if this contract has a close link with the territory of one or more Member States.

Article 13

Judicial and administrative redress

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers.

2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action in accordance with national law before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:

(a) public bodies or their representatives;

(b) consumer organisations having a legitimate interest in protecting consumers;

(c) professional organisations having a legitimate interest in acting.

3. Member States shall take the measures necessary to ensure that operators and suppliers of means of distance communication put an end to practices that have been declared to be contrary to this Directive, on the basis of a judicial decision, an administrative decision or a decision issued by a supervisory authority notified to them, where those operators or suppliers are in a position to do so.

Article 14

Out-of-court redress

1. Member States shall promote the setting up or development of adequate and effective out-of-court complaints and redress procedures for the settlement of consumer disputes concerning financial services provided at distance.

2. Member States shall, in particular, encourage the bodies responsible for out-of-court settlement of disputes to cooperate in the resolution of cross-border disputes concerning financial services provided at distance.

Article 15

Burden of proof

Without prejudice to Article 7(3), Member States may stipulate that the burden of proof in respect of the supplier's obligations to inform the consumer and the consumer's consent to conclusion of the contract and, where appropriate, its performance, can be placed on the supplier.

Any contractual term or condition providing that the burden of proof of the respect by the supplier of all or part of the obligations incumbent on him pursuant to this Directive should lie with the consumer shall be an unfair term within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1].

Article 16

Transitional measures

Member States may impose national rules which are in conformity with this Directive on suppliers established in a Member State which has not yet transposed this Directive and whose law has no obligations corresponding to those provided for in this Directive.

Article 17

Directive 90/619/EC

In Article 15(1) of Directive 90/619/EEC the first subparagraph shall be replaced by the following:

'1. Each Member State shall prescribe that a policyholder who concludes an individual life-assurance contract shall have a period of 30 calendar days, from the time when he was informed that the contract had been concluded, within which to cancel the contract.'

Article 18

Directive 97/7/EC

Directive 97/7/EC is hereby amended as follows:

1. the first indent of Article 3(1) shall be replaced by the following:

'— relating to any financial service to which Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (*) applies,

(*) OJ L 271, 9.10.2002, p. 16.';

2. Annex II shall be deleted.

[1] OJ L 95, 21.4.1993, p. 29.

Article 19

Directive 98/27/EC

The following point shall be added to the Annex of Directive 98/27/EC:

'11. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (*).

(*) OJ L 271, 9.10.2002, p. 16.'

Article 20

Review

1. Following the implementation of this Directive, the Commission shall examine the functioning of the internal market in financial services in respect of the marketing of those services. It should seek to analyse and detail the difficulties that are, or might be faced by both consumers and suppliers, in particular arising from differences between national provisions regarding information and right of withdrawal.

2. Not later than 9 April 2006 the Commission shall report to the European Parliament and the Council on the problems facing both consumers and suppliers seeking to buy and sell financial services, and shall submit, where appropriate, proposals to amend and/or further harmonise the information and right of withdrawal provisions in Community legislation concerning financial services and/or those covered in Article 3.

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 9 October 2004. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 22

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 23

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 23 September 2002.

For the European Parliament	*For the Council*
The President	*The President*
P. COX	M. FISCHER BOEL

Special Eurobarometer

European Commission

EUROBAROMETER

Public Opinion in Europe: Financial Services Executive Summary

Fieldwork November-December 2003

Publication: June 2004

Special Eurobarometer 202 / Wave 60.2 - *European Opinion Research Group EEIG*

This survey was requested by the Health and Consumer Protection Directorate-General and coordinated by Directorate General Press and Communication

This executive summary is based on a survey of a sample of views of EU citizens on financial services.

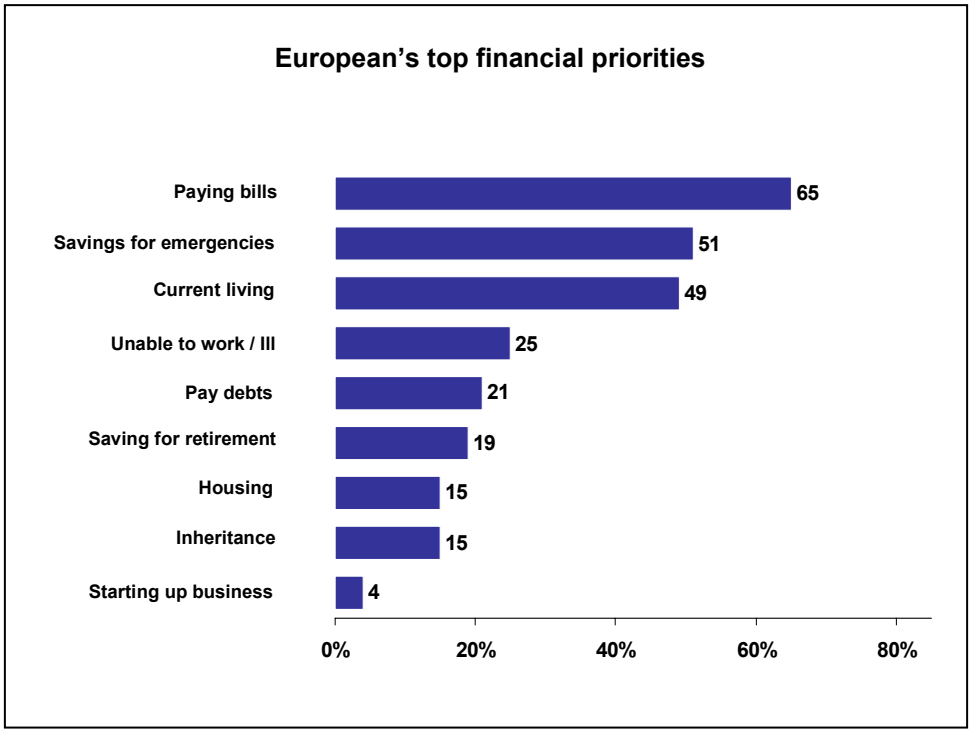
Views are assessed across the European Union and results are presented according to results at EU level, country level and with socio-demographic analysis, which attempts to highlight both the similarities and differences by such varied factors as gender, age, education, occupation, etc.

The main data making up this report was gathered between 02 November 2003 and 12 December 2003 and are part of wave 60.2 of the Standard Eurobarometer.

In the detailed analysis of the data in this survey, it became apparent that fundamental variations in attitude were most apparent between different countries, rather than as a result of a particular socio-demographic characteristic. Accordingly, this Executive Summary focuses on country variations and a detailed socio-demographic analysis is contained in Report A and Report B.

Europeans' top financial priorities

65% of the EU15 respondents ranked "paying the bills" as their top financial priority. 51% of those polled considered "having some savings for emergencies" to be a top priority and 49% cited "living as well as I can on my current income" as one of their top financial priorities.



The top 3 priorities were the same from one country to another. The proportion of respondents citing a given financial priority ranged significantly between countries. While 63% of Dutch and 61% of Italian respondents cited "having some savings for emergencies" as a top priority, only 33% of Danes and 30% of Finns felt the same way. In Finland 61% of the respondents saw "living as well as I can on my current income" as one of their top three financial priorities. Together with the Irish (58%), Dutch (58%) and British figures (57%), the Finnish figure was in contrast to a figure of 36% in Italy.

Europeans' views regarding their finances and financial services

Respondents were asked about their feelings when thinking about their finances and financial services.

Across the EU15, the most common response (23%) was that thinking about finances and financial services was "complicated". The second most common feeling (20%) was "intimidating". The next most chosen option was that thinking about their finances and financial services was "depressing". 19% of respondents across the EU15 felt this way.

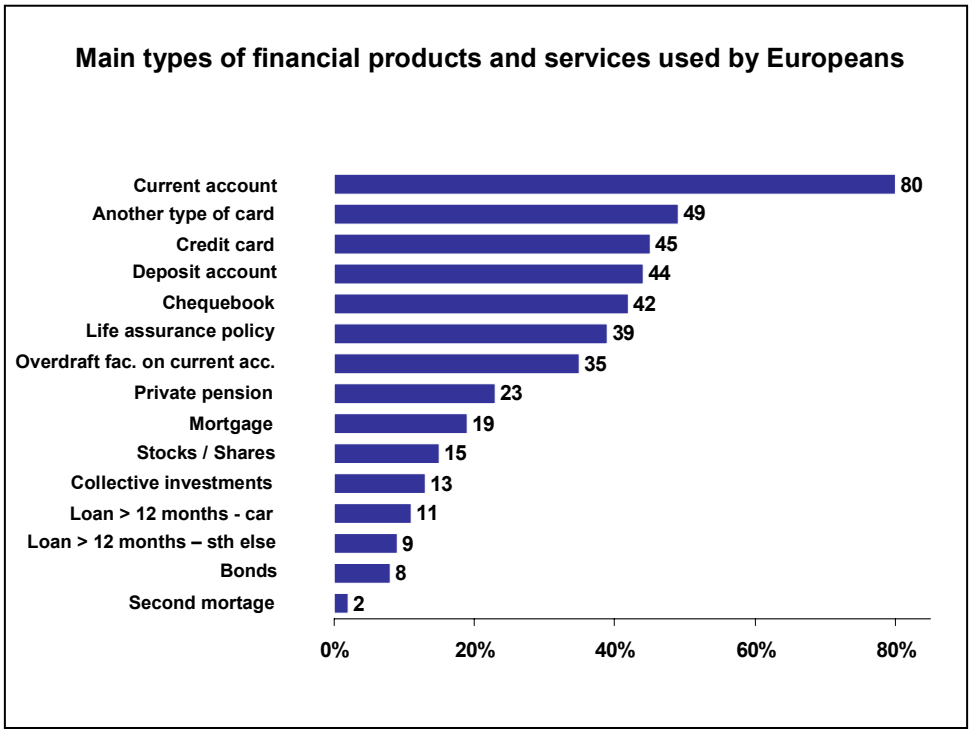
There are however some important variations across countries. The figures for "complicated" ranged between 12% (Luxembourg) and 45% (Portugal), for "intimidating" between 3% (Denmark) and 40% (Greece) and for "depressing" between 7% (Denmark) and 32% (UK).

Main types of financial products and services used by Europeans

80% of EU15 respondents surveyed had a current account with a payment card or chequebook. The picture across the EU15 was patchy: high figures were recorded for the Netherlands (98%), Belgium (93%), France (93%) and Germany (91%). In contrast to these was the figure for Greece. Only 20% of the Greek had a current account with a payment card or a chequebook.

Almost half (45%) of the Europeans had a credit card. Ownership of a credit card was extremely high in France (75%) and Luxembourg (69%) and much lower than the EU15 average in Germany (26%), Portugal (21%) and Greece (20%).

Almost one out of two (44%) respondents said they had a deposit account which pays interest but has no payment card or chequebook. 75% of the respondents in Belgium and Austria reported having one, while Italy (11%) and Portugal (19%) were at the low end of the scale with scores below 20%.



In general the ownership of different types of financial products and services was very low in Greece and Portugal.

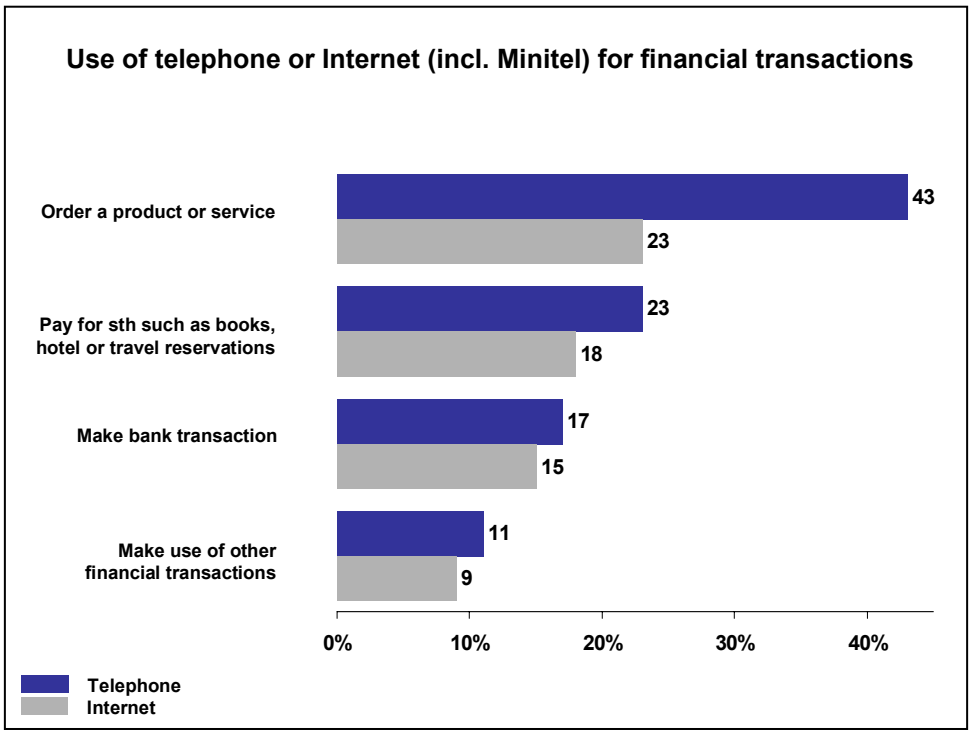
Use of telephone or Internet for financial transactions

In general, more EU15 respondents reported they had used the telephone than the Internet to make a financial transaction.

Ordering a product or service is the most common financial transaction for which the telephone or Internet is used. 43% of respondents said they had used the telephone to order a product or service and 23% said they had used the Internet for this.

While 43% of the respondents said they had used the telephone to order a product or service, only 23% reported they had paid via the telephone. This gap is smaller for financial transactions via the Internet: 23% said they had ordered via the Internet and 18% said they had paid via the Internet.

Almost half of the respondents (42%) who replied they had never used the telephone to pay for something explained that they just were not interested in paying that way and 20% thought it was not safe.

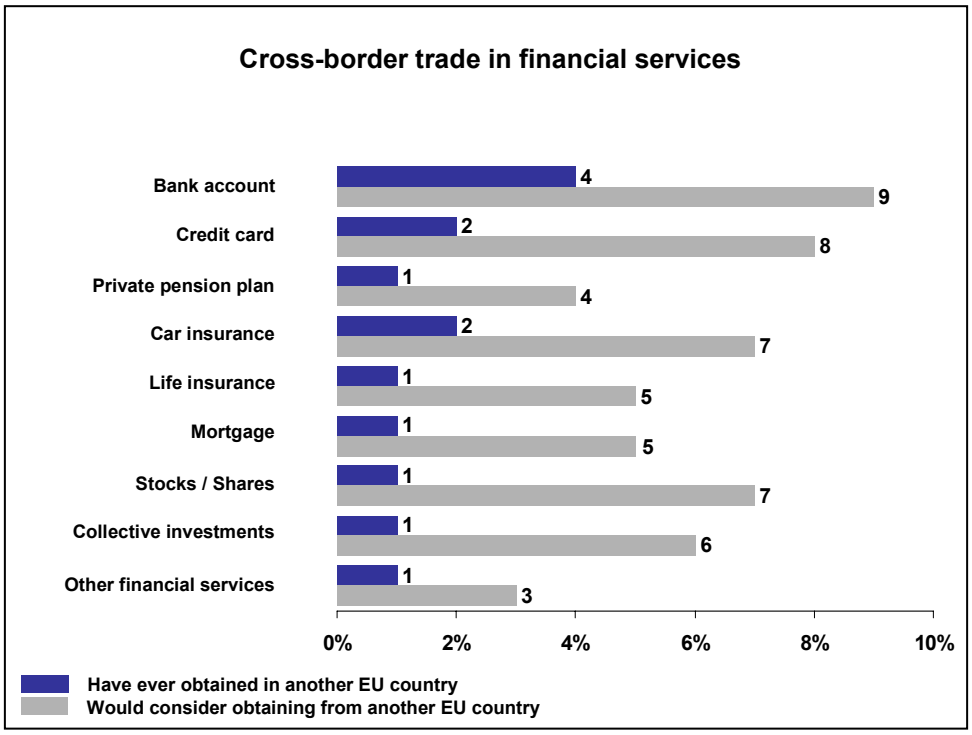


The use of telephone or Internet for financial transactions is high above the EU15 average in the Nordic countries (DK, S, FIN, UK, NL), while Portugal and Greece are at the bottom of the scale.

Cross-border trade in financial services and obstacles to trade

The levels of cross-border trade in financial services were, for the most part, very low in Europe ranging from 4% (bank account) to 1% (most other financial services). Luxembourg respondents are in general above the EU15 average.

The extent to which respondents would consider obtaining financial services from another EU country within the next 5 years was also low, never surpassing a level of 10%.

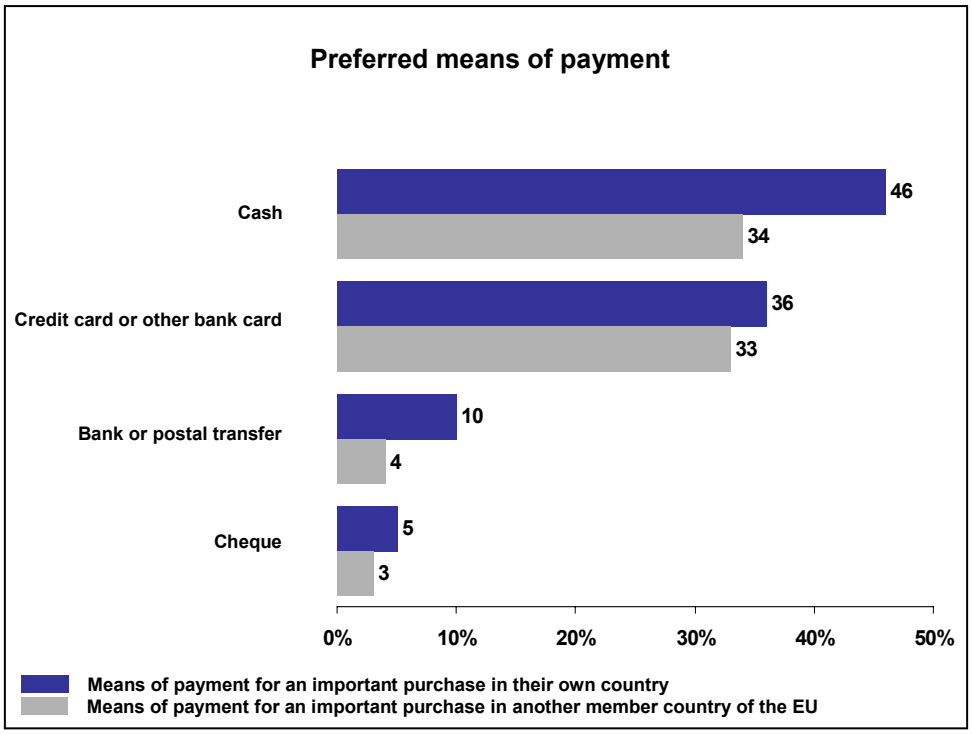


Overall, EU15 respondents reported “lack of information” as main obstacle (24%) to cross border trade in financial services. Next to this, more than one out of five mentioned “too risky” (23%) and “language problems” (22%) as an obstacle.

28% of the EU15 respondents did however not experience any obstacles preventing them from using financial services elsewhere in the European Union.

Preferred means of payment

European respondents preferred to use cash for payments in their own country (46%) and both cash (34%) and credit card or another bank card (33%) in another member country of the European Union. Cheques were the least preferred means of payment.



The EU15 average hid enormous disparities between countries. While 94% of the Greeks preferred cash to pay in their own country, only 3% said they made use of a credit card. In France an opposite picture was discerned: only 20% of the French preferred to pay with cash in their own country, but 37% preferred a cheque.

Most respondents reported “because it is easy” as the most important reason for the preferred means of payment in their own country (78%) and in another EU country (69%). Besides, they mentioned most “safety and security” reasons (14% in own country – 18% in another EU country) and “to avoid the risk of loss or theft” (14% in own country – 18% in another EU country).

It is also worth mentioning that more than one out of five respondents overall and 41% in Greece, 34% in Portugal, 25% in Spain, 25% in France, 24% in Ireland and 22% in UK had never bought anything in another member country.

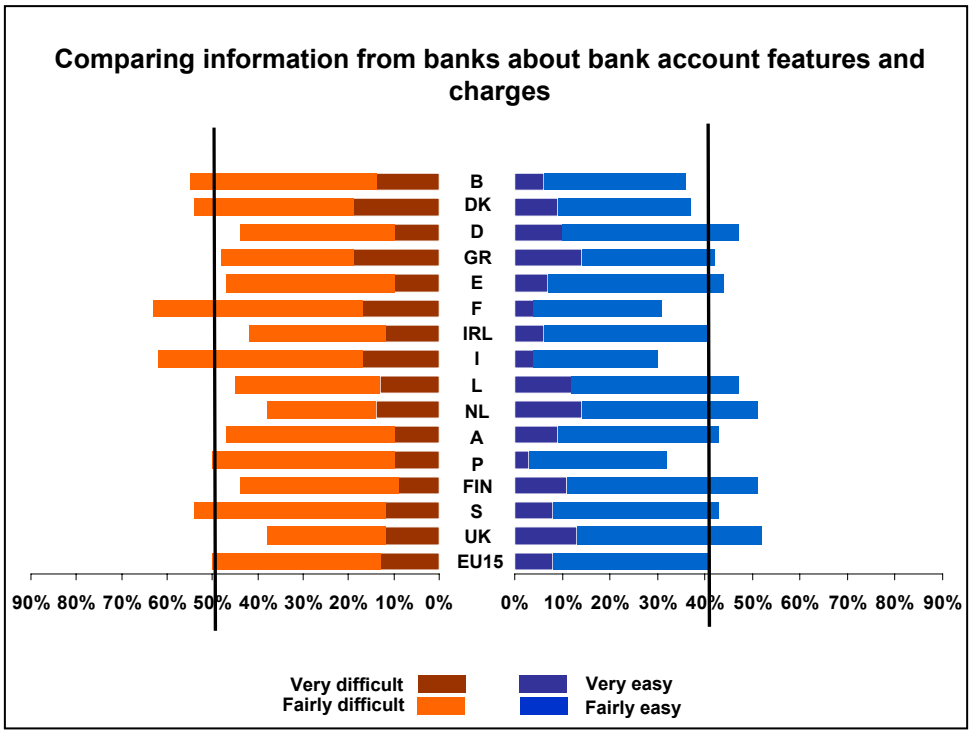
Electronic purse

While 13% of the EU15 respondents reported having used an electronic purse, 20% said that they would consider using it within the next few years. 65% reported that they would not and 15% did not know.

The use of an electronic purse was the most common in Belgium (42%), the Netherlands (41%) and Luxembourg (38%).

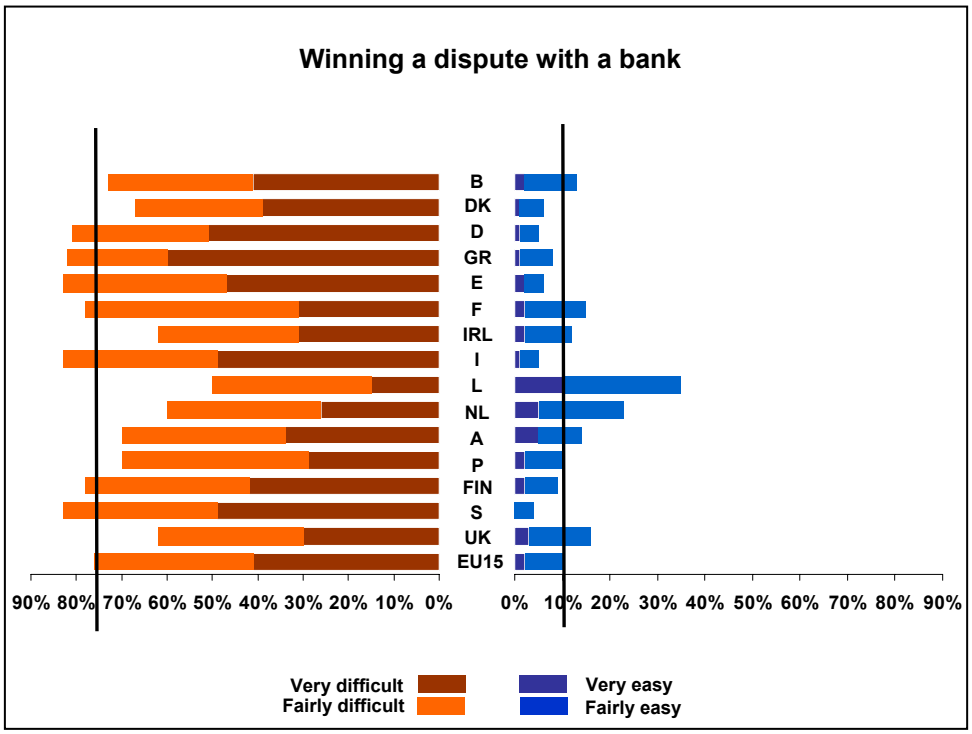
Comparing information from banks about bank account features and charges

50% of EU15 respondents believed that it was ' difficult' to compare information from banks about bank account charges and features (37% 'fairly difficult' + 13% 'very difficult'). 41% felt it was easy (33% 'fairly easy' + 8% 'very easy'). 9% did not know.



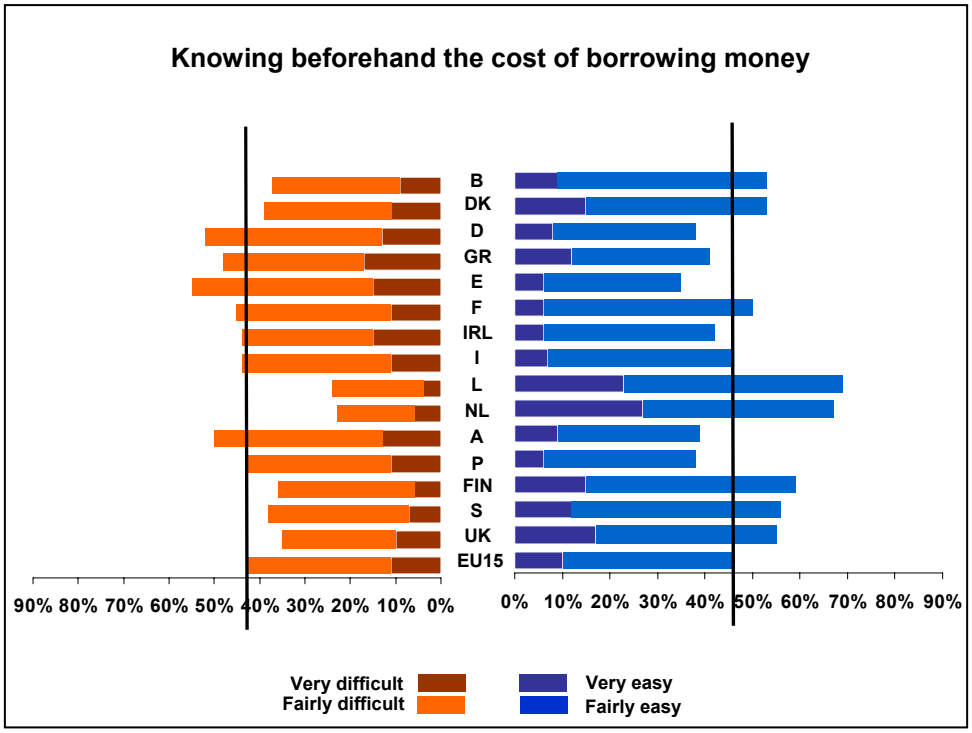
Winning a dispute with a bank

76% of EU15 respondents believed that it was 'difficult' to win a dispute with a bank (35% 'fairly difficult' + 41% 'very difficult'). Only 10% felt it was 'easy' (8% 'fairly easy' + 2% 'very easy'). 'Don't knows' across the EU15 amounted to 15%.



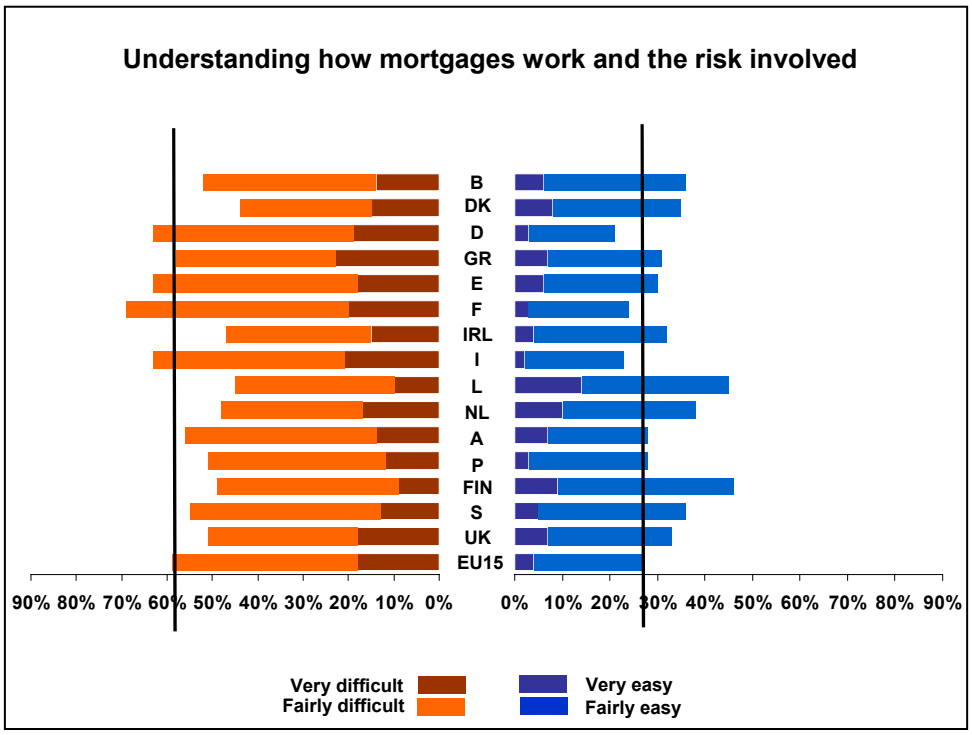
Knowing beforehand the cost of borrowing money

46% of EU15 respondents felt it was 'easy' to know beforehand how much it was going to cost to borrow money (36% 'fairly'+ 10% 'very'). 43% of respondents believed it to be 'difficult' (32% 'fairly'+ 11% 'very'). 10% of respondents did not know.



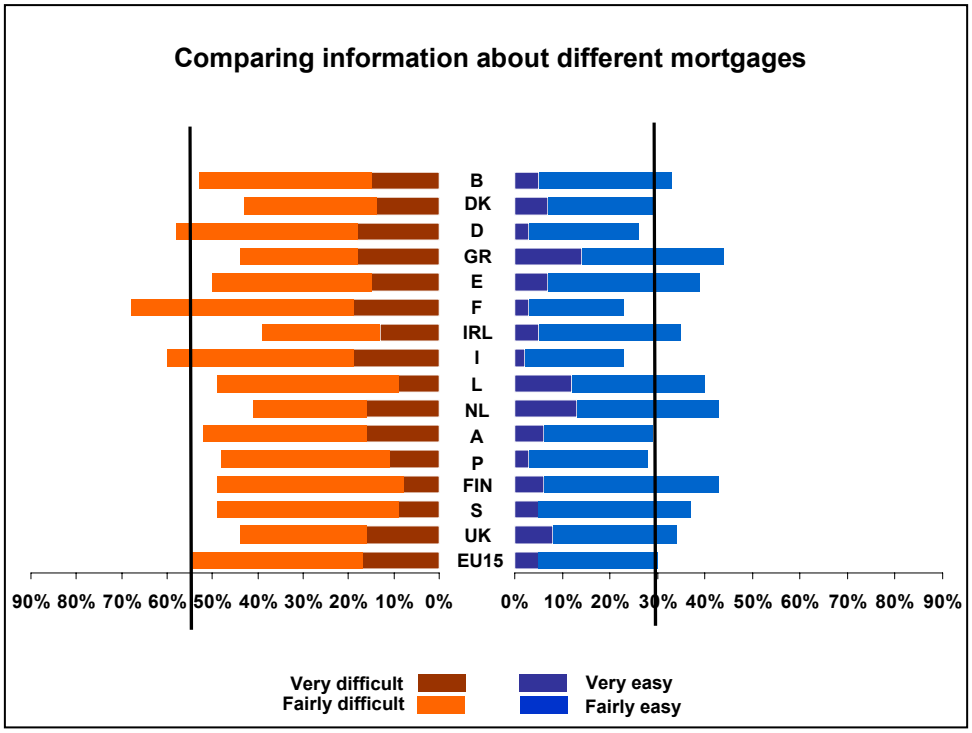
Understanding how mortgages work and the risk involved

59% of respondents across the EU15 believed it was 'difficult' to understand the information given by financial institutions about the way their mortgages work and the risks involved (41% 'fairly' + 18% 'very'). 27% believed it was 'easy' (23% 'fairly' + 4% 'very'). 14% did not know.



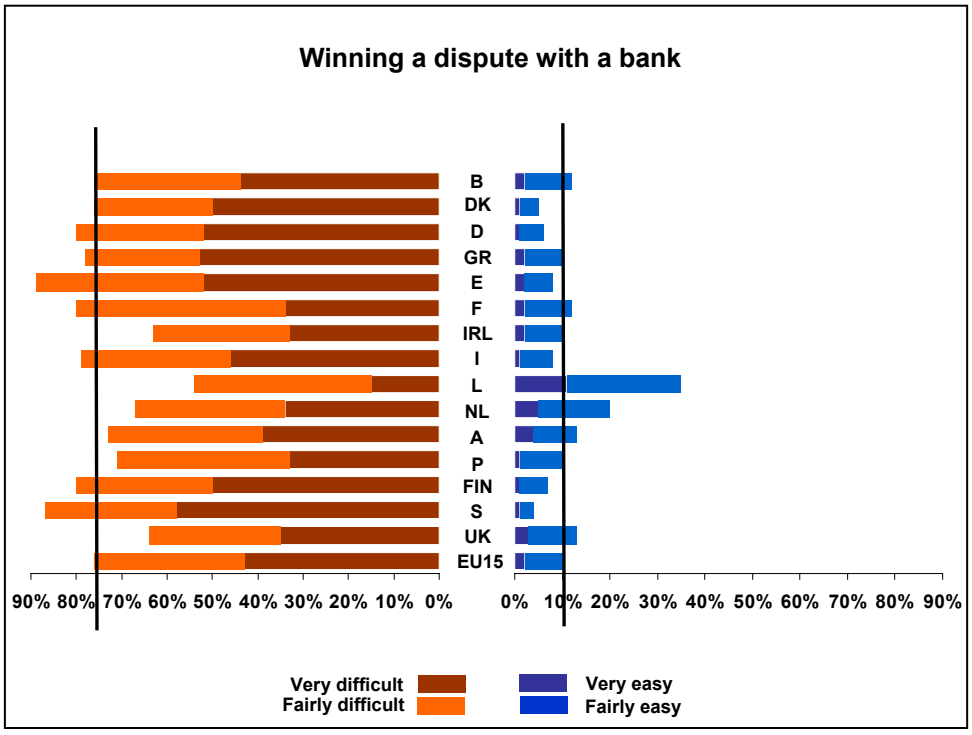
Comparing information about different mortgages

55% of respondents across the EU15 felt it was 'difficult' to compare information about different mortgages (38% 'fairly' + 17% 'very'). 30% thought it was 'easy' (25% 'fairly' + 5% 'very'). 16% of respondents had no opinion.



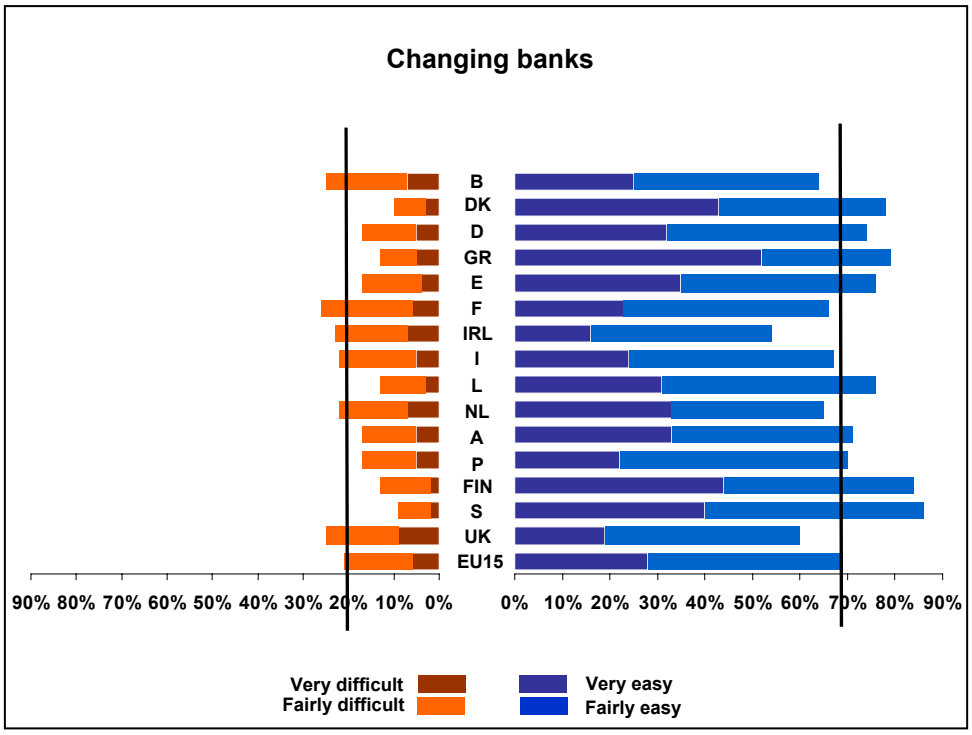
Winning a dispute with an insurance company

76% of EU15 respondents felt it was 'difficult' to win in a dispute with an insurance company (33% 'fairly' + 43% 'very'). Only 10% felt it was 'easy' (8% 'fairly' + 2% 'very'). 14% said they did not know.



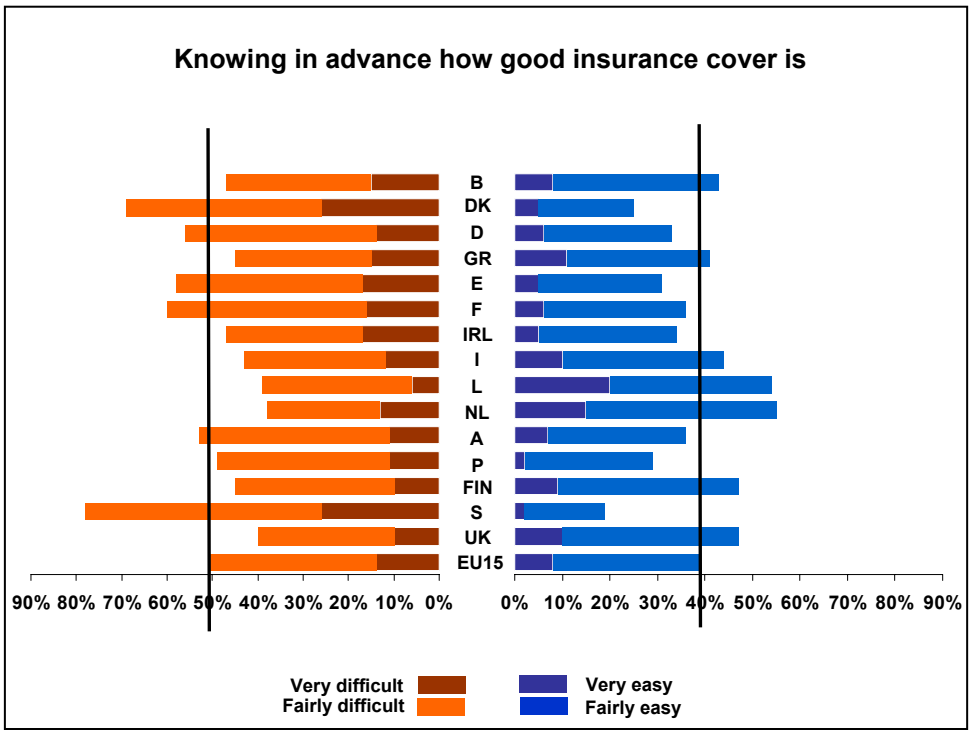
Changing banks

Only 21% of EU15 respondents believed it was 'difficult' to change banks (15% 'fairly' + 6% 'very'). 69% believed it was 'easy' (41% 'fairly' + 28% 'very'). 10% did not know.



Knowing in advance how good insurance cover is

39% of the EU15 respondents reported that they believed it was 'easy' to know in advance how well they are covered by insurance policies (31% 'fairly' + 8% 'very'). Half of the EU15 respondents believed it was 'difficult' (37% 'fairly' + 14% 'very'). 11% did not know.



Having a bank account is expensive

In the EU15, 45% of respondents shared the opinion that having a bank account is expensive. On the other hand, 48% disagreed with this statement and 7% had no opinion.

The EU15 average hid a wide range of opinion across Europe. Only 20% of the Dutch agreed that it was expensive, while more than three-quarters of Italians (80%) believed this to be the case.

More respondents disagreed with the statement than agreed with it in Denmark (57%), Germany (49%), Greece (61%), Spain (50%), France (50%), the Netherlands (73%), Finland (58%), Sweden (72%) and UK (71%).

Buying on credit is more useful than dangerous

35% of Europeans agreed that buying on credit is more useful than dangerous. However, slightly more than half (52%) disagreed, while 13% had no opinion.

There were considerable differences between countries: 49% of Spanish, 47% of Irish and British, and 46% of Italian respondents agreed with the statement, while only 12% of the Dutch did.

Conversely, the percentages for those disagreeing with the statement ranged from 30% in Italy to high scores of 71% in Austria, 74% in Denmark and 80% in the Netherlands.

No real checks on borrowing

Seven out of ten Europeans disagreed that it is possible for them to borrow as much as they like because there are no real checks. 12%, on the other hand, agreed with the statement and 11% had no opinion.

More than three quarters of the Portuguese (76%), Spaniards and Italians (77% each), Finns (78%) and Swedes (80%) disagreed with the statement that they could borrow as much as they like because there are no real checks. There were only three countries where those disagreeing fell below the two-thirds mark: UK (60%), France (63%) and Austria (64%).

Indebtedness problem does not exist in the respondent's country

More than seven out of ten (73%) Europeans disagreed that the problem of borrowing more than one can pay back did not exist in their country. 14% agreed with the statement and a further 13% had no opinion.

30% of Finns and 20% of Greeks and Luxembourgers surveyed agreed with the statement that the problem of indebtedness did not exist in their countries.

The Dutch (93%) topped the list with their opposition to the statement, followed by the French (86%), the Belgians (82%) and the Danes (81%). On the other hand, only 61% of Spaniards and Finns and 62% of Greeks surveyed registered their disagreement.

Marketing techniques of financial institutions are aggressive

Almost six out of ten (57%) of EU15 respondents agreed with the statement that marketing techniques of financial institutions are aggressive. 22% had no opinion and 21% did not agree.

There were substantial variations in the readings recorded by the various EU15 countries.

The most striking aspect is that 51% of Finnish respondents disagreed with the statement. At 29%, Luxembourg and Belgium were second in this ranking. This means a disparity of 22% between the first and second position.

On the other hand, more than two-thirds of French and Swedish (66% each), Danish (67%) and Dutch (74%) respondents agreed with the statement.

Information from financial institutions is clear and understandable

58% of EU15 respondents disagreed with the statement that the information they get from financial institutions is clear and understandable. 29% agreed and 13% had no opinion.

Close to two-thirds of French (64%), Italian (66%) and Swedish respondents (67%) disagreed with this statement.

On the other hand, 44% of Luxembourgers, 46% of Finns and 44% of the Belgians and the Irish agreed.

Consumer rights are adequately protected in relation to financial services

A quarter of EU15 respondents had no opinion on the statement that their rights as consumers are adequately protected in relation to financial services. 34% agreed with the statement and 41% disagreed.

More than half of Finns (60%) and Luxembourgers surveyed (58%) agreed with the statement, trailed by 44% of Belgian and 43% of Danish respondents.

On the other hand, in Greece (56%), Sweden (53%), Italy (50%) and France (49%) above-average scores were recorded for respondents who disagreed with the statement.

There are easy ways to settle disputes with banks and insurance companies

58% of EU15 respondents disagreed with the statement that there are easy ways to settle disputes with banks and insurance companies. Only 17% agreed with it and 26% had no opinion.

Those disagreeing with the statement were headed by the Swedes (72%), the Finns (67%), the Italians (65%) and the French (64%).

In Luxembourg, almost half of those surveyed (45%) agreed.

Financial transactions are generally secure

Half (55%) of EU15 respondents agreed with the statement that financial transactions are generally secure. 24% disagreed and 21% had no opinion.

The Scandinavian countries recorded high numbers of responses agreeing with the statement that financial transactions are generally secure: 86% of Finns, 78% of Danes and 77% of Swedes. Next in line came the Netherlands (73%) and Luxembourg (70%). The lowest level of agreement was to be found in Greece (29%).

Greece was the only country where more respondents disagreed (46%) with the statement then agreed (29%).

Confidential information given to banks or insurance companies is adequately protected

Half the EU15 respondents surveyed (51%) agreed with the statement that the confidential information they give to banks or insurance companies is adequately protected. A fifth of the respondents (22%), however, did not have an opinion and 27% disagreed.

The EU15 figure concealed the diversity of opinions on this point.

While the level of agreement was only 37% in Portugal, more than two-thirds of all Scandinavian respondents agreed with the statement: Sweden (67%), Denmark (73%) and Finland (74%). Figures slightly below the EU15 average were recorded in Italy (48%), France (48%) and Germany (49%), whereas Spain (51%), Ireland (52%) and Austria (53%) were slightly above the average (51%).

Trust in telephone for banking transactions

24% of EU15 respondents agreed, 61% disagreed and 15% had no opinion on the statement that they trusted the telephone for banking transactions.

More than half of the Swedes (60%) and Danes (55%) surveyed agreed with the statement. A high agreement figure of 49% was also recorded for the Dutch respondents.

In the Netherlands (42%), Sweden (32%) and Denmark (27%), there were fewer respondents who disagreed than agreed with the statement. Roughly as many Irish disagreed (40%) as agreed (38%).

Trust in Internet for banking transactions

58% of EU15 respondents disagreed with the statement regarding trust in using the Internet for banking transactions and payments. Only 20% agreed and 21% had no opinion.

There were considerable variations in the views of respondents in the different EU countries.

As with trust in the phone, the Scandinavian countries tended to be the most trusting with respect to the use of the Internet for banking transactions and payments: Denmark (56%), Sweden (55%) and Finland (48%). The Dutch respondents also agreed to a high degree (46%).

Disagreement levels were highest in Greece (71%), Italy (68%), France (64%) and Germany (63%).

Transactions on the Internet are generally secure

In the EU15 countries, 45% disagreed with the statement that transactions on the Internet are generally secure, 22% agreed, and 33% had no opinion.

Despite the EU15 average of only 22% agreeing with the statement, half or more of those surveyed in the Scandinavian countries agreed: Finland and Denmark (51% each) and Sweden (59%). The figures for the Netherlands were also high: 29% of respondents agreed with the statement.

The highest levels of disagreement were amongst respondents in Greece (64%).

Harder to sort out problems that arise if transaction is by Internet

40% of EU15 respondents had no opinion on the statement that if they make a transaction on the Internet, it's harder to sort out any problems that may arise. 30% agreed and the same proportion disagreed. A possible explanation for the high 'don't know' score is the high proportion of people who have never tried to make a transaction using the Internet.

53% of Portuguese respondents had no opinion, nor did 46% of the Spaniards and Irish and 44% of the Italians and British.

The Finns (52%) and the Swedes (44%) were most likely to agree.

On the other hand, more than a third of the Swedish (33%), Belgian, Greek and French (34% each) and 37% of the Luxembourg respondents disagreed.

In eight countries the proportion of respondents who disagreed was greater than the proportion of those who agreed: Belgium, Germany, Greece, France, Ireland, Luxembourg, Portugal and UK.

Consumers' expectation of financial institutions giving advice

74% of the EU15 respondents expected to be given advice by financial institutions. 21% did not expect this kind of advice and 6% did not have an opinion.

Huge cross-country differences were observed. In three countries less than half of the respondents expected to receive advice from financial institutions: Greece (37%) and Portugal and Spain (46% each).

At the very top of the table were Germany (92%), Denmark and the Netherlands (88% each), Luxembourg (86%), Finland (84%) and Sweden (80%), where more than eight out of ten respondents expected to be given advice by financial institutions.

Consumer makes own financial decisions

92% of the EU15 respondents made their own financial decisions; only 6% said they did not do so. 2% had no opinion.

No striking differences were observed between the member countries. Except for Spain (86%) and Italy (89%), more than 90% of the respondents in all countries reported that they made their own financial decisions.

Trust in advice given by financial institutions

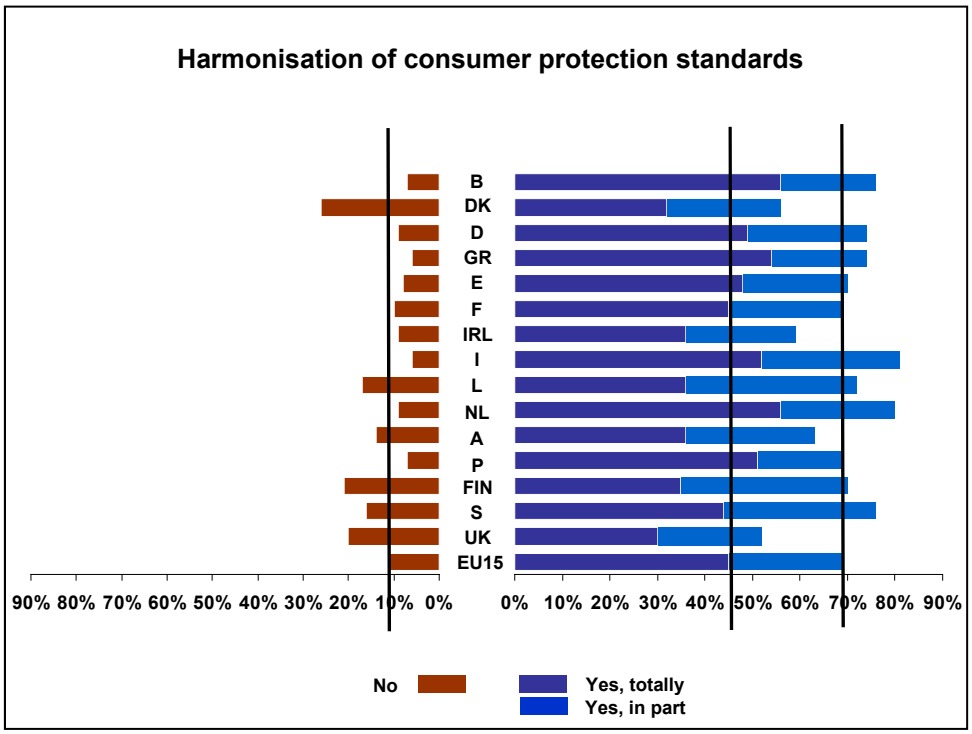
47% of the EU15 respondents trusted the advice given by financial institutions, 38% did not and 15% did not have an opinion.

The highest figures for trusting the advice given by financial institutions were recorded in Denmark (72%) and Finland (73%). The Austrians (65%), Germans (56%) and Luxembourgers (55%) also recorded figures well above the average.

At the other end of the scale were to be found Greece (20%), Italy (33%), Spain and Portugal (41% each), France (46%) and UK (48%), all showing figures below 50%.

Harmonisation of consumer protection standards

45% of EU15 respondents felt that there should be total harmonisation of consumer protection standards across Europe. A further 24% felt that there should be partial harmonisation, while one-fifth said they had no opinion. 11% of respondents were against the harmonisation of consumer protection standards.



When a more specific question was asked about harmonisation in relation to financial services, no significant differences were observed with answers to the question about harmonisation in general. This gives evidence that respondents understood the general question correctly as being about harmonisation in relation to financial services.

41998Y0126(03) Official Journal C 027 , 26/01/1998 p. 0034 - 0046 1

1980 Rome Convention on the law applicable to contractual obligations (consolidated version)

Convention on the law applicable to contractual obligations (consolidated version)

PRELIMINARY NOTE

The signing on 29 November 1996 of the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Rome Convention on the law applicable to contractual obligations and to the two Protocols on its interpretation by the Court of Justice has made it desirable to produce a consolidated version of the Rome convention and of those two Protocols.

These texts are accompanied by three Declarations, one made in 1980 with regard to the need for consistency between measures to be adopted on choice-of-law rules by the Community and those under the Convention, a second, also made in 1980, on the interpretation of the Convention by the Court of Justice and a third, made in 1996, concerning compliance with the procedure provided for in Article 23 of the Rome Convention as regards carriage of goods by sea.

The text printed in this edition was drawn up by the General Secretariat of the Council, in whose archives the originals of the instruments concerned are deposited. It should be noted, however, that this text has no binding force. The official texts of the instruments consolidated are to be found in the following Official Journals.

Language version of the Official Journal	1980 Convention	1984 Accession	1988 First Protocol	1988 Second Protocol	1992 Accession Convention	1996 Accession Convention
German	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
English	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Danish	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
French	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Greek	L 146, 31. 5. 1984, p. 7	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Irish	Special Edition (L 266)	Special Edition (L 146)	Special Edition (L 48)	Special Edition (L 48)	Special Edition (L 333)	Special Edition (C 15)
Italian	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10

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Dutch	L 266, 9. 10. 1980, p. 1	L 146, 31. 5. 1984, p. 1	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Spanish	Special Edition, Chapter 1, Volume 3, p. 36 (See also OJ L 333, p. 17)	Special Edition, Chapter 1, Volume 4, p. 36 (See also OJ L 333, p. 72)	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Portuguese	Special Edition, Chapter 1, Volume 3, p. 36 (See also OJ L 333, p. 7)	Special Edition, Chapter 1, Volume 4, p. 72 (See also OJ L 333, p. 74)	L 48, 20. 2. 1989, p. 1	L 48, 20. 2. 1989, p. 17	L 333, 18. 11. 1992, p. 1	C 15, 15. 1. 1997, p. 10
Finnish	C 15, 15. 1. 1997, p. 70	C 15, 15. 1. 1997, p. 66	C 15, 15. 1. 1997, p. 60	C 15, 15. 1. 1997, p. 64	C 15, 15. 1. 1997, p. 68	C 15, 15. 1. 1997, p. 53
Swedish	C 15, 15. 1. 1997, p. 70	C 15, 15. 1. 1997, p. 66	C 15, 15. 1. 1997, p. 60	C 15, 15. 1. 1997, p. 64	C 15, 15. 1. 1997, p. 68	C 15, 15. 1. 1997, p. 53

ANNEX

CONVENTION on the law applicable to contractual obligations (1) opened for signature in Rome on 19 June 1980

PREAMBLE

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,

ANXIOUS to continue in the field of private international law the work of unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments,

WISHING to establish uniform rules concerning the law applicable to contractual obligations,

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE OF THE CONVENTION

Article 1 Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:

- wills and succession,
- rights in property arising out of a matrimonial relationship,
- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) arbitration agreements and agreements on the choice of court;

(c) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;

(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine

whether a risk is situated in those territories the court shall apply its internal law.

4. The proceeding paragraph does not apply to contracts of re-insurance.

Article 2 Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II

UNIFORM RULES

Article 3 Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules`.

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.

Article 4 Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place

of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5 Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer`) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 6 Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7 Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 8 Material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 9 Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10 Scope of applicable law

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11 Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12 Voluntary assignment

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debter`) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 13 Subrogation

1. Where a person ('the creditor`) has a contractual claim upon another ('the debtor`), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14 Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 15 Exclusion of convoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 16 'Ordre public`

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public`) of the forum.

Article 17 No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 18 Uniform interpretation

In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

Article 19 States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20 Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.

Article 21 Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 22 Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:

(a) the provisions of Article 7 (1);

(b) the provisions of Article 10 (1) (e).

2. . . . (2)

3. Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III

FINAL PROVISIONS

Article 23

1. If, after the date on which this Convention has entered into force for a Contracting State, that State wishes to adopt any new choice of law rule in regard to any particular category of contract within the scope of this Convention, it shall communicate its intention to the other signatory States through the Secretary-General of the Council of the European Communities.

2. Any signatory State may, within six months from the date of the communication made to the Secretary-General,

request him to arrange consultations between signatory States in order to reach agreement.

3. If no signatory State has requested consultations within this period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the Contracting State concerned may amend its law in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States through the Secretary-General of the Council of the European Communities.

Article 24

1. If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention, the procedure set out in Article 23 shall apply. However, the period of two years, referred to in paragraph 3 of that Article, shall be reduced to one year.

2. The procedure referred to in the preceding paragraph need not be followed if a Contracting State or one of the European Communities is already a party to the multilateral convention, or if its object is to revise a convention to which the State concerned is already a party, or if it is a convention concluded within the framework of the Treaties establishing the European Communities.

Article 25

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by Article 24 (1), that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 26

Any Contracting State may request the revision of this Convention. In this event a revision conference shall be convened by the President of the Council of the European Communities.

Article 27 (3)

Article 28

1. This Convention shall be open from 19 June 1980 for signature by the States party to the Treaty establishing the European Economic Community.

2. This Convention shall be subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of the European Communities (4).

Article 29 (5)

1. This Convention shall enter into force on the first day of the third month following the deposit

of the seventh instrument of ratification, acceptance or approval.

2. This Convention shall enter into force for each signatory State ratifying, accepting or approving at a later date on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

Article 30

1. This Convention shall remain in force for 10 years from the date of its entry into force in accordance with Article 29 (1), even for States for which it enters into force at a later date.

2. If there has been no denunciation it shall be renewed tacitly every five years.

3. A Contracting State which wishes to denounce shall, not less than six months before the expiration of the period of 10 or five years, as the case may be, give notice to the Secretary-General of the Council of the European Communities. Denunciation may be limited to any territory to which the Convention has been extended by a declaration under Article 27 (2) (6).

4. The denunciation shall have effect only in relation to the State which has notified it. The Convention will remain in force as between all other Contracting States.

Article 31 (7)

The Secretary-General of the Council of the European Communities shall notify the States party to the Treaty establishing the European Economic Community of:

(a) the signatures;

(b) deposit of each instrument of ratification, acceptance or approval;

(c) the date of entry into force of this Convention;

(d) communications made in pursuance of Articles 23, 24, 25, 26 and 30 (8);

(e) the reservations and withdrawals of reservations referred to in Article 22.

Article 32

The Protocol annexed to this Convention shall form an integral part thereof.

Article 33 (9)

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy thereof to the Government of each signatory State.

In witness whereof the undersigned, being duly authorized thereto, having signed this Convention.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the plenipotentiaries]

PROTOCOL (10)

The High Contracting Parties have agreed upon the following provision which shall be annexed to

the Convention:

'Notwithstanding the provisions of the Convention, Denmark, Sweden and Finland may retain national provisions concerning the law applicable to questions relating to the carriage of goods by sea and may amend such provisions without following the procedure provided for in Article 23 of the Convention of Rome. The national provisions applicable in this respect are the following:

- in Denmark, paragraphs 252 and 321 (3) and (4) of the "Solov" (maritime law),
- in Sweden, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "sjölagen" (maritime law),
- in Finland, Chapter 13, Article 2 (1) and (2), and Chapter 14, Article 1 (3), of "merilaki"/"sjölagen" (maritime law).`

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

JOINT DECLARATION

At the time of the signature of the Convention on the law applicable to contractual obligations, the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

I. anxious to avoid, as far as possible, dispersion of choice of law rules among several instruments and differences between these rules, express the wish that the institutions of the European Communities, in the exercise of their powers under the Treaties by which they were established, will, where the need arises, endeavour to adopt choice of law rules which are as far as possible consistent with those of this Convention;

II. declare their intention as from the date of signature of this Convention until becoming bound by Article 24, to consult with each other if any one of the signatory States wishes to become a party to any convention to which the procedure referred to in Article 24 would apply;

III. having regard to the contribution of the Convention on the law applicable to contractual obligations to the unification of choice of law rules within the European Communities, express the view that any State which becomes a member of the European Communities should accede to this Convention.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

JOINT DECLARATION

The Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland,

On signing the Convention on the law applicable to contractual obligations;

Desiring to ensure that the Convention is applied as effectively as possible;

Anxious to prevent differences of interpretation of the Convention from impairing its unifying

effect;

Declare themselves ready:

1. to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice of the European Communities and, if necessary, to negotiate an agreement to this effect;

2. to arrange meetings at regular intervals between their representatives.

In witness whereof the undersigned, being duly authorized thereto, have signed this Joint Declaration.

Done at Rome on the nineteenth day of June in the year one thousand nine hundred and eighty.

[Signatures of the Plenipotentiaries]

(1) Text as amended by the Convention of 10 April 1984 on the accession of the Hellenic Republic - hereafter referred to as the '1984 Accession Convention` -, by the Convention of 18 May 1992 on the accession of the Kingdom of Spain and the Portuguese Republic - hereafter referred to as the '1992 Accession Convention` - and by the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden - hereafter referred to as the '1996 Accession Convention`.

(2) Paragraph deleted by Article 2 (1) of the 1992 Accession Convention.

(3) Article deleted by Article 2 (1) of the 1992 Accession Convention.

(4) Ratification of the Accession Conventions is governed by the following provisions of those conventions:

- as regards the 1984 Accession Convention, by Article 3 of that Convention, which reads as follows:

'Article 3

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1992 Accession Convention, by Article 4 of that Convention, which reads as follows:

'Article 4

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.`,

- as regards the 1996 Accession Convention, by Article 5 of that Convention, which reads as follows:

'Article 5

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Union.`.

(5) The entry into force of the Accession Conventions is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 4 of that Convention, which reads as follows:

'Article 4

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Hellenic Republic and seven States which have ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1992 Accession Convention, by Article 5 of that Convention which reads as follows:

'Article 5

This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Kingdom of Spain or the Portuguese Republic and by one State which has ratified the Convention on the law applicable to contractual obligations.

This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`,

- as regards the 1996 Accession Convention, by Article 6 of that Convention, which reads as follows:

'Article 6

1. This Convention shall enter into force, as between the States which have ratified it, on the first day of the third month following the deposit of the last instrument of ratification by the Republic of Austria, the Republic of Finland or the Kingdom of Sweden and by one Contracting State which has ratified the Convention on the law applicable to contractual obligations.

2. This Convention shall enter into force for each Contracting State which subsequently ratifies it on the first day of the third month following the deposit of its instrument of ratification.`.

(6) Phrase deleted by the 1992 Accession Convention.

(7) Notification concerning the Accession Convention is governed by the following provisions of those Conventions:

- as regards the 1984 Accession Convention, by Article 5 of that Convention, which reads as follows:

'Article 5

The Secretary-General of the Council of the European Communities shall notify Signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1992 Accession Convention, by Article 6 of that Convention, which reads as follows:

'Article 6

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`,

- as regards the 1996 Accession Convention, by Article 7 of that Convention, which reads as follows:

'Article 7

The Secretary-General of the Council of the European Union shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the dates of entry into force of this Convention for the Contracting States.`.

(8) Point (d) as amended by the 1992 Accession Convention.

(9) An indication of the authentic texts of the Accession Convention is to be found in the following provisions:

- as regards the 1984 Accession Convention, in Articles 2 and 6 of that Convention, which reads as follows:

'Article 2

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Irish and Italian languages to the Government of the Hellenic Republic.

The text of the Convention on the law applicable to contractual obligations in the Greek language is annexed hereto. The text in the Greek language shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 6

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages, all eight texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General

shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1992 Accession Convention, in Articles 3 and 7 of that Convention, which read as follows:

'Article 3

The Secretary-General of the Council of the European Communities shall transmit a certified copy of the Convention on the law applicable to contractual obligations in the Danish, Dutch, English, French, German, Greek, Irish and Italian languages to the Governments of the Kingdom of Spain and the Portuguese Republic.

The text of the Convention on the law applicable to contractual obligations in the Portuguese and Spanish languages is set out in Annexes I and II to this Convention. The texts drawn up in the Portuguese and Spanish languages shall be authentic under the same conditions as the other texts of the Convention on the law applicable to contractual obligations.`

'Article 7

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish languages, all texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each Signatory State.`,

- as regards the 1996 Accession Convention, in Articles 4 and 8 of that Convention, which read as follows:

'Article 4

1. The Secretary-General of the Council of the European Union shall transmit a certified copy of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Danish, Dutch, English, French, German, Greek, Irish, Italian, Spanish and Portuguese languages to the Governments of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

2. The text of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992 in the Finnish and Swedish languages shall be authentic under the same conditions as the other texts of the Convention of 1980, the Convention of 1984, the First Protocol of 1988, the Second Protocol of 1988 and the Convention of 1992.`

'Article 8

This Convention, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, all 12 texts being equally authentic, shall be deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified copy to the Government

of each signatory State.`

(10) Text as amended by the 1996 Accession Convention.

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Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Council Regulation (EC) No 44/2001

of 22 December 2000

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the "Brussels Convention")(4). On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.

(10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

(14) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

(18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional

provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol(5) should remain applicable also to cases already pending when this Regulation enters into force.

(20) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

(22) Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by this Regulation.

(23) The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

(24) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

(25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(26) The necessary flexibility should be provided for in the basic rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should accordingly be incorporated in this Regulation.

(27) In order to allow a harmonious transition in certain areas which were the subject of special provisions in the Protocol annexed to the Brussels Convention, this Regulation lays down, for a transitional period, provisions taking into consideration the specific situation in certain Member States.

(28) No later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations.

(29) The Commission will have to adjust Annexes I to IV on the rules of national jurisdiction, the courts or competent authorities and redress procedures available on the basis of the amendments forwarded by the Member State concerned; amendments made to Annexes V and VI should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(6),

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

CHAPTER II

JURISDICTION

Section 1

General provisions

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2

Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;

6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment, or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine

them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Article 7

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Section 3

Jurisdiction in matters relating to insurance

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

Article 9

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may in addition

be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 12

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or

3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or

4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or

5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

Article 14

The following are the risks referred to in Article 13(5):

1. any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in point 1(b);

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in points 1 to 3;

5. notwithstanding points 1 to 4, all "large risks" as defined in Council Directive 73/239/EEC(7), as amended by Council Directives 88/357/EEC(8) and 90/618/EEC(9), as they may be amended.

Section 4

Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts

of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Section 5

Jurisdiction over individual contracts of employment

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19

An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

Section 6

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7

Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8

Examination as to jurisdiction and admissibility

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters(10) shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9

Lis pendens - related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised

may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or

2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 10

Provisional, including protective, measures

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

Section 2

Enforcement

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39

1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Article 53 shall be attached to the application.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article

53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 43

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal is to be lodged with the court indicated in the list in Annex III.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46

1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 47

1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.

2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 50

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section,

to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

Section 3

Common provisions

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 55

1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative ad litem.

CHAPTER IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 57

1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.

2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.

3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

4. Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

Article 58

A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a Member State where a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

CHAPTER V

GENERAL PROVISIONS

Article 59

1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply

the law of that Member State.

Article 60

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.

2. For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Article 61

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Member States.

Article 62

In Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the expression "court" includes the "Swedish enforcement service" (kronofogdemyndighet).

Article 63

1. A person domiciled in the territory of the Grand Duchy of Luxembourg and sued in the court of another Member State pursuant to Article 5(1) may refuse to submit to the jurisdiction of that court if the final place of delivery of the goods or provision of the services is in Luxembourg.

2. Where, under paragraph 1, the final place of delivery of the goods or provision of the services is in Luxembourg, any agreement conferring jurisdiction must, in order to be valid, be accepted in writing or evidenced in writing within the meaning of Article 23(1)(a).

3. The provisions of this Article shall not apply to contracts for the provision of financial services.

4. The provisions of this Article shall apply for a period of six years from entry into force of

this Regulation.

Article 64

1. In proceedings involving a dispute between the master and a member of the crew of a seagoing ship registered in Greece or in Portugal, concerning remuneration or other conditions of service, a court in a Member State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It may act as soon as that officer has been notified.

2. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 65

1. The jurisdiction specified in Article 6(2), and Article 11 in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to in Germany and Austria. Any person domiciled in another Member State may be sued in the courts:

(a) of Germany, pursuant to Articles 68 and 72 to 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices,

(b) of Austria, pursuant to Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices.

2. Judgments given in other Member States by virtue of Article 6(2), or Article 11 shall be recognised and enforced in Germany and Austria in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 66

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State or origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII

RELATIONS WITH OTHER INSTRUMENTS

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 68

1. This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.

Article 69

Subject to Article 66(2) and Article 70, this Regulation shall, as between Member States, supersede the following conventions and treaty concluded between two or more of them:

- the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899,

- the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925,

- the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930,

- the Convention between Germany and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 9 March 1936,

- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments relating to Maintenance Obligations, signed at Vienna on 25 October 1957,

- the Convention between Germany and Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958,

- the Convention between the Netherlands and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 17 April 1959,

- the Convention between Germany and Austria on the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed at

Vienna on 6 June 1959,

- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments, Arbitral Awards and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 16 June 1959,

- the Convention between Greece and Germany for the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed in Athens on 4 November 1961,

- the Convention between Belgium and Italy on the Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at Rome on 6 April 1962,

- the Convention between the Netherlands and Germany on the Mutual Recognition and Enforcement of Judgments and Other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962,

- the Convention between the Netherlands and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at The Hague on 6 February 1963,

- the Convention between France and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 15 July 1966,

- the Convention between Spain and France on the Recognition and Enforcement of Judgment Arbitration Awards in Civil and Commercial Matters, signed at Paris on 28 May 1969,

- the Convention between Luxembourg and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Luxembourg on 29 July 1971,

- the Convention between Italy and Austria on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, of Judicial Settlements and of Authentic Instruments, signed at Rome on 16 November 1971,

- the Convention between Spain and Italy regarding Legal Aid and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Madrid on 22 May 1973,

- the Convention between Finland, Iceland, Norway, Sweden and Denmark on the Recognition and Enforcement of Judgments in Civil Matters, signed at Copenhagen on 11 October 1977,

- the Convention between Austria and Sweden on the Recognition and Enforcement of Judgments in Civil Matters, signed at Stockholm on 16 September 1982,

- the Convention between Spain and the Federal Republic of Germany on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 14 November 1983,

- the Convention between Austria and Spain on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 17 February 1984,

- the Convention between Finland and Austria on the Recognition and Enforcement of Judgments in Civil Matters, signed at Vienna on 17 November 1986, and

- the Treaty between Belgium, the Netherlands and Luxembourg in Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 24 November 1961, in so far as it is in force.

Article 70

1. The Treaty and the Conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Regulation.

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

Article 72

This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

CHAPTER VIII

FINAL PROVISIONS

Article 73

No later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the

application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation.

Article 74

1. The Member States shall notify the Commission of the texts amending the lists set out in Annexes I to IV. The Commission shall adapt the Annexes concerned accordingly.

2. The updating or technical adjustment of the forms, specimens of which appear in Annexes V and VI, shall be adopted in accordance with the advisory procedure referred to in Article 75(2).

Article 75

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The Committee shall adopt its rules of procedure.

Article 76

This Regulation shall enter into force on l March 2002.

This Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 22 December 2000.

For the Council

The President

C. Pierret

(1) OJ C 376, 28.12.1999, p. 1.

(2) Opinion delivered on 21 September 2000 (not yet published in the Official Journal).

(3) OJ C 117, 26.4.2000, p. 6.

(4) OJ L 299, 31.12.1972, p. 32.

OJ L 304, 30.10.1978, p. 1.

OJ L 388, 31.12.1982, p. 1.

OJ L 285, 3.10.1989, p. 1.

OJ C 15, 15.1.1997, p. 1.

For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

(5) OJ L 204, 2.8.1975, p. 28.

OJ L 304, 30.10.1978, p. 1.

OJ L 388, 31.12.1982, p. 1.

OJ L 285, 3.10.1989, p. 1.

OJ C 15, 15.1.1997, p. 1.

For a consolidated text see OJ C 27, 26.1.1998, p. 28.

(6) OJ L 184, 17.7.1999, p. 23.

(7) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2000/26/EC of the European Parliament and of the Council (OJ L 181, 20.7.2000, p. 65).

(8) OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2000/26/EC.

(9) OJ L 330, 29.11.1990, p. 44.

(10) OJ L 160, 30.6.2000, p. 37.

ANNEX I

Rules of jurisdiction referred to in Article 3(2) and Article 4(2)

The rules of jurisdiction referred to in Article 3(2) and Article 4(2) are the following:

- in Belgium: Article 15 of the Civil Code (Code civil/Burgerlijk Wetboek) and Article 638 of the Judicial Code (Code judiciaire/Gerechtelijk Wetboek);

- in Germany: Article 23 of the Code of Civil Procedure (Zivilprozessordnung),

- in Greece, Article 40 of the Code of Civil Procedure (! ISO_7! E¦äéêao áïeéôéê«o Æéêïíïiißao);

- ! ISO_1! in France: Articles 14 and 15 of the Civil Code (Code civil),

- in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,

- in Italy: Articles 3 and 4 of Act 218 of 31 May 1995,

- in Luxembourg: Articles 14 and 15 of the Civil Code (Code civil),

- in the Netherlands: Articles 126(3) and 127 of the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering),

- in Austria: Article 99 of the Court Jurisdiction Act (Jurisdiktionsnorm),

- in Portugal: Articles 65 and 65A of the Code of Civil Procedure (Codigo de Processo Civil) and Article 11 of the Code of Labour Procedure (Codigo de Processo de Trabalho),

- in Finland: the second, third and fourth sentences of the first paragraph of Section 1 of Chapter 10 of the Code of Judicial Procedure (oikeudenkäymiskaari/rättegångsbalken),

- in Sweden: the first sentence of the first paragraph of Section 3 of Chapter 10 of the Code of Judicial Procedure (rättegångsbalken),

- in the United Kingdom: rules which enable jurisdiction to be founded on:

(a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or

(b) the presence within the United Kingdom of property belonging to the defendant; or

(c) the seizure by the plaintiff of property situated in the United Kingdom.

ANNEX II

The courts or competent authorities to which the application referred to in Article 39 may be submitted are the following:

- in Belgium, the "tribunal de première instance" or "rechtbank van eerste aanleg" or "erstinstanzliches Gericht",

- in Germany, the presiding judge of a chamber of the "Landgericht",

- in Greece, the "! ISO_7! öïíïiåe¡o áñùôïäéêåßï",

- ! ISO_1! in Spain, the "Juzgado de Primera Instancia",

- in France, the presiding judge of the "tribunal de grande instance",

- in Ireland, the High Court,

- in Italy, the "Corte d'appello",

- in Luxembourg, the presiding judge of the "tribunal d'arrondissement",

- in the Netherlands, the presiding judge of the "arrondissementsrechtbank";

- in Austria, the "Bezirksgericht",

- in Portugal, the "Tribunal de Comarca",

- in Finland, the "käräjäoikeus/tingsrätt",

- in Sweden, the "Svea hovrätt",

- in the United Kingdom:

(a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court on transmission by the Secretary of State;

(b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court on transmission by the Secretary of State;

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court on transmission by the Secretary of State;

(d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates' Court on transmission by the Attorney General of Gibraltar.

ANNEX III

The courts with which appeals referred to in Article 43(2) may be lodged are the following:

- in Belgium,

(a) as regards appeal by the defendant: the "tribunal de première instance" or "rechtbank van eerste aanleg" or "erstinstanzliches Gericht",

(b) as regards appeal by the applicant: the "Cour d'appel" or "hof van beroep",

- in the Federal Republic of Germany, the "Oberlandesgericht",
- in Greece, the "! ISO_7! Åöåôåßï",
- ! ISO_1! in Spain, the "Audiencia Provincial",
- in France, the "cour d'appel",
- in Ireland, the High Court,
- in Italy, the "corte d'appello",
- in Luxembourg, the "Cour supérieure de Justice" sitting as a court of civil appeal,
- in the Netherlands:

(a) for the defendant: the "arrondissementsrechtbank",

(b) for the applicant: the "gerechtshof",

- in Austria, the "Bezirksgericht",
- in Portugal, the "Tribunal de Relaçao",
- in Finland, the "hovioikeus/hovrätt",
- in Sweden, the "Svea hovrätt",
- in the United Kingdom:

(a) in England and Wales, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court;

(b) in Scotland, the Court of Session, or in the case of a maintenance judgment, the Sheriff Court;

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court;

(d) in Gibraltar, the Supreme Court of Gibraltar, or in the case of a maintenance judgment, the Magistrates' Court.

ANNEX IV

The appeals which may be lodged pursuant to Article 44 are the following

- in Belgium, Greece, Spain, France, Italy, Luxembourg and the Netherlands, an appeal in cassation,
- in Germany, a "Rechtsbeschwerde",
- in Ireland, an appeal on a point of law to the Supreme Court,
- in Austria, a "Revisionsrekurs",
- in Portugal, an appeal on a point of law,
- in Finland, an appeal to the "korkein oikeus/högsta domstolen",
- in Sweden, an appeal to the "Högsta domstolen",
- in the United Kingdom, a single further appeal on a point of law.

ANNEX V

Certificate referred to in Articles 54 and 58 of the Regulation on judgments and court settlements

(English, inglés, anglais, inglese,...)

1. Member State of origin

2. Court or competent authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Court which delivered the judgment/approved the court settlement(1)

3.1. Type of court

3.2. Place of court

4. Judgment/court settlement(2)

4.1. Date

4.2. Reference number

4.3. The parties to the judgment/court settlement(3)

4.3.1. Name(s) of plaintiff(s)

4.3.2. Name(s) of defendant(s)

4.3.3. Name(s) of other party(ies), if any

4.4. Date of service of the document instituting the proceedings where judgment was given in default of appearance

4.5. Text of the judgment/court settlement(4) as annexed to this certificate

5. Names of parties to whom legal aid has been granted

The judgment/court settlement(5) is enforceable in the Member State of origin (Articles 38 and 58 of the Regulation) against:

Name:

Done at ... , date...

Signature and/or stamp...

(1) Delete as appropriate.

(2) Delete as appropriate.

(3) Delete as appropriate.

(4) Delete as appropriate.

(5) Delete as appropriate.

ANNEX VI

Certificate referred to in Article 57(4) of the Regulation on authentic instruments

(English, inglés, anglais, inglese.....)

1. Member State of origin

2. Competent authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Authority which has given authenticity to the instrument

3.1. Authority involved in the drawing up of the authentic instrument (if applicable)

3.1.1. Name and designation of authority

3.1.2. Place of authority

3.2. Authority which has registered the authentic instrument (if applicable)

3.2.1. Type of authority

3.2.2. Place of authority

4. Authentic instrument

4.1. Description of the instrument

4.2. Date

4.2.1. on which the instrument was drawn up

4.2.2. if different: on which the instrument was registered

4.3. Reference number

4.4. Parties to the instrument

4.4.1. Name of the creditor

4.4.2. Name of the debtor

5. Text of the enforceable obligation as annexed to this certificate

The authentic instrument is enforceable against the debtor in the Member State of origin (Article 57(1) of the Regulation)

Done at ..., date...

Signature and/or stamp...

DOCNUM 32001R0044

AUTHOR Council

FORM	Regulation
TREATY	European Community
TYPDOC	3 ; secondary legislation ; 2001 ; R
PUBREF	Official Journal L 012 , 16/01/2001 P. 0001 - 0023
DESCRIPT	civil law ; commercial law ; Community national ; EC countries ; jurisdiction of the courts ; mutual recognition principle
PUB	2001/01/16
DOC	2000/12/22
INFORCE	2002/03/01=EV
ENDVAL	9999/99/99
LEGBASE	11997E061-PTC..... 11997E067-P1.....
LEGCIT	41968A0927(01)..... 41971A0603(02)..... 31973L0239..... 41978A1009(01)..... 41978A1009(01)..... 41982A1025(01)..... 41982A1025(01)..... 31988L0357..... 41989A0535..... 41989A0535..... 31990L0618..... 11997E005..... 11997E065..... 11997E293..... 11997E299..... 41997A0115(01)..... 41997A0115(01)..... 41998Y0126(01)..... 41998Y0126(02)..... 31999D0468..... 32000R1348.....
MODIFIES	41968A0927(01)..... Relation..... 41998Y0126(01)..... Relation.....
MODIFIED	Corrected by.. 32001R0044R(01)..... (DA, DE, EL, EN, ES, FI, FR, IT, NL, PT, SV)
SUB	Approximation of laws ; Justice and home affairs
REGISTER	19200000

PREPWORK	Proposal Commission;Com 1999/0348 Final ; OJ C 376/1999 P 1 Opinion European Parliament;given on 21/09/2000 Opinion Economic and Social Committee;OJ C 117/2000 P 6
MISCINF	CNS 99/0154
DATES	of document: 22/12/2000 of effect: 01/03/2002; Entry into force See Art 76 end of validity: 99/99/9999

DIRECTIVE 98/27/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 19 May 1998

on injunctions for the protection of consumers' interests

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189b of the Treaty [3],

(1) Whereas certain Directives, listed in the schedule annexed to this Directive, lay down rules with regard to the protection of consumers' interests;

(2) Whereas current mechanisms available both at national and at Community level for ensuring compliance with those Directives do not always allow infringements harmful to the collective interests of consumers to be terminated in good time; whereas collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement; whereas this is without prejudice to individual actions brought by individuals who have been harmed by an infringement;

(3) Whereas, as far as the purpose of bringing about the cessation of practices that are unlawful under the national provisions applicable is concerned, the effectiveness of national measures transposing the above Directives including protective measures that go beyond the level required by those Directives, provided they are compatible with the Treaty and allowed by those Directives, may be thwarted where those practices produce effects in a Member State other than that in which they originate;

(4) Whereas those difficulties can disrupt the smooth functioning of the internal market, their consequence being that it is sufficient to move the source of an unlawful practice to another country in order to place it out of reach of all forms of enforcement; whereas this constitutes a distortion of competition;

(5) Whereas those difficulties are likely to diminish consumer confidence in the internal market and may limit the scope for action by organisations representing the collective interests of consumers or independent public bodies responsible for protecting the collective interests of consumers, adversely affected by practices that infringe Community law;

(6) Whereas those practices often extend beyond the frontiers between the Member States; whereas there is an urgent need for some degree of approximation of national provisions designed to enjoin the cessation of the abovementioned unlawful practices irrespective of the country in which the unlawful practice has produced its effects; whereas, with regard to jurisdiction, this is without prejudice to the rules of private international law and the Conventions in force between Member States, while respecting the general obligations of the Member States deriving from the Treaty, in particular those related to the smooth functioning of the internal market;

(7) Whereas the objective of the action envisaged can only be attained by the Community; whereas it is therefore incumbent on the Community to act;

(8) Whereas the third paragraph of Article 3b of the Treaty makes it incumbent on the Community not to go beyond what is necessary to achieve the objectives of the Treaty; whereas, in accordance with that Article, the specific features of national legal systems must be taken into account to every extent possible by leaving Member States free to choose between different options having equivalent effect; whereas the courts or administrative authorities competent to rule on the proceedings referred to in Article 2 of this Directive should have the right to examine the effects of previous decisions;

(9) Whereas one option should consist in requiring one or more independent public bodies, specifically responsible for the protection of the collective interests of consumers, to exercise the rights of

[1] OJ C 107, 13. 4. 1996, p. 3 and OJ C 80, 13. 3. 1997, p. 10.
[2] OJ C 30, 30. 1. 1997, p. 112.
[3] Opinion of the European Parliament of 14 November 1996 (OJ C 362, 2. 12. 1996, p. 236). Council common position of 30 October 1997 (OJ C 389, 22. 12. 1997, p. 51) and Decision of the European Parliament of 12 March 1998 (OJ C 104, 6. 4. 1998). Council Decision of 23 April 1998.

action set out in this Directive; whereas another option should provide for the exercise of those rights by organisations whose purpose is to protect the collective interests of consumers, in accordance with criteria laid down by national law;

(10) Whereas Member States should be able to choose between or combine these two options in designating at national level the bodies and/or organisations qualified for the purposes of this Directive;

(11) Whereas for the purposes of intra-Community infringements the principle of mutual recognition should apply to these bodies and/or organisations; whereas the Member States should, at the request of their national entities, communicate to the Commission the name and purpose of their national entities which are qualified to bring an action in their own country according to the provisions of this Directive;

(12) Whereas it is the business of the Commission to ensure the publication of a list of these qualified entities in the *Official Journal of the European Communities;* whereas, until a statement to the contrary is published, a qualified entity is assumed to have legal capacity if its name is included in that list;

(13) Whereas Member States should be able to require that a prior consultation be undertaken by the party that intends to bring an action for an injunction, in order to give the defendant an opportunity to bring the contested infringement to an end; whereas Member States should be able to require that this prior consultation take place jointly with an independent public body designated by those Member States;

(14) Whereas, where the Member States have established that there should be prior consultation, a deadline of two weeks after the request for consultation is received should be set after which, should the cessation of the infringement not be achieved, the applicant shall be entitled to bring an action before the competent court or administrative authority without any further delay;

(15) Whereas it is appropriate that the Commission report on the functioning of this Directive and in particular on its scope and the operation of prior consultation;

(16) Whereas the application of this Directive should not prejudice the application of Community competition rules,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction referred to in Article 2 aimed at the protection of the collective interests of consumers included in the Directives listed in the Annex, with a view to ensuring the smooth functioning of the internal market.

2. For the purpose of this Directive, an infringement shall mean any act contrary to the Directives listed in the Annex as transposed into the internal legal order of the Member States which harms the collective interests referred to in paragraph 1.

Article 2

Actions for an injunction

1. Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of Article 3 seeking:

(a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;

(b) where appropriate, measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement;

(c) insofar as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time-limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions.

2. This Directive shall be without prejudice to the rules of private international law, with respect to the applicable law, thus leading normally to the application of either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effects.

Article 3

Entities qualified to bring an action

For the purposes of this Directive, a 'qualified entity' means any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular:

(a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or

(b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law.

Article 4

Intra-Community infringements

1. Each Member State shall take the measures necessary to ensure that, in the event of an infringement originating in that Member State, any qualified entity from another Member State where the interests protected by that qualified entity are affected by the infringement, may seize the court or administrative authority referred to in Article 2, on presentation of the list provided for in paragraph 3. The courts or administrative authorities shall accept this list as proof of the legal capacity of the qualified entity without prejudice to their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case.

2. For the purposes of intra-Community infringements, and without prejudice to the rights granted to other entities under national legislation, the Member States shall, at the request of their qualified entities, communicate to the Commission that these entities are qualified to bring an action under Article 2. The Member States shall inform the Commission of the name and purpose of these qualified entities.

3. The Commission shall draw up a list of the qualified entities referred to in paragraph 2, with the specification of their purpose. This list shall be published in the *Official Journal of the European Communities;* changes to this list shall be published without delay, the updated list shall be published every six months.

Article 5

Prior consultation

1. Member States may introduce or maintain in force provisions whereby the party that intends to seek an injunction can only start this procedure after it has tried to achieve the cessation of the infringement in consultation with either the defendant or with both the defendant and a qualified entity within the meaning of Article 3(a) of the Member State in which the injunction is sought. It shall be for the Member State to decide whether the party seeking the injunction must consult the qualified entity. If the cessation of the infringement is not achieved within two weeks after the request for consultation is received, the party concerned may bring an action for an injunction without any further delay.

2. The rules governing prior consultation adopted by Member States shall be notified to the Commission and shall be published in the *Official Journal of the European Communities.*

Article 6

Reports

1. Every three years and for the first time no later than five years after the entry into force of this Directive the Commission shall submit to the European Parliament and the Council a report on the application of this Directive.

2. In its first report the Commission shall examine in particular:

— the scope of this Directive in relation to the protection of the collective interests of persons exercising a commercial, industrial, craft or professional activity;

— the scope of this Directive as determined by the Directives listed in the Annex;

— whether the prior consultation in Article 5 has contributed to the effective protection of consumers.

Where appropriate, this report shall be accompanied by proposals with a view to amending this Directive.

Article 7

Provisions for wider action

This Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant qualified entities and any other person concerned more extensive rights to bring action at national level.

Article 8

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 months after its entry into force. They shall immediately inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 9

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities.*

Article 10

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 19 May 1998.

For the European Parliament	*For the Council*
The President	*The President*
J.M. GIL-ROBLES	G. BROWN

ANNEX

LIST OF DIRECTIVES COVERED BY ARTICLE 1 (*)

1. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ L 250, 19.9.1984, p. 17).
2. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).
3. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member Sttes concerning consumer credit (OJ L 42, 12.2.1987, p. 48), as last amended by Directive 98/7/EC (OJ L 101, 1.4.1998, p. 17).
4. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 23 as amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60)).
5. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).
6. Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use (OJ L 113, 30.4.1992, p. 13).
7. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).
8. Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).
9. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

(*) Directive Nos 1, 6, 7 and 9 contain specific provisions on injunctive actions.

Commission communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Article 2 of this Directive

(2003/C 321/07)

(Text with EEA relevance)

The authorities of the Member States concerned have recognised the entities mentioned below as being qualified to bring actions for an injunction under Article 2 of Directive 98/27/EC.

BELGIUM

Association belge des consommateurs Test-Achats — Belgische verbruikersunie Test-Aankoop

Rue de Hollande 13
B-1060 Bruxelles
Téléphone (32-2) 542 35 55
Télécopieur (32-2) 542 32 50
Courrier électronique: membres@test-achats.be
www.test-achats.be

Hollandstraat 13
B-1060 Brussel
Telefoon (32-2) 542 32 32
Fax (32-2) 542 32 50
E-mail: leden@test-aankoop.be
www.test-aankoop.be

DENMARK

1. **Forbrugerombudsmanden**
(Consumer Ombudsman)
Amagerfælledvej 56
DK-2300 København S
Tel. (45) 32 66 90 00
Fax (45) 32 66 91 00
E-mail: fs@fs.dk
Website: www.fs.dk
(English: www.consumer.dk/index-uk.htm)

Purpose of the Consumer Ombudsman

The Consumer Ombudsman ensures, with reference to the Marketing Act, that the law is observed, more specifically from the point of view of consumers.

The Consumer Ombudsman is competent to *bring actions under the following Directives*:

— Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

— Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

— Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as most recently amended by Directive 98/7/EC.

— Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC.

— Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

— Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

— Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

— Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

— Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

— Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

2. **Lægemiddelstyrelsen**
(Danish Medicines Agency)
Frederikssundsvej 378
DK-2730 Brønshøj
Tel. (45) 44 88 91 11
Fax (45) 44 91 73 73
E-mail: dkma@dkma.dk
Website: www.dkma.dk

Purpose of the Danish Medicines Agency

The task of the Danish Medicines Agency is to approve the placing on the market of medicines that are effective and safe, to help ensure that social security expenditure on medicines is in reasonable proportion to the therapeutic benefits, and to monitor the area of medicinal products and medicinal equipment.

The Danish Medicines Agency is competent to *bring actions* in the event of contraventions of Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use.

GERMANY

1.	**Aktion Bildungsinformation e.V. (ABI)**	Alte Poststraße 5 D-70173 Stuttgart	Protects consumers' interests by offering information and advice; authorised to bring collective actions in the interest of consumers
2.	**Verbraucherzentrale Bundesverband e.V.**	Markgrafenstraße 66 D-10969 Berlin	Association incorporating three former organisations: Stiftung Verbraucherinstitut, Arbeitsgemeinschaft der Verbraucherverbände e.V. and Verbraucherschutzverein e.V. (VSV) Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
3.	**Berliner Mieterverein e.V.**	Wilhelmstraße 74 D-10117 Berlin	Protects tenants' interests in Berlin by offering information and advice; authorised to bring collective actions in the interest of tenants
4.	**Bund der Energieverbraucher e.V.**	Grabenstraße 7 D-53619 Rheinbreitbach	Protects energy consumers' interests; authorised to bring collective actions in the interest of energy consumers
5.	**Bund der Versicherten e.V.**	Rönkrei 28 D-22399 Hamburg	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
6.	**Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband e.V. (VZBV)**	Markgrafenstraße 66 D-10969 Berlin	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
7.	**Bundesverband privater Kapitalanleger e.V.**	Am Goldgraben 6 D-37073 Göttingen	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
8.	**Datenschutzbund Hamburg e.V.**	Am Diebsteich 1 D-22761 Hamburg	Protects consumers' interests by providing information and advice, especially in the field of data protection; authorised to bring collective actions in the interest of consumers
9.	**Deutsche Gesellschaft für Sonnenenergie e.V.**	Augustenstraße 79 D-80333 München	Protects consumers' interests by providing information and advice, especially in the fields of renewable energy forms and rational use of energy, focusing particularly on solar energy; authorised to bring collective actions in the interest of consumers

10.	**Deutscher Mieterbund — Kieler Mieterverein e.V.**	Eggerstedtstraße 1 D-24103 Kiel	Protects consumers' interests in Kiel in the field of tenancy law by providing information and advice; authorised to bring collective actions in the interest of consumers
11.	**Deutscher Mieterbund — Landesverband Mecklenburg-Vorpommern e.V.**	Dr.-Külz-Straße 18 D-19053 Schwerin	Protects consumers' interests in Mecklenburg-Western Pomerania in the field of tenancy law by providing information and advice; authorised to bring collective actions in the interest of consumers
12.	**Deutscher Mieterbund — Landesverband der Mietervereine in Nordrhein-Westfalen e.V.**	Luisenstraße 12 D-44137 Dortmund	Protects consumers' interests in the field of tenancy law by providing information and advice; authorised to bring collective actions in the interest of consumers
13.	**Deutscher Mieterbund — Landesverband Schleswig-Holstein e.V.**	Eggerstedtstraße 1 D-24103 Kiel	Protects consumers' interests in Schleswig-Holstein in the field of tenancy law by providing information and advice; authorised to bring collective actions in the interest of consumers
14.	**Deutscher Mieterbund Mieterbund Rhein-Ruhr e.V.**	Rathausstraße 18—20 D-47166 Duisburg	Protects tenants' interests in Duisburg by providing information and advice; authorised to bring collective actions in the interest of tenants
15.	**Deutscher Mieterbund — Mieterverein Groß-Velbert und Umgebung e.V.**	Friedrich-Ebert-Straße 62—64 D-42549 Velbert	Protects tenants' interests in the Velbert region by providing information and advice; authorised to bring collective actions in the interest of tenants
16.	**Deutscher Mieterbund — Mieterverein Hamm und Umgebung e.V.**	Südring 1 D-59065 Hamm	Protects tenants' interests in the Hamm region by providing information and advice; authorised to bring collective actions in the interest of tenants
17.	**Deutscher Mieterbund — Mieterverein Iserlohn e.V.**	Vinckestraße 4 D-58636 Iserlohn	Protects tenants' interests in Iserlohn by providing information and advice; authorised to bring collective actions in the interest of tenants
18.	**Deutscher Mieterbund — Mieterverein Kassel und Umgebung e.V.**	Königsplatz 59/ Eingang Poststraße 1 D-34117 Kassel	Protects tenants' interests in the Kassel region by providing information and advice; authorised to bring collective actions in the interest of tenants
19.	**Deutscher Mieterbund — Mieterverein Schwerin und Umgebung e.V.**	Dr.-Külz-Straße 18 D-19053 Schwerin	Protects tenants' interests in the Schwerin region by providing information and advice; authorised to bring collective actions in the interest of tenants

20.	**Deutscher Mieterbund — Mieterverein Siegerland und Umgebung e.V.**	Koblenzer Straße 5 D-57072 Siegen	Protects tenants' interests in the Siegerland region by providing information and advice; authorised to bring collective actions in the interest of tenants
21.	**DMB — Mieterverein Stuttgart und Umgebung e.V.**	Moserstraße 5 D-70182 Stuttgart	Protects tenants' interests in the Stuttgart region by providing information and advice; authorised to bring collective actions in the interest of tenants
22.	**DMB — Mieterschutzverein Frankfurt am Main e.V.**	Eckenheimer Landstraße 339 D-60320 Frankfurt am Main	Protects the interests of tenants in Frankfurt am Main by providing information and advice; authorised to bring collective actions in the interest of tenants
23.	**Deutscher Mieterbund — Mieterschutzverein Wiesbaden und Umgebung e.V.**	Adelheidstraße 70 D-65185 Wiesbaden	Protects tenants' interests in the Wiesbaden region by providing information and advice; authorised to bring collective actions in the interest of tenants
24.	**Deutsche Schutzvereinigung Auslandsimmobilien e.V.**	Zähringer Straße 373 D-79108 Freiburg	Protects the interests of private house, flat and land owners with property abroad and other persons with interests in foreign property by providing information and advice; authorised to bring collective actions in the interest of the above persons
25.	**Mieter helfen Mietern, Münchner Mieterverein e.V.**	Weißenburger Straße 25 D-81667 München	Protects the interests of tenants in Munich by providing information and advice; authorised to bring collective actions in the interest of tenants
26.	**Mieter und Pächter e.V.**	Prinzenstraße 7 D-44135 Dortmund	Protects the interests of tenants and lessees in Dortmund by providing information and advice; authorised to bring collective actions in the interest of tenants
27.	**Mieterverein Bochum, Hattingen und Umgegend e.V.**	Brückstraße 58 D-44787 Bochum	Protects tenants' interests in Bochum, Hattingen and the region by providing information and advice; authorised to bring collective actions in the interest of tenants
28.	**Mieterverein für Lüdenscheid und Umgegend e.V.**	Lösenbacher Straße 3 D-58507 Lüdenscheid	Protects tenants' interests in the Lüdenscheid region by providing information and advice; authorised to bring collective actions in the interest of tenants
29.	**Mieterverein Gelsenkirchen e.V. im Deutschen Mieterbund**	Gabelsberger Straße 9 D-45879 Gelsenkirchen	Protects the interests of tenants and lessees by providing information and advice; authorised to bring collective actions in the interest of tenants

30.	**Mieterverein Köln e.V.**	Mühlenbach 49 D-50676 Köln	Protects the interests of tenants in Cologne by providing information and advice; authorised to bring collective actions in the interest of tenants
31.	**Mieterverein München e.V.**	Sonnenstraße 10 D-80331 München	Protects the interests of tenants in Munich by providing information and advice; authorised to bring collective actions in the interest of tenants
32.	**Schutzverband für Verbraucher und Dienstleistungsnehmer e.V. — Endverbraucher, Kapitalanleger, Versicherte**	Spessartring 37 D-63110 Rodgau	Protects the interests of consumers and service users by providing information and advice; authorised to bring collective actions in the interest of consumers and service users
33.	**Verbraucherzentrale Baden-Württemberg e.V.**	Paulinenstraße 47 D-70178 Stuttgart	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
34.	**Verbraucherschutzverein e.V. (VSV)**	Lützowstraße 33—36 D-10785 Berlin	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
35.	**Verbraucherzentrale Berlin e.V.**	Bayreuther Straße 40 D-10787 Berlin	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
36.	**Verbraucher-Zentrale Brandenburg e.V.**	Templiner Straße 21 D-14473 Potsdam	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
37.	**Verbraucher-Zentrale des Landes Bremen e.V.**	Altenweg 4 D-28195 Bremen	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
38.	**Verbraucher-Zentrale Hamburg e.V.**	Kirchenallee 22 D-20099 Hamburg	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
39.	**Verbraucher-Zentrale Hessen e.V.**	Große Friedberger Straße 13—17 D-60313 Frankfurt/Main	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
40.	**Verbraucherzentrale Mecklenburg-Vorpommern e.V.**	Strandstraße 98 D-18055 Rostock	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers

41.	**Verbraucher-Zentrale Niedersachsen e.V.**	Herrenstraße 14 D-30159 Hannover	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
42.	**Verbraucher-Zentrale Nordrhein-Westfalen Landesarbeitsgemeinschaft der Verbraucherverbände e.V.**	Mintropstraße 27 D-40215 Düsseldorf	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
43.	**Verbraucherzentrale Rheinland-Pfalz e.V.**	Ludwigstraße 6 D-55116 Mainz	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
44.	**Verbraucherzentrale des Saarlandes Landesarbeitsgemeinschaft der Verbraucherverbände e.V.**	Hohenzollernstraße 11 D-66117 Saarbrücken	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
45.	**Verbraucher-Zentrale Sachsen e.V.**	Bernhardstraße 7 D-04315 Leipzig	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
46.	**Verbraucherzentrale Sachsen-Anhalt e.V.**	Steinbockgasse 1 D-06108 Halle	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers
47.	**Verbraucherzentrale Thüringen e.V.**	Eugen-Richter-Straße 45 D-99085 Erfurt	Protects consumers' interests by providing information and advice; authorised to bring collective actions in the interest of consumers

FRANCE

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Site Internet: www.unaf.fr
Président: M. Hubert Brin
Directeur: M. Jean-Michel Rossignol

GREECE

1. **Consumers' association — New consumers' institute (NEO INKA)**
Akadimias 7, GR-106 71 Athens
Tel. (30-210) 363 24 43
Fax (30-210) 363 39 76

2. **Consumers' protection centre of Thessaloniki (KEPKA)**
Tsimiski 54, GR-546 23 Thessaloniki
Tel. (30) 2310 26 94 49
Fax (30) 2310 24 22 11

3. **Consumers' association 'the quality of life' (EKPIZO)**
Valtetsiou 43-45, GR-106 81 Athens
Tel. (30-210) 330 44 44
Fax (30-210) 330 05 91

4. **Greek consumers' organisation (EKATO)**
Dimokritou 10, GR-543 52 Thessaloniki
Tel. (30) 2310 85 70 07/866 80 07
Fax (30) 2310 86 74 56

5. **Consumers' institute (INKA) of Ioannina**
Th. Paschidi 52, GR-454 45 Ioannina
Tel./Fax (30) 26510 651 78

6. **Citizens' rights organisation**
Kolokotroni 134, Piraeus
Tel. (30-210) 360 04 10
Fax (30-210) 360 04 11

7. **Consumers' institute (INKA) of Macedonia**
Monastiriou 17, GR-546 27 Thessaloniki
Tel. (30) 2310 53 52 63
Fax (30) 2310 23 80 61

8. **Consumers' institute (INKA) of Corfu**
Plateia Iroon Kypriakou Agona 19, Corfu
Tel. (30) 26610 481 69/428 63
Fax (30) 26610 381 81

IRELAND

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ITALY

1. **ACU — Associazione Consumatori Utenti — Onlus**
Via Bazzini 4, I-20131 Milano (MI)
Tel. (39) 02 70 63 06 68
Fax (39) 02 70 63 67 77

2. **Adiconsum**
Via G. M. Lancisi 25, I-00161 Roma (RM)
Tel. (39) 06 641 70 21
Fax (39) 06 44 17 02 30

3. **ADOC — Associazione Difesa Orientamento Consumatori**
Via Lucullo 6, I-00187 Roma (RM)
Tel. (39) 06 482 58 49
Fax (39) 06 481 90 28

4. **Centro Tutela Consumatori Utenti Onlus — Verbraucherzentrale Südtirol**
Via Dodiciville 11, I-39100 Bolzano (BZ)
Tel. (39) 047 197 55 97
Fax (39) 047 197 99 14

5. **Cittadinanzattiva**
Via Flaminia 53, I-00196 Roma (RM)
Tel. (39) 06 36 71 81
Fax (39) 06 36 71 83 33

6. **Codacons — Coordinamento delle associazioni per la tutela dell'ambiente e per la difesa dei diritti degli utenti e consumatori**
Viale Mazzini 73, I-00195 Roma (RM)
Tel. (39) 06 372 58 09
Fax (39) 06 370 17 09

7. **Comitato Consumatori Altroconsumo**
Via Valassina 22, I-20159 Milano (MI)
Tel. (39) 02 66 89 01
Fax (39) 02 66 89 02 88

8. **Confconsumatori**
Via Aurelio Saffi 16, I-43100 Parma (PR)
Tel. (39) 052 123 01 34
Fax (39) 052 128 52 17

9. **Federconsumatori — Federazione Nazionale di Consumatori e Utenti**
Via Gioberti 54, I-00185 Roma (RM)
Tel. (39) 06 49 27 04 34
Fax (39) 06 49 27 04 52

10. **Lega Consumatori**
Via Orchidee 4/A, I-20147 Milano (MI)
Tel. (39) 02 48 30 36 59
Fax (39) 02 48 30 26 11

11. **Movimento Consumatori**
Via Carlo Maria Maggi 14, I-20154 Milano (MI)
Tel. (39) 02 33 60 30 60
Fax (39) 02 34 93 74 00

12. **Movimento Difesa del Cittadino**
Via Adis Abeba 1, I-00199 Roma (RM)
Tel. (39) 06 86 39 92 08
Fax (39) 06 86 38 84 06

13. **Unione Nazionale Consumatori**
Via Duilio 13, I-00192 Roma (RM)
Tel. (39) 06 326 95 31
Fax (39) 06 323 46 16

14. **ADUSBEF — Associazione difesa utenti servizi bancari e finanziari**
Via Farini 62, I-00185 Roma (RM)
Tel. (39) 06 481 86 32
Fax (39) 06 481 86 33
Posta elettronica: info@adusbef.it

NETHERLANDS

Consumentenbond

Enthovenplein 1
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2500 BA Den Haag
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Tel. (31-70) 445 45 45
Fax (31-70) 445 45 96
1e) Koos Peters, kpeters@consumentenbond.nl
2e) Wibo Koole, wkoole@consumentenbond.nl
Website: www.consumentenbond.nl

AUSTRIA

1. **Wirtschaftskammer Österreich**

Represents and promotes the common interests of its members and of industry and trade and individual members (§ 1 of the *Wirtschaftskammergesetz* = Chamber of Commerce Act). Protection of the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Wirtschaftskammer Österreich
Wiedner Hauptstraße 63
A-1045 Wien
Tel. (43-1) 501 05 42 96
Fax (43-1) 50 20 62 43
E-mail: huberta.maitz-strassnig@wko.at

2. **Bundesarbeitskammer**

Represents and promotes the social, economic, occupational and cultural interests of workers; contributes to improving the economic and social situation of workers and their families, implements measures in matters pertaining to education, culture, environmental protection, consumer protection, the organisation of leisure time, the protection and promotion of health and living conditions, the promotion of full employment; involved in the establishing of prices and competition rules; provides advice and legal protection in matters pertaining to labour law and social law, including representation. Protects the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Bundesarbeitskammer
Prinz-Eugen-Straße 20-22
A-1040 Wien
Tel. (43-1) 501 65 25 50
Fax (43-1) 501 65 25 32
E-mail: helmut.gahleitner@akwien.or.at

3. **Präsidentenkonferenz der Landwirtschaftskammern Österreichs**

Promotes the national economic role of agriculture and forestry and represents their common interests. Protects the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Präsidentenkonferenz der Landwirtschaftskammern Österreichs
Löwenstraße 12
A-1010 Wien
Tel. (43-1) 534 41 85 00
Fax (43-1) 534 41 85 09
E-mail: pkrecht@pklwk.at

4. **Österreichischer Gewerkschaftsbund**

Represents the social, economic and cultural interests of all gainfully employed people other than the self-employed (manual workers, white-collar workers, public servants, including apprentices or persons in a similar situation), the unemployed, even if they have not yet had the opportunity to be gainfully employed (other than in self-employment), pupils and students who intend to go into gainful employment (other than self-employment) and other occupational groups (such as freelancers or people working in private practice), provided that they can be compared, in terms of their activity, to people who are gainfully employed other than in self-employment. Protects the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Österreichischer Gewerkschaftsbund
Hohenstaufengasse 10-12
A-1010 Wien
Tel. (43-1) 53 44 44 05
Fax (43-1) 53 44 45 52
E-mail: thomas.maurer-muehlleitner@oegb.or.at

5. **Verein für Konsumenteninformation**

Advises, informs and protects consumers with regard to misleading and unfair advertising and sales methods, and in legal matters pertaining to the purchase of goods and services. Protects the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Verein für Konsumenteninformation
Mariahilferstraße 81
A-1010 Wien
Tel. (43-1) 58 87 73 33
Fax (43-1) 588 77 75
E-mail: pkolba@vki.or.at

6. **Österreichischer Landarbeiterkammertag**

Promotes cooperation between chambers of agricultural workers, provides advice and deals with common matters that fall within the sphere of responsibility of the chambers of agricultural workers (employees' sections). Protection of the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Österreichischer Landarbeiterkammertag
Marco d'Aviano-Gasse 1
A-1015 Wien
Tel. (43-1) 512 23 31
Fax (43-1) 512 23 31 70
E-mail: oelakt@netway.at

7. **Österreichischer Seniorenrat (Bundesaltenrat Österreichs)**
Ensures that all economic, social and cultural facilities are accessible to the older generation in keeping with its needs, contributes to solving problems of social, old-age and health policy, and supports the provision of advice, information and care to the elderly. Protects the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Österreichischer Seniorenrat
(Bundesaltenrat Österreichs)
Sperrgasse 8-10/III
A-1150 Wien
Tel. (43-1) 892 34 65
Fax (43-1) 892 34 65 24
E-mail: kontakt@seniorenrat.at

8. **Schutzverband gegen den unlauteren Wettbewerb**
Combats unfair competition, especially trade libel in economic life, protects the collective interests of consumers pursuant to § 28(1), § 28(a)(1) and § 29(1) of the KSchG and § 1, § 2(1) and § 14(1) of the UWG.

Schutzverband gegen den unlauteren Wettbewerb
Schwarzenbergplatz 14
A-1040 Wien
Tel. (43-1) 514 50 32 92
Fax (43-1) 505 78 93
E-mail: office@schutzverband.at

SUOMI/FINLAND

1. **Kuluttaja-asiamies**
(the Consumer Ombudsman) is responsible for:

— general supervision of consumer protection in connection with marketing and conditions of contract,

— supervision of radio and television advertising to check compliance with the regulations governing ethical principles in advertising and teleshopping and the protection of minors, and to pinpoint cases where television and radio broadcasts include marketing which is unfair or misleading to the consumer.

2. **Kuluttajat — Konsumenterna ry**
(registered consumer organisation) monitors the effectiveness and progress of consumer protection).

3. **Suomen Kuluttajaliitto**
(Finnish Consumers' Association) monitors consumers' interests through independent civil action in the community and in relation to the market.

4. **Kuluttajavirasto**
(National Consumer Administration of Finland) supervises the provision of security in connection with package travel.

5. **Rahoitustarkastus**
(Financial Inspection Authority) supervises consumer credit marketing and conditions of contract, with the consumer ombudsman.

6. **Lääkelaitos**
(National Agency for Medicines) supervises medicine advertising.

7. **Sosiaali- ja terveydenhuollon tuotevalvontakeskus**
(National Product Control Agency for Welfare and Health) supervises tobacco and alcohol advertising.

8. **Telehallintokeskus**
(Telecommunications Administration Centre) supervises television and radio advertising, excluding:

— regulations governing ethical principles in advertising and teleshopping and the protection of minors

— alcohol and tobacco advertising.

SPAIN

1. **Instituto Nacional del Consumo** (National Consumers' Institute)

This is an autonomous body coming under the Ministry for Health and Consumer Affairs which, in keeping with Article 51 of the Constitution and Act 26/84 on Consumer and User Protection, promotes and fosters consumer and user rights.

Chairman: The Under-Secretary for Health and Consumer Affairs
Address: Príncipe de Vergara, 54
E-28006 Madrid
Tel. (34) 915 75 49 30.

2. **Asociacíon de Usuarios de la Comunicación (AUC)** (Association of Media Users)

The purpose of the association is to defend the general interests and basic rights of consumers as laid down by law, both individual and collective ones. To this end, it has set itself the goal of promoting education and training for consumers and users, especially as regards rational consumption of goods and use of services, thus making it easier for them to understand the information directed at them by the mass media.

Chairman: Alejandro Perales Albert
Address: Cavanilles, 29, 6° B
E-28007 Madrid
Tel. (34) 915 01 67 73.

3. **Confederación Española de Organizaciones de Amas de Casa, Consumidores y Usuarios (CEACCU)** (Spanish Confederation of Organisations of Housewives, Consumers and Users)

The Confederation's tasks include defending the interest of housewives, consumers and users via the channels laid down in the applicable legislation, promoting and drawing up reliable and useful information for housewives, consumers and users, promoting education to improve their ability to make sound choices and decisions, and coordinating its member organisations' action plans.

Chairwoman: Isabel Ávila Fernández-Monge
Address: San Bernardo, 97/99
E-28015 Madrid
Tel. (34) 915 94 50 89.

4. **Directorate-General for Consumer Affairs (Government of Aragón)**

Management body attached to the Ministry of Health, Consumer Affairs of the Government of Aragón

The Director-General for Consumer Affairs

Address: Paseo María Agustín 36, Edificio Pignatelli,
Puerta 30, 2º Planta,
E-50004 Zaragoza
Tel. (34) 976 71 56 12

5. **Directorate-General for Industry, Trade and Consumer Affairs (Government of La Rioja)**

Management body attached to the Ministry of Economy and Finance of the Government of La Rioja

The Director-General for Industry, Trade and Consumer Affairs

Address: C/ Portales, 46
E-26071 Logroño
Tel. (34) 941 29 13 39

6. **Directorate-General for Consumer Affairs (Government of Madrid)**

Management body attached to the Ministry of Economy and Technical Innovation of the Government of Madrid

The Director-General for Consumer Affairs

Address: C/ Ventura Rodríguez, nº 7
E-28008 Madrid
Tel. (34) 915 80 22 00

7. **Directorate for Consumer Affairs (Basque Government)**

Management body attached to the Basque Government Department of Industry, Trade and Tourism

The Director of Consumer Affairs

Address: San Sebastián, 1
E-01010 Vitoria
Tel. (34) 945 01 99 23

8. **Legal Advisory Service (Catalonia Regional Government)**

Appointed by the Department of Labour, Industry, Trade and Tourism of the Catalonia Regional Government

Legal Advisory Service

Department of Labour, Industry, Trade and Tourism

Address: Paseo de Gracia, 105 (Torre Muñoz)
E-08008 Barcelona
Tel. (34) 934 84 93 00

9. **Directorate-General for Consumer Affairs (Regional Government of Castile-La Mancha)**

Management body attached to the Ministry of Health of the Regional Government of Castile-La Mancha

The Director-General for Consumer Affairs

Address: C/ Berna, 1
E-45071 Toledo
Tel. (34) 925 28 45 29

10. **Directorate-General for Consumer Affairs (Junta de Andalucía)**

Management body attached to the Regional Ministry of Internal Affairs, Junta de Andalucía

The Director-General for Consumer Affairs

Address: Plana Nueva, 4
E-41071 Seville
Tel. (34) 955 04 14 78

11. **Directorate-General for Trade and Tourism (Government of Navarre)**

Management body attached to the Department of Industry and Technology, Trade, Tourism and Employment of the Government of Navarre

The Director-General for Trade and Tourism

Address: Parque Tomás Caballero, 1, 4ª planta
E-31005 Pamplona
Tel. (34) 948 42 77 30

12. **Organisation of Consumers and Users (OCU)**

This organisation was set up to educate, inform, guide, defend and represent consumers and users.

Chair: Mr Carlos Sánchez-Reyes de Palacio
Address: Albarracín, 21
E-28037 Madrid
Tel. (34) 902 30 01 87

13. **Federación Unión Cívica de Consumidores y Amas de Hogar de España (UNAE — Spanish Civic Union Federation of Consumers and Housewives)**

This organisation was set up to protect consumers of goods and users of services, with particular focus on consumption within the family and the figure of the housewife as administrator of the household economy.

Chair: Mrs Margarita Fernández de Lis
Address: Villanueva, 8
E-28001 Madrid
Tel. (34) 915 75 72 19

14. **Asociación para la Defensa de los Impositores de Bancos y Cajas de Ahorro de España (ADICAE, Spanish Association for the Defence of Savers in Banks and Savings Banks)**

This Association is intended to defend consumers' interests in respect of banks, savings banks, insurers and other financial institutions. It also provides protection and advice to consumers and users on any consumer issues.

Chair: Mr Manuel Pardos Vicente
Address: Gavín, 12
E-50001 Zaragoza
Tel. (34) 976 39 00 60

15. **Federación de Usuarios-Consumidores Independientes (FUCI, Federation of Independent Users and Consumers)**

Set up to train and inform consumers and users and promote and develop their rights by publicising, encouraging the exercise of and demanding respect for these rights.

Chair: Mrs Agustina Laguna Trujillo
Address: Joaquín Costa, 61
E-28002 Madrid
Tel. (34) 915 64 01 18

16. **Confederation of Consumers and Users**

The Confederation was set up to protect consumers, specifically through training, information and legal defence activities and lobbying businesses and/or the Government to ensure that the rights enshrined in the legislation are implemented throughout Spanish society.

Chair: Mrs Maria Rodrígues Sánchez
Address: Cava Baja, 30
E-28005 Madrid
Tel. (34) 913 64 02 76, (34) 913 64 05 22

SWEDEN

Information on national measures taken to fulfil Sweden's obligations in the European Union:

In accordance with Articles 4(2) and 5(2) of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, we hereby provide the following information:

Article 4(2): The *Konsumentverket* (National Consumer Agency) is the central managing authority for consumer questions, and is charged with looking after consumers' interests.

The National Consumer Agency and the Consumer Ombudsman are authorised to bring actions under Article 2.

Article 5(2): The rules governing prior consultation are contained in § 4 of the Act (2000:1175) on access to justice for certain foreign consumer authorities and consumer organisations (see Annex).

UNITED KINGDOM

1. **Office of Fair Trading (OFT)**

The purpose of the Office of Fair Trading is to make the markets work well for consumers. Its objectives are: (a) to help maximise consumer welfare in the long term, protecting vulnerable consumers' interests by: empowering consumers through information and redress; protecting them by preventing abuse; and promoting competitive and responsive supply; (b) to make sure that competition works well in markets for goods and services so as to make those markets more efficient and benefit consumers.

2. **The Information Commissioner**

The Information Commissioner has a number of specific duties under the Data Protection and Freedom of Information Acts, including promoting the following of good practice and observance of the requirements of both acts including, in the case of data protection, observance of the data protection principles by data controllers; the encouragement of the production of codes of practice by others; and the dissemination of information to the public about the Acts.

3. **The Civil Aviation Authority**

The Civil Aviation Authority has a number of specific functions under the Civil Aviation Act 1982 including furthering the reasonable interest of users of air transport services and protection against the consequences of air transport organiser failure through the licensing of provision of flight accommodation.

4. **The Gas and Electricity Markets Authority**

The Gas and Electricity Markets Authority is responsible for regulating the gas and electricity markets in Great Britain and protecting the interests of gas and electricity customers.

5. **The Director-General of Electricity Supply for Northern Ireland**

The Director-General of Electricity Supply for Northern Ireland is responsible for regulating the gas and electricity markets in Northern Ireland and protecting the interests of gas and electricity customers.

6. **The Director-General of Telecommunications**

The Director-General for Telecommunications is the regulator for the UK telecommunications industry whose responsibilities include promoting the interests of consumers, purchasers and other users of telecommunication services provided and telecommunications apparatus supplied.

7. **The Director-General of Water Services**

The Director-General of Water Services is the economic regulator of the privatised water industry in England and Wales. His responsibilities include protecting the interests of the consumers with regard to pricing and standards of service and adjudicating certain disputes between appointed companies and their customers.

8. **The Rail Regulator**

The Rail Regulator is responsible for the regulation of the railways in Great Britain. The Regulator's responsibilities include protecting the interests of users of railway services.

9. **Every weights and measures authority in Great Britain**

Weights and measures authorities are part of local government in Great Britain. They enforce the law and regulations governing the sale and supply of goods and services and provide advice services for consumers and business.

10. **The Department of Enterprise, Trade and Investment in Northern Ireland**

The Department of Enterprise, Trade and Investment in Northern Ireland enforces the law and regulations governing the sale and supply of goods and services in Northern Ireland, and provide advice for consumers and business.

ANNEX

Act (2000:1175) on access to justice for certain foreign consumer authorities and consumer organisations promulgated on 7 December 2000

Pursuant to the decision of the Swedish Parliament [1] the following provisions are laid down [2].

Scope

§ 1 This Act applies to infringements of provisions implementing the Directives listed in an Annex to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

However, the Act applies only to those infringements of provisions aimed at protecting consumers' interests that affect consumers in countries of the EEA (European Economic Area) other than Sweden.

Bringing of actions before Swedish courts by qualified entities

§ 2 An authority or organisation in an EEA country other than Sweden may bring an action in a Swedish court on the grounds of an infringement as referred to in § 1 if it is a qualified entity included in a special list drawn up by the European Union and published in the *Official Journal of the European Communities*.

§ 3 The action must be for measures to be taken against someone for failure to comply with a provision as provided for in § 1. The measures sought must be:

1. a prohibition or injunction pursuant to §§ 14-16, § 17(1) and §§ 8-20 of the Swedish Marketing Act (1995:450), or a prohibition pursuant to §§ 3 and 6 of the Swedish Consumer Contracts Act (1994:1512);
2. an injunction to pay the Swedish State a special fee as provided for in Chapter 10, §§ 5 and 6, of the Radio and Television Act (1996:844); or
3. imposition of a fine prescribed in those cases referred to in 1. Act (2001:401).

§ 4 An action may be brought only if:

1. the applicant has tried, through consultation, to make the other party cease the alleged infringement; and
2. the alleged infringement has still not ceased two weeks after the other party has received the request for consultation.

Competent court

§ 5 The action shall be brought before:

1. the Market Court (*Marknadsdomstolen*) in cases seeking a prohibition or injunction as provided for in the Marketing Act (1995:450), and in cases seeking a prohibition pursuant to the Swedish Consumer Contracts Act (1994:1512);
2. the Stockholm County Administrative Court (*Länsrätten*) in cases seeking special fees as provided for in the Radio and Television Act (1996:844);
3. the competent district court (*tingsrätten*) in accordance with Chapter 10 of the Code of Judicial Procedure (*Rättegångsbalken*), or the Stockholm city court, in cases seeking imposition of a fine. Act (2001:401).

[1] Prop 2000/01:34, bet. 2000/01:LU3, rskr 2000/01:84.
[2] See Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11.6.1998, p. 51, Celex 31998L0027).

I

(Acts whose publication is obligatory)

REGULATION (EC) No 2006/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 October 2004

on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Council Resolution of 8 July 1996 on cooperation between administrations for the enforcement of legislation on the internal market [3] acknowledged that a continuing effort is required to improve cooperation between administrations and invited the Member States and the Commission to examine as a matter of priority the possibility of reinforcing administrative cooperation in the enforcement of legislation.

(2) Existing national enforcement arrangements for the laws that protect consumers' interests are not adapted to the challenges of enforcement in the internal market and effective and efficient enforcement cooperation in these cases is not currently possible. These difficulties give rise to barriers to cooperation between public enforcement authorities to detect, investigate and bring about the cessation or prohibition of intra-Community infringements of the laws that protect consumers' interests. The resulting lack of effective enforcement in cross-border cases enables sellers and suppliers to evade enforcement attempts by relocating within the Community. This gives rise to a distortion of competition for law-abiding sellers and suppliers operating either domestically or cross-border. The difficulties of enforcement in cross-border cases also undermine the confidence of consumers in taking up cross-border offers and hence their confidence in the internal market.

(3) It is therefore appropriate to facilitate cooperation between public authorities responsible for enforcement of the laws that protect consumers' interests in dealing with intra-Community infringements, and to contribute to the smooth functioning of the internal market, the quality and consistency of enforcement of the laws that protect consumers' interests and the monitoring of the protection of consumers' economic interests.

(4) Enforcement cooperation networks exist in Community legislation, to protect consumers above and beyond their economic interests, not least where health is concerned. Best practice should be exchanged between the networks established by this Regulation and these other networks.

(5) The scope of the provisions on mutual assistance in this Regulation should be limited to intra-Community infringements of Community legislation that protects consumers' interests. The effectiveness with which infringements at national level are pursued should ensure that there is no discrimination between national and intra-Community transactions. This Regulation does not affect the responsibilities of the Commission with regard to infringements of Community law by the Member States, nor does it confer on the Commission powers to stop intra-Community infringements defined in this Regulation.

[1] OJ C 108, 30.4.2004, p. 86.

[2] Opinion of the European Parliament of 20 April 2004 (not yet published in the Official Journal) and Council Decision of 7 October 2004.

[3] OJ C 224, 1.8.1996, p. 3.

(6) The protection of consumers from intra-Community infringements requires the establishment of a network of public enforcement authorities throughout the Community and these authorities require a minimum of common investigation and enforcement powers to apply this Regulation effectively and to deter sellers or suppliers from committing intra-Community infringements.

(7) The ability of competent authorities to cooperate freely on a reciprocal basis in exchanging information, detecting and investigating intra-Community infringements and taking action to bring about their cessation or prohibition is essential to guaranteeing the smooth functioning of the internal market and the protection of consumers.

(8) Competent authorities should also make use of other powers or measures granted to them at national level, including the power to initiate or refer matters for criminal prosecution, in order to bring about the cessation or prohibition of intra-Community infringements without delay as a result of a request for mutual assistance, where this is appropriate.

(9) Information exchanged between competent authorities should be subject to the strictest guarantees of confidentiality and professional secrecy in order to ensure investigations are not compromised or the reputation of sellers or suppliers unfairly harmed. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2] should apply in the context of this Regulation.

(10) The enforcement challenges that exist go beyond the frontiers of the European Union and the interests of Community consumers need to be protected from rogue traders based in third countries. Hence, there is a need for international agreements to be negotiated with third countries regarding mutual assistance in the enforcement of the laws that protect consumers' interests. These international agreements should be negotiated at Community level in the areas covered by this Regulation in order to ensure the optimum protection of Community consumers and the smooth functioning of enforcement cooperation with third countries.

(11) It is appropriate to coordinate at Community level the enforcement activities of the Member States in respect of intra-Community infringements in order to improve the application of this Regulation and contribute to raising the standard and consistency of enforcement.

(12) It is appropriate to coordinate at Community level the administrative cooperation activities of the Member States, in respect of their intra-Community dimension, in order to improve the application of the laws that protect consumers' interests. This role has already been demonstrated in the establishment of the European extra-judicial network.

(13) Where the coordination of the activities of the Member States under this Regulation entails Community financial support, the decision to grant such support shall be taken in accordance with the procedures set out in Decision No 20/2004/EC of the European Parliament and of the Council of 8 December 2003 establishing a general framework for financing Community actions in support of consumer policy for the years 2004 to 2007 [3], in particular Actions 5 and 10 set out in the Annex to that Decision and future Decisions.

(14) Consumer organisations play an essential role in terms of consumer information and education and in the protection of consumer interests, including in the settlement of disputes, and should be encouraged to cooperate with competent authorities to enhance the application of this Regulation.

(15) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [4].

(16) The effective monitoring of the application of this Regulation and the effectiveness of consumer protection requires regular reports from the Member States.

(17) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [5]. Accordingly this Regulation should be interpreted and applied with respect to those rights and principles.

[1] OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

[2] OJ L 8, 12.1.2001, p. 1.

[3] OJ L 5, 9.1.2004, p. 1. Decision as amended by Decision No 786/2004/EC (OJ L 138, 30.4.2004, p. 7).

[4] OJ L 184, 17.7.1999, p. 23.

[5] OJ C 364, 18.12.2000, p. 1.

(18) Since the objective of this Regulation, namely cooperation between national authorities responsible for the enforcement of consumer protection law, cannot be sufficiently achieved by the Member States because they cannot ensure cooperation and coordination by acting alone, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

INTRODUCTORY PROVISIONS

Article 1

Objective

This Regulation lays down the conditions under which the competent authorities in the Member States designated as responsible for the enforcement of the laws that protect consumers' interests shall cooperate with each other and with the Commission in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests.

Article 2

Scope

1. The provisions on mutual assistance set out in Chapters II and III shall cover intra-Community infringements.

2. This Regulation shall be without prejudice to the Community rules on private international law, in particular rules related to court jurisdiction and applicable law.

3. This Regulation shall be without prejudice to the application in the Member States of measures relating to judicial cooperation in criminal and civil matters, in particular the operation of the European Judicial Network.

4. This Regulation shall be without prejudice to the fulfilment by the Member States of any additional obligations in relation to mutual assistance on the protection of the collective economic interests of consumers, including in criminal matters, ensuing from other legal acts, including bilateral or multilateral agreements.

5. This Regulation shall be without prejudice to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1].

6. This Regulation shall be without prejudice to Community law relating to the internal market, in particular those provisions concerning the free movement of goods and services.

7. This Regulation shall be without prejudice to Community law relating to television broadcasting services.

Article 3

Definitions

For the purposes of this Regulation:

(a) 'laws that protect consumers' interests' means the Directives as transposed into the internal legal order of the Member States and the Regulations listed in the Annex;

(b) 'intra-Community infringement' means any act or omission contrary to the laws that protect consumers' interests, as defined in (a), that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found;

(c) 'competent authority' means any public authority established either at national, regional or local level with specific responsibilities to enforce the laws that protect consumers' interests;

(d) 'single liaison office' means the public authority in each Member State designated as responsible for coordinating the application of this Regulation within that Member State;

(e) 'competent official' means an official of a competent authority designated as responsible for the application of this Regulation;

(f) 'applicant authority' means the competent authority that makes a request for mutual assistance;

(g) 'requested authority' means the competent authority that receives a request for mutual assistance;

[1] OJ L 166, 11.6.1998, p. 51. Directive as last amended by Directive 2002/65/EC (OJ L 271, 9.10.2002, p. 16).

(h) 'seller or supplier' means any natural or legal person who, in respect of the laws that protect consumers' interests, is acting for purposes relating to his trade, business, craft or profession;

(i) 'market surveillance activities' means the actions of a competent authority designed to detect whether intra-Community infringements have taken place within its territory;

(j) 'consumer complaint' means a statement, supported by reasonable evidence, that a seller or supplier has committed, or is likely to commit, an infringement of the laws that protect consumers' interests;

(k) 'collective interests of consumers' means the interests of a number of consumers that have been harmed or are likely to be harmed by an infringement.

Article 4

Competent authorities

1. Each Member State shall designate the competent authorities and a single liaison office responsible for the application of this Regulation.

2. Each Member State may, if necessary in order to fulfil its obligations under this Regulation, designate other public authorities. They may also designate bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements in accordance with Article 8(3).

3. Each competent authority shall, without prejudice to paragraph 4, have the investigation and enforcement powers necessary for the application of this Regulation and shall exercise them in conformity with national law.

4. The competent authorities may exercise the powers referred to in paragraph 3 in conformity with national law either:

(a) directly under their own authority or under the supervision of the judicial authorities; or

(b) by application to courts competent to grant the necessary decision, including, where appropriate, by appeal, if the application to grant the necessary decision is not successful.

5. Insofar as competent authorities exercise their powers by application to the courts in accordance with paragraph 4(b), those courts shall be competent to grant the necessary decisions.

6. The powers referred to in paragraph 3 shall only be exercised where there is a reasonable suspicion of an intra-Community infringement and shall include, at least, the right:

(a) to have access to any relevant document, in any form, related to the intra-Community infringement;

(b) to require the supply by any person of relevant information related to the intra-Community infringement;

(c) to carry out necessary on-site inspections;

(d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;

(e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking;

(f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;

(g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.

7. Member States shall ensure that competent authorities have adequate resources necessary for the application of this Regulation. The competent officials shall observe professional standards and be subject to appropriate internal procedures or rules of conduct that ensure, in particular, the protection of individuals with regard to the processing of personal data, procedural fairness and the proper observance of the confidentiality and professional secrecy provisions established in Article 13.

8. Each competent authority shall make known to the general public the rights and responsibilities it has been granted under this Regulation and shall designate the competent officials.

Article 5

Lists

1. Each Member State shall communicate to the Commission and the other Member States the identities of the competent authorities, of other public authorities and bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements, and of the single liaison office.

2. The Commission shall publish and update the list of single liaison offices and competent authorities in the *Official Journal of the European Union*.

CHAPTER II

MUTUAL ASSISTANCE

Article 6

Exchange of information on request

1. A requested authority shall, on request from an applicant authority, in accordance with Article 4, supply without delay any relevant information required to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur.

2. The requested authority shall undertake, if necessary with the assistance of other public authorities, the appropriate investigations or any other necessary or appropriate measures in accordance with Article 4, in order to gather the required information.

3. On request from the applicant authority, the requested authority may permit a competent official of the applicant authority to accompany the officials of the requested authority in the course of their investigations.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 7

Exchange of information without request

1. When a competent authority becomes aware of an intra-Community infringement, or reasonably suspects that such an infringement may occur, it shall notify the competent authorities of other Member States and the Commission, supplying all necessary information, without delay.

2. When a competent authority takes further enforcement measures or receives requests for mutual assistance in relation to the intra-Community infringement, it shall notify the competent authorities of other Member States and the Commission.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 8

Requests for enforcement measures

1. A requested authority shall, on request from an applicant authority, take all necessary enforcement measures to bring about the cessation or prohibition of the intra-Community infringement without delay.

2. In order to fulfil its obligations under paragraph 1, the requested authority shall exercise the powers set out under Article 4(6) and any additional powers granted to it under national law. The requested authority shall determine, if necessary with the assistance of other public authorities, the enforcement measures to be taken to bring about the cessation or prohibition of the intra-Community infringement in a proportionate, efficient and effective way.

3. The requested authority may also fulfil its obligations under paragraphs 1 and 2 by instructing a body designated in accordance with the second sentence of Article 4(2) as having a legitimate interest in the cessation or prohibition of intra-Community infringements to take all necessary enforcement measures available to it under national law to bring about the cessation or prohibition of the intra-Community infringement on behalf of the requested authority. In the event of a failure by that body to bring about the cessation or prohibition of the intra-Community infringement without delay, the obligations of the requested authority under paragraphs 1 and 2 shall remain.

4. The requested authority may only take the measures set out in paragraph 3 if, after consultation with the applicant authority on the use of these measures, both applicant and requested authority are in agreement that:

— use of the measures in paragraph 3 is likely to bring about the cessation or prohibition of the intra-Community infringement in at least equally efficient and effective a way as action by the requested authority,

and

— the instruction of the body designated under national law does not give rise to any disclosure to that body of information protected under Article 13.

5. If the applicant authority is of the opinion that the conditions set out under paragraph 4 are not fulfilled, it shall inform the requested authority in writing, setting out the grounds for its opinion. If the applicant authority and the requested authority are not in agreement, the requested authority may refer the matter to the Commission, which shall issue an opinion in accordance with the procedure referred to in Article 19(2).

6. The requested authority may consult the applicant authority in the course of taking the enforcement measures referred to in paragraphs 1 and 2. The requested authority shall notify without delay the applicant authority, the competent authorities of other Member States and the Commission of the measures taken and the effect thereof on the intra-Community infringement, including whether it has ceased.

7. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 9

Coordination of market surveillance and enforcement activities

1. Competent authorities shall coordinate their market surveillance and enforcement activities. They shall exchange all information necessary to achieve this.

2. When competent authorities become aware that an intra-Community infringement harms the interests of consumers in more than two Member States, the competent authorities concerned shall coordinate their enforcement actions and requests for mutual assistance via the single liaison office. In particular they shall seek to conduct simultaneous investigations and enforcement measures.

3. The competent authorities shall inform the Commission in advance of this coordination and may invite the officials and other accompanying persons authorised by the Commission to participate.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 10

Database

1. The Commission shall maintain an electronic database in which it shall store and process the information it receives under Articles 7, 8 and 9. The database shall be made available for consultation only by the competent authorities. In relation to their responsibilities to notify information for storage in the database and the processing of personal data involved therein, the competent authorities shall be regarded as controllers in accordance with Article 2(d) of Directive 95/46/EC. In relation to its responsibilities under this Article and the processing of personal data involved therein, the Commission shall be regarded as a controller in accordance with Article 2(d) of Regulation (EC) No 45/2001.

2. Where a competent authority establishes that a notification of an intra-Community infringement made by it pursuant to Article 7 has subsequently proved to be unfounded, it shall withdraw the notification and the Commission shall without delay remove the information from the database. Where a requested authority notifies the Commission under Article 8(6) that an intra-Community infringement has ceased, the stored data relating to the intra-Community infringement shall be deleted five years after the notification.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

CHAPTER III

CONDITIONS GOVERNING MUTUAL ASSISTANCE

Article 11

General responsibilities

1. Competent authorities shall fulfil their obligations under this Regulation as though acting on behalf of consumers in their own country and on their own account or at the request of another competent authority in their own country.

2. Member States shall take all necessary measures to ensure effective coordination of the application of this Regulation by the competent authorities, other public authorities, bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements designated by them and the competent courts, through the single liaison office.

3. Member States shall encourage cooperation between the competent authorities and any other bodies having a legitimate interest under national law in the cessation or prohibition of intra-Community infringements to ensure that potential intra-Community infringements are notified to competent authorities without delay.

Article 12

Request for mutual assistance and information exchange procedures

1. The applicant authority shall ensure that all requests for mutual assistance contain sufficient information to enable a requested authority to fulfil the request, including any necessary evidence obtainable only in the territory of the applicant authority.

2. Requests shall be sent by the applicant authority to the single liaison office of the requested authority, via the single liaison office of the applicant authority. Requests shall be forwarded by the single liaison office of the requested authority to the appropriate competent authority without delay.

3. Requests for assistance and all communication of information shall be made in writing using a standard form and communicated electronically via the database established in Article 10.

4. The languages used for requests and for the communication of information shall be agreed by the competent authorities in question before requests have been made. If no agreement can be reached, requests shall be communicated in the official language(s) of the Member State of the applicant authority and responses in the official language(s) of the Member State of the requested authority.

5. Information communicated as a result of a request shall be communicated directly to the applicant authority and simultaneously to the single liaison offices of the applicant and requested authorities.

6. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 13

Use of information and protection of personal data and professional and commercial secrecy

1. Information communicated may only be used for the purposes of ensuring compliance with the laws that protect consumers' interests.

2. Competent authorities may invoke as evidence any information, documents, findings, statements, certified true copies or intelligence communicated, on the same basis as similar documents obtained in their own country.

3. Information communicated in any form to persons working for competent authorities, courts, other public authorities and the Commission, including information notified to the Commission and stored on the database referred to in Article 10, the disclosure of which would undermine:

— the protection of the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data,

— the commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

or

— the purpose of inspections or investigations,

shall be confidential and be covered by the obligation of professional secrecy, unless its disclosure is necessary to bring about the cessation or prohibition of an intra-Community infringement and the authority communicating the information consents to its disclosure.

4. For the purpose of applying this Regulation, Member States shall adopt the legislative measures necessary to restrict the rights and obligations under Articles 10, 11 and 12 of Directive 95/46/EC as necessary to safeguard the interests referred to in Article 13(1)(d) and (f) of that Directive. The Commission may restrict the rights and obligations under Articles 4(1), 11, 12(1), 13 to 17 and 37(1) of Regulation (EC) No 45/2001 where such restriction constitutes a necessary measure to safeguard the interests referred to in Article 20(1)(a) and (e) of that Regulation.

5. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 14

Information exchange with third countries

1. When a competent authority receives information from an authority of a third country, it shall communicate the information to the relevant competent authorities of other Member States, insofar as it is permitted so to do by bilateral assistance agreements with the third country and in accordance with Community legislation regarding the protection of individuals with regard to the processing of personal data.

2. Information communicated under this Regulation may also be communicated to an authority of a third country by a competent authority under a bilateral assistance agreement with the third country, provided the consent of the competent authority that originally communicated the information has been obtained and in accordance with Community legislation regarding the protection of individuals with regard to the processing of personal data.

Article 15

Conditions

1. Member States shall waive all claims for the reimbursement of expenses incurred in applying this Regulation. However, the Member State of the applicant authority shall remain liable to the Member State of the requested authority for any costs and any losses incurred as a result of measures held to be unfounded by a court as far as the substance of the intra-Community infringement is concerned.

2. A requested authority may refuse to comply with a request for enforcement measures under Article 8, following consultation with the applicant authority, if:

(a) judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority;

(b) in its opinion, following appropriate investigation by the requested authority, no intra-Community infringement has taken place;

or

(c) in its opinion the applicant authority has not provided sufficient information in accordance with Article 12(1) except when the requested authority has already refused to comply with a request under paragraph (3)(c) in relation to the same intra-Community infringement.

3. A requested authority may refuse to comply with a request for information under Article 6 if:

(a) in its opinion, following consultation with the applicant authority, the information requested is not required by the applicant authority to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur;

(b) the applicant authority does not agree that the information is subject to the provisions on confidentiality and professional secrecy set out in Article 13(3);

or

(c) criminal investigations or judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority.

4. A requested authority may decide not to comply with the obligations referred to in Article 7 if criminal investigations or judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority.

5. The requested authority shall inform the applicant authority and the Commission of the grounds for refusing to comply with a request for assistance. The applicant authority may refer the matter to the Commission which shall issue an opinion, in accordance with the procedure referred to in Article 19(2).

6. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19(2).

CHAPTER IV

COMMUNITY ACTIVITIES

Article 16

Enforcement coordination

1. To the extent necessary to achieve the objectives of this Regulation, Member States shall inform each other and the Commission of their activities of Community interest in areas such as:

(a) the training of their consumer protection enforcement officials, including language training and the organisation of training seminars;

(b) the collection and classification of consumer complaints;

(c) the development of sector-specific networks of competent officials;

(d) the development of information and communication tools;

(e) the development of standards, methodologies and guidelines for consumer protection enforcement officials;

(f) the exchange of their officials.

Member States may, in cooperation with the Commission, carry out common activities in the areas referred to in (a) to (f). The Member States shall, in cooperation with the Commission, develop a common framework for the classification of consumer complaints.

2. The competent authorities may exchange competent officials in order to improve cooperation. The competent authorities shall take the necessary measures to enable exchanged competent officials to play an effective part in activities of the competent authority. To this end such officials shall be authorised to carry out the duties entrusted to them by the host competent authority in accordance with the laws of its Member State.

3. During the exchange the civil and criminal liability of the competent official shall be treated in the same way as that of the officials of the host competent authority. Exchanged competent officials shall observe professional standards and be subject to the appropriate internal rules of conduct of the host competent authority that ensure, in particular, the protection of individuals with regard to the processing of personal data, procedural fairness and the proper observance of the confidentiality and professional secrecy provisions established in Article 13.

4. The Community measures necessary for the implementation of this Article, including the arrangements for implementing common activities, shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 17

Administrative cooperation

1. To the extent necessary to achieve the objectives of this Regulation, Member States shall inform each other and the Commission of their activities of Community interest in areas such as:

(a) consumer information and advice;

(b) support of the activities of consumer representatives;

(c) support of the activities of bodies responsible for the extra-judicial settlement of consumer disputes;

(d) support of consumers' access to justice;

(e) collection of statistics, the results of research or other information relating to consumer behaviour, attitudes and outcomes.

Member States may, in cooperation with the Commission, carry out common activities in the areas referred to in (a) to (e). The Member States shall, in cooperation with the Commission, develop a common framework for the activities referred to in (e).

2. The Community measures necessary for the implementation of this Article, including the arrangements for implementing common activities, shall be adopted in accordance with the procedure referred to in Article 19(2).

Article 18

International agreements

The Community shall cooperate with third countries and with the competent international organisations in the areas covered by this Regulation in order to enhance the protection of consumers' economic interests. The arrangements for cooperation, including the establishment of mutual assistance arrangements, may be the subject of agreements between the Community and the third countries concerned.

CHAPTER V

FINAL PROVISIONS

Article 19

Committee procedure

1. The Commission shall be assisted by a Committee.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its Rules of Procedure.

Article 20

Committee tasks

1. The Committee may examine all matters relating to the application of this Regulation raised by its chairman, either on his own initiative or at the request of the representative of a Member State.

2. In particular, it shall examine and evaluate how the arrangements for cooperation provided for in this Regulation are working.

Article 21

Reports

1. Member States shall communicate to the Commission the text of any provisions of national law that they adopt, or of agreements other than to deal with individual cases that they conclude, on matters covered by this Regulation.

2. Every two years from the date of entry into force of this Regulation, the Member States shall report to the Commission on the application of this Regulation. The Commission shall make these reports publicly available.

3. The reports shall address:

(a) any new information about the organisation, powers, resources or responsibilities of the competent authorities;

(b) any information concerning trends, means or methods of committing intra-Community infringements, particularly those that have revealed shortcomings or lacunae in this Regulation or in the laws that protect consumers' interests;

(c) any information on enforcement techniques that have proved their effectiveness;

(d) summary statistics relating to the activities of competent authorities, such as actions under this Regulation, complaints received, enforcement actions and judgments;

(e) summaries of significant national interpretative judgments in the laws that protect consumers' interests;

(f) any other information relevant to the application of this Regulation.

4. The Commission shall submit to the European Parliament and the Council a report on the application of this Regulation on the basis of the reports of the Member States.

Article 22

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 29 December 2005.

The provisions on mutual assistance set out in Chapters II and III shall apply from 29 December 2006.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 27 October 2004.

For the European Parliament
The President
J. P. BORRELL FONTELLES

For the Council
The President
A. NICOLAÏ

ANNEX

Directives and Regulations covered by Article 3(a) [1]

1. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ L 250, 19.9.1984, p. 17). Directive as last amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).

2. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).

3. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48). Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 17).

4. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 23). Directive as last amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

5. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).

6. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29). Directive as amended by Commission Decision 2002/995/EC (OJ L 353, 30.12.2002, p. 1).

7. Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).

8. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19). Directive as amended by Directive 2002/65/EC (OJ L 271, 9.10.2002, p. 16).

9. Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.

10. Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, p. 27).

11. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p. 12).

12. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000 p. 1).

13. Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67). Directive as last amended by Directive 2004/27/EC (OJ L 136, 30.4.2004, p. 34).

14. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.

15. Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights (OJ L 46, 17.2.2004, p. 1).

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[1] Directives Nos 1, 6, 8 and 13 contain specific provisions.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.7.2003
COM(2003) 443 final

2003/0162 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation")

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. EXECUTIVE SUMMARY

1. The effective functioning of the internal market calls for a significant improvement in the way laws that protect consumers economic interests are enforced in cross-border cases. The development of cross-border transactions, including through the greater use of the Internet, has made the need for this improvement more urgent. Enlargement further reinforces the need for action.

2. The protection of consumers from cross-border infringements requires the creation of a network of public enforcement authorities throughout the internal market. These authorities require a minimum of common investigation and enforcement powers. The proposal provides a framework of mutual assistance rights and obligations for enforcement authorities to use when dealing with cross-border infringements. The resulting network is designed to give national enforcement authorities an enforcement solution to deal quickly with the most serious rogue traders.

3. The proposed regulation also provides for wider administrative cooperation among the Member States and with the Commission on projects of common interest that are designed to inform and educate consumers and empower them. The scope of the proposed regulation is limited to cross-border infringements. Therefore the Member States are not required to change their arrangements for domestic infringements.

2. THE NEED FOR ACTION

4. In 2001, the Green Paper on EU Consumer Protection[1] identified a gap in the enforcement of consumer protection laws relating to consumer economic interests in the internal market. It argued that there was a need for a legal framework for cooperation between public authorities responsible for the enforcement of consumer protection laws. It outlined the possible elements for inclusion in such an instrument.

5. The Commission's ideas were very favourably received by nearly all stakeholders[2]. There was widespread agreement that such an instrument would help secure the proper functioning of the internal market and enhance consumer protection. Business stakeholders in particular welcomed the Commission's intentions.

6. In the communication on the follow-up to the Green Paper[3], the Commission undertook to present a proposal for such a legal instrument, following further consultation with national governments. This consultation took place in the autumn of 2002 and spring of 2003 (including at the informal ministerial meeting at Eretria in May) and broadly confirmed the orientations of national governments expressed in their responses to the Green Paper and follow-up communication[4]. The recent Internal Market Strategy 2003-2006[5] also argued that

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1 COM (2001) 531 final

2 Responses to the Green Paper can be found at:http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/responses/index_en.htm

3 Com (2002) 289 final

4 Responses to the follow-up communication can be found at:

better enforcement was needed to ensure consumer confidence in the internal market and identified this proposal as a priority action.

7. In addition, the Council adopted a resolution on 2 December 2002 on the Community's consumer policy strategy 2002-2006 that welcomed the Commission's intention to make a proposal in this area[6]. The European Parliament adopted a resolution on the consumer policy strategy and two resolutions on the Green Paper and follow-up communication on 13 March 2003 that also welcomed the Commission's intention to make a proposal[7].

8. There is therefore a broad consensus that consistent and effective enforcement of consumer protection laws is essential to the good functioning of the internal market, the elimination of distortions of competition and the protection of consumers.

9. The development of cross-border shopping has increased the possibility of cross-border infringements. It is increasingly likely that the advertiser or retailer will be located in a different jurisdiction from the consumer. In only its first sixteen months of operation, the European Extra-Judicial Network of alternative dispute resolution bodies (EEJ-net) recorded 1115 cross-border disputes[8]. The Consumer Sentinel, a US-led international enforcement project, has recorded 4100 cross-border complaints from consumers against traders in EU, EEA and acceding countries since 1999, over half of which occurred in January to September 2002[9].

10. The development of e-commerce, the arrival of Euro notes and coins and the more widespread use of common languages are likely to increase cross-border shopping still further. The greater use of cross-border advertising and marketing through post, the Internet and television will have an important part to play in stimulating cross-border shopping. However, unless backed by effective enforcement, the freedoms of cross-border trade and e-commerce could become freedom for rogue traders to undermine the internal market and harm consumers with impunity. The European Advertising Standards Alliance (EASA) estimates that around 63% of the cross-border complaints received between 1992 and 2002 concern rogue or peripheral traders and that this figure rises to around 86% for direct mail[10].

11. Consumer confidence in cross-border shopping in the internal market depends, in large part, on effective cross-border enforcement. In a recent Eurobarometer survey, 43% of those consumers who were less confident in cross-border shopping said that enabling their own national authorities to intervene abroad on their behalf was very important in increasing

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http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/responses_followup/index_en.htm

5 Internal Market Strategy: Priorities 2003-2006 COM (2003) 238 final

6 Council Resolution of 2 December 2002 on Community consumer policy strategy 2002-2006 OJ C11 of 17.01.2003 p1

7 European Parliament resolution on the implications of the Commission Green Paper on European Union Consumer Protection for the future of EU consumer policy (COM(2001) 531 - C5-0295/2002 - 2002/2151(COS)), European Parliament resolution on prospects for legal protection of the consumer in the light of the Commission Green Paper on European Union Consumer Protection (COM(2001) 531 - C5-0294/2002 - 2002/2150(COS)), European Parliament resolution on the Commission communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on 'Consumer Policy Strategy 2002-2006' (COM(2002) 208 - C5-0329/2002 - 2002/2173(COS))

8 http://europa.eu.int/comm/consumers/redress/out_of_court/eej_net/index_en.htm

9 http://www.ftc.gov/bcp/conline/edcams/crossborder/PDFs/Cross-BorderCY-2002.pdf

10 Source: EASA estimate of their own cross-border complaints figures

their confidence. A further 33% said that such a measure would be important[11]. Business confidence in a level playing field also depends on the guarantee of consistent and effective enforcement throughout the internal market.

12. Each Member State has developed an enforcement system adapted to its own laws and institutions. Each system has come into being in order to tackle purely domestic infringements and is not fully adapted to the challenges of the internal market. Domestic authorities lack the power to investigate infringements outside their jurisdiction. Some are also restricted in acting against traders within their own jurisdiction who are directing their activities at foreign but not domestic consumers. National authorities are also under no obligations to assist their counterparts in other Member States.

13. The result is a system of enforcement in the internal market that has not adapted sufficiently to meet the demands of the internal market and is not, at present, able to meet the challenge posed by rogue traders seeking to exploit the potential of the Internet in particular. The enlargement of the internal market in 2004 is likely to significantly increase the enforcement challenges that already exist and further highlight the inadequacies of current arrangements.

14. This analysis of the importance of the enforcement cooperation to the internal market is hardly new. It has been recognised in several policy fields, notably customs[12], indirect taxation[13], competition[14], financial services[15] and food[16] and product safety that the greater development of cross-border trade requires the development of a more rigorous EU approach.

15. The need for effective cross-border enforcement for consumer protection has also been recognised in the international domain. In 1999 the OECD adopted a recommendation on consumer protection in relation to e-commerce that stated that member countries should through 'their judicial, regulatory and law enforcement authorities co-operate at the international level, as appropriate, through information exchange, coordination, communication and joint action to combat cross-border fraudulent, misleading and unfair commercial conduct'[17]. On 11 June 2003, the OECD adopted further guidelines protecting consumers from cross-border fraudulent and deceptive commercial practices that recognise that the same enforcement problems and inadequacies of existing systems exist worldwide[18].

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11 http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/index_en.htm

12 Council Regulation 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters OJ L 082 of 22/03/1997 p1

13 Proposal for a Council Regulation on administrative cooperation in the field of value added tax COM (2001) 294 final OJ C270 of 25.09.2001 p 87 – now the subject of a common position

14 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1 of 4.01.2003 p1

15 Proposal for a directive of the European Parliament and of the Council on investment services and regulated markets COM (2002) 625 (01) and the recently adopted directive on insider dealing and market manipulation (market abuse) - common position: OJ C 228 E of 25.09.2002 p19.

16 Proposal for a regulation of the European Parliament and of the Council on official feed and food controls COM (2003) 52 final

17 Recommendation of the Council of the OECD concerning Guidelines for Consumer Protection in the context of electronic commerce, adopted on 9 December 1999 [C(99)184/FINAL]

18 http://www.oecd.org/sti/crossborderfraud

16. Some initiatives have been taken at EU and international level to address these issues. The Injunctions Directive[19] gives certain bodies, notably consumer associations, nominated by the Member States the right to seek injunctions in courts in other Member States against rogue traders. The International Marketing Supervision Network (IMSN) recently re-named the International Consumer Protection Enforcement Network (ICPEN) provides a bi-annual opportunity for enforcement officials from several countries to cooperate informally. An EU sub-group also meets bi-annually to discuss issues related to EU law.

17. In addition some Member States have signed bilateral cooperation agreements. The most notable of these is the cooperation agreement between the four Nordic enforcement authorities.

18. These initiatives have an important part to play in the enforcement dimension of EU consumer protection. They are not however sufficient. As in other internal market policy fields, a network is needed of enforcement authorities in each Member State linked through reciprocal rights and obligations ('mutual assistance'). This network needs a legal basis, not least to overcome the legal barriers to cooperation that have been identified.

3. THE REGULATION ON CONSUMER PROTECTION COOPERATION

3.1 Chapter 1: Objective, definitions, scope and competent authorities

3.1.1 Objective

19. The overall goals of the regulation are to ensure the smooth functioning of the internal market and the effective protection of consumers participating in the internal market. The proposed regulation has two specific objectives to achieve these goals, both related to the way the Member States and in particular their competent authorities cooperate with each other and with the Commission to protect consumers' economic interests. They are:

– to provide for cooperation between enforcement authorities in dealing with intra-Community infringements that disrupt the internal market;

– to contribute to improving the quality and consistency of enforcement of consumer protection laws and to the monitoring of the protection of consumer economic interests.

20. The first objective is designed to ensure that enforcement authorities can cooperate efficiently and effectively with their counterparts in other Member States. The second objective recognises that the EU can contribute to raising the standard of enforcement through common projects and the exchange of best practice on a wide range of information, education and representation activities. It also acknowledges the EU contribution to monitoring the functioning of the internal market.

21. These goals and objectives have determined the choice of legal base and instrument. The Commission has opted for Article 95 of the Treaty as a legal base . There are a number of examples of the barriers to efficiently and effectively tackling cross-border rogue traders that disrupt the smooth functioning of the internal market:

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[19] Directive 98/27/EC of the European Parliament and of the Council of 19.05.1998 on injunctions for the protection of consumers' interests. (OJ L 166 of 11.06.1998, pp. 51-56)

- A public authority in the Member State of the consumer may be prevented, under national confidentiality rules, from communicating the necessary information requesting assistance from an authority in the Member State of the trader.

- The public authority in the Member State of the trader is unable to act on behalf of foreign consumers, lacks the powers or resources to investigate or act or simply refuses to act, on grounds of national interest, rather than the Community interest. The public authority may also lack the power to seek injunctions to cease a practice quickly, thus having to use criminal law procedures.

- No public authority exists in the Member State of the trader to investigate the infringement and to seek an injunction against the trader.

- No public authority exists in the Member State of the consumer to seek the assistance of a public authority in the Member State of the trader.

- No obligations exist between Member States to provide mutual assistance in cross-border cases.

22. These barriers to cross-border enforcement mean that a rogue trader can evade enforcement relatively easily either by targeting consumers in another jurisdiction or by targeting their own consumers but from another jurisdiction. Consequently, traders respecting the law suffer from a competitive disadvantage from this lack of effective cross-border enforcement, leading to a distortion of competition.

23. These barriers to cross-border enforcement are also likely to inhibit the development of consumer confidence in cross-border shopping in the internal market and thus cause obstacles to the take-up of goods and services cross-border. The proposed Regulation thus both contributes to removing distortions of competition and to eliminating internal market obstacles.

24. The Injunctions Directive, which also aims at improving enforcement of consumer protection rules, provides one precedent for the use of Article 95 for enforcement questions. Existing directives on data protection and investment services, which also provide for the establishment of public bodies with investigative and enforcement powers are also based on Article 95.

25. A regulation has been chosen (as has been the practice in other such EU cooperation instruments, notably those on customs cooperation, VAT cooperation and feed and food controls), as the measure essentially provides arrangements for cooperation between public authorities of direct applicability.

3.1.2 Definitions, scope and competent authorities

26. The scope of the regulation is limited to intra-Community infringements of EU legislation that protects consumers' interests. The scope of the regulation will be enlarged when the proposed framework directive prohibiting unfair commercial practices enters into force.

27. Competent authorities are at the heart of the proposed regulation. The regulation puts in place a series of mutual assistance tools. The use of these tools rests entirely in the hands of the competent authorities, who are best placed to judge the operational enforcement needs of

consumer protection. The regulation grants the Commission no enforcement rights or responsibilities.

28. The designation of competent authorities is left to the Member States, in order to take account of national constitutional arrangements for consumer protection enforcement. Member States are free to nominate national and/or regional, local or sectoral competent authorities. The proposal also provides for the designation by each Member State of a single liaison office to ensure proper co-ordination between the competent authorities nominated in each Member State.

29. Competent authorities are defined as public authorities with specific consumer protection enforcement responsibilities. The proposal also ensures that only those authorities with a minimum of common investigation and enforcement powers can be designated as competent authorities. This common minimum is required to ensure that the provisions on mutual assistance can function in practice and act as a credible deterrent to rogue traders. The need for a network of public authorities having such powers has also been recognised in Community instruments on data protection, competition and financial services.

30. The regulation will require some change to the enforcement rules of all Member States. Clearly however, some Member States will be more affected than others will. A large majority of Member States and acceding countries nevertheless have public authorities with specific consumer protection enforcement responsibilities.

31. However no such authorities exist in Germany, the Netherlands or in Luxembourg. In Austria, Länder authorities have executive authority to impose fines on traders for breaches of certain laws.

32. The Member States, since the Injunctions Directive, have provided a privileged place for consumer organisations in enforcement and many also foresee an enforcement role for competitors and business organisations. All these organisations have a valuable role to play. The present proposal does not change or diminish the role played by these organisations at national or EU level in any way. Their role should continue to be encouraged, including in cross-border cases.

33. The proposed regulation puts in place a network of competent authorities and a framework for mutual assistance that complements those which exist already in each Member State or which exist on a sectoral basis at Community level. The existing systems are not on their own sufficient to ensure the smooth functioning of the internal market or the protection of consumers. The proposed network is designed to provide an enforcement solution to deal quickly with the most difficult rogue traders committing cross-border infringements, especially those who seek to exploit the freedoms of the internal market to harm consumers.

34. There are several reasons why an EU network of public authorities is required.

- Only public authorities can have the investigation powers necessary to obtain evidence of an infringement.

- Only public authorities can provide sufficient guarantee of the confidentiality and professional secrecy concerning information exchanged. A guarantee of confidentiality and secrecy is essential to ensure the trader's reputation is not unfairly harmed and to prevent investigations being compromised.

- The public authorities in the large majority of Member States where they exist have demonstrated the efficiency and effectiveness of a public dimension to enforcement. The threat of speedy action from public authorities is an important deterrent to rogue traders, especially those taking advantage of the opportunities of the internet. The credibility of this deterrent at EU level would be harmed if there were gaps in the network. Some anecdotal evidence has come to light in ICPEN discussions that some rogue traders may already be exploiting these gaps to base themselves in Member States without public authorities.

- Public authorities are both impartial and accountable in the way that they operate to defend the public interest. This is an important reassurance for traders. Private bodies are not so accountable. In order to ensure the accountable operation of the regulation, the mutual assistance rights provided in the regulation should therefore only be entrusted to public authorities. In addition, private bodies are primarily concerned, given their organisation along national lines, with consumers in their own country rather than other consumers in the EU

- The effectiveness of the enforcement network established in the proposal depends upon the reciprocal rights and obligations of mutual assistance. Because of this reciprocity, each Member States can be sure that their consumers will be effectively protected in cross-border situations. This reciprocity can only be guaranteed by equivalent public authorities in each Member State.

- Given that a large majority of the Member States recognise the value of a public dimension to their enforcement systems, the creation of a network of public authorities at EU level is an important element in overcoming reluctance to apply the principles of maximum harmonisation to consumer protection laws. Reassuring the Member States that consumers will be protected by equally effective public authorities when shopping cross-border will make inclusion of maximum harmonisation in a directive on unfair commercial practices and future consumer legislation more acceptable.

- The prospect of enlargement demands action to safeguard consumer interests in an enlarged internal market. Most of the new Member States do not have a long tradition of consumer protection enforcement, although they have established public authorities. The proposed regulation is therefore an opportunity to ensure that effective enforcement is in place throughout the new internal market.

35. The scope of the proposed regulation is limited to cross-border infringements. Therefore the Member States are not required to change their arrangements for domestic infringements by this regulation.

36. New public authorities are also not necessarily required in those Member States that currently lack them. The limited responsibilities of the regulation could be given to existing public authorities. For example, in several Member States and third countries, enforcement responsibilities for consumer protection are carried out by the agency responsible for the enforcement of competition law matters. Positive synergies exist between the consumer protection and competition dimensions of market surveillance and enforcement.

3.2 Chapter II – Mutual Assistance

37. The proposed regulation establishes several reciprocal mutual assistance rights and obligations on competent authorities. This balance reflects the fact that the competent authority in the Member State of the consumer is best placed to understand and judge the

harm suffered by the consumer but the competent authority in the Member State of the trader is best placed to act within their own jurisdiction and national culture. All competent authorities will have to play both roles.

38. The basis of mutual assistance is free and confidential information exchange between competent authorities. The proposal puts in place a system of exchange on request and, just as importantly, spontaneous exchange. Spontaneous exchange is essential to effective internal market surveillance.

39. If the information exchanged confirms the existence of an intra-Community infringement, the proposal requires that competent authorities act to bring about cessation of the infringement without delay. The requested authority is free to determine the most effective and efficient way to achieve this, being best placed to make this judgement. Injunctions are likely to be the main enforcement tool. They enable action to be taken speedily and effectively to remove practices from the internal market that infringe EU rules before consumers are harmed.

40. The proposal also provides for co-ordination of surveillance and enforcement actions between competent authorities. It is increasingly likely that cross-border problems will not simply be bilateral but will involve consumers in several Member States, especially where the Internet is involved.

3.3 Chapter III: general conditions governing mutual assistance

41. The proposal establishes the general principle that competent authorities can act against traders within their jurisdiction regardless of the location of the consumers involved. This chapter also sets out general procedural rules for the conduct of mutual assistance and standard rules on the use of information exchanged as a result of the Regulation.

42. Article 13 sets out the possibility for information to be exchanged with competent authorities of third countries under bilateral agreements. Article 14 foresees the conditions under which competent authorities may refuse assistance. The default principle of the Regulation is that requests for assistance should be accepted. This article sets out the conditions that can be used to justify a refusal to assist.

3.4 Chapter IV: Community activities

43. The principal task of the Regulation is to provide a system for cooperation between competent authorities in enforcement. However, the Community also has a role to play in supporting enforcement and in co-ordinating the wider Member States' information, education and representation activities designed to promote consumer economic interests. The Community's role is limited here to supporting measures which raise the standard of enforcement generally and which improve the ability of consumers to enforce their rights. The Community has a traditional role of encouraging the exchange of best practice and co-ordinating national efforts so as to avoid duplication and the waste of scarce resources.

44. There is in addition a need for negotiation at Community level of mutual assistance agreements with third countries. Similar agreements exist in the area of competition and customs. The work in the OECD has demonstrated that there is a demand for mutual assistance on an international scale. Considerable efficiency gains can be expected if such international agreements can be negotiated on a Community-wide basis rather than individually with each Member State. The arrangements for this are set out in Article 18.

45. Article 15 provides for information notified to the Commission to be stored in a database accessible to competent authorities. This is designed to improve the quality of the surveillance of the internal market. A similar database already exists under the aegis of the EU-group of the ICPEN and the Commission.

46. Article 16 provides for Community co-ordination of administrative activities of competent authorities related to enforcement. The article sets out possible areas for co-ordination, leaving the Member States and the Commission to decide over time the precise actions needed at Community level to co-ordinate their enforcement work. It also makes explicit provision for exchanges of officials between competent authorities.

47. Article 17 sets out further possible areas for Community co-ordination in relation to national actions on information, advice and education, consumer representation, the extra-judicial settlement of disputes, access to justice and statistics. Once again, it is left to the Member States and the Commission to decide over time the precise actions needed at Community level to coordinate their actions.

48. These coordinated actions may or may not require Community and/or national funding. The present proposal does not of itself provide the legal basis for Community expenditure on these actions. The Commission's proposed legal framework for Community action in support of consumer policy 2004-2007[20] and successor frameworks shall provide the basis for such expenditure. The present proposal instead provides a decision-making framework for co-ordinated actions. It will provide the possibility for the practical arrangements concerning the operation of the EEJ-net and the European Consumer Information Centres (sometimes known as the Euroguichets) to be put on a more formal basis.

3.5 Chapter V: final provisions

49. The proposal provides for an Advisory Committee to be set up to assist the Commission in implementing the practical procedures for the operation of the regulation. Articles 6, 7, 8, 9, 11, 14, 15, 16, 17, and 19 provide for detailed practical arrangements (such as common forms) and other implementing measures to be delegated to the Committee, as is common to other mutual assistance arrangements. Given the operational enforcement issues covered by the Regulation, representatives of competent authorities, amongst others, should be members of this Committee. The role of the Advisory Committee shall not include issues covered by the Contact Committee established under the Television without frontiers Directive.

50. Articles 20 and 21 set out the necessary arrangements for the monitoring of the effectiveness of enforcement in the EU. Member States are required to regularly report on the application of the Regulation.

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[20] Proposal for a Decision of the European Parliament and of the Council establishing a legal framework for Community actions in support of consumer policy 2004-2007 COM (2003) 44 final.

4. FINAL REMARKS

51. The proposed regulation is designed to operate on the basis of the existing consumer protection acquis. However the effective operation of the arrangements would undoubtedly be boosted with the adoption of a directive on unfair commercial practices and the development of maximum harmonisation in all the consumer protection acquis. A more harmonised and simpler regulatory system can make the work of enforcement officials easier as well as that of traders and consumers.

52. The Commission considers that adoption of the proposed regulation by Council and Parliament should be undertaken as quickly as possible, in particular, given the imminent enlargement of the EU.

2003/0162 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation")

(text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Having regard to the opinion of the Committee of the Regions[3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[4],

Whereas:

(1) The Council resolution of 8 July 1996[5] acknowledged that a continuing effort is required to improve cooperation between administrations and invited the Member States and the Commission to examine as a matter of priority the possibility of reinforcing administrative cooperation in the enforcement of legislation.

(2) Existing national enforcement arrangements for the laws that protect consumers' interests are not adapted to the challenges of enforcement in the internal market and effective and efficient enforcement cooperation in these cases is not currently possible. These difficulties give rise to barriers to cooperation between public authorities to detect, investigate and bring about the cessation of infringements of the laws that protect consumers' interests in cross-border cases. The resulting lack of effective enforcement in cross-border cases enables sellers and suppliers to evade enforcement attempts by relocating within the Community. This gives rise to a distortion of competition for law-abiding sellers and suppliers operating either domestically or cross-border. The difficulties of enforcement in cross-border cases also undermines the confidence of consumers in taking up cross-border offers and hence their confidence in the internal market.

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1 OJ C , , p. .
2 OJ C , , p. .
3 OJ C , , p. .
4 OJ C , , p. .
5 OJ C 224, 01.08.1996, p 3

(3) It is therefore appropriate to facilitate cooperation between public authorities responsible for enforcement of consumer protection in dealing with intra-Community infringements; to contribute to improving the smooth functioning of the internal market, the quality and consistency of enforcement of consumer protection laws and the monitoring of the protection of consumers' economic interests.

(4) Since the objectives of the proposed action cannot be sufficiently achieved by the Member States because they cannot ensure cooperation and co-ordination by acting alone and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this regulation does not go beyond what is necessary in order to achieve those objectives.

(5) The scope of the provisions on mutual assistance in this regulation should be limited to intra-Community infringements of Community directives on consumer protection. The effectiveness with which infringements at national level are pursued should ensure that there is no discrimination between national and intra-Community transactions. This regulation does not affect the responsibilities of the Commission with regard to infringements of Community law by the Member States.

(6) The protection of consumers from cross-border infringements requires the establishment of a network of public enforcement authorities throughout the Community and these authorities require a minimum of common investigation and enforcement powers to apply this regulation effectively and to deter sellers or suppliers from committing intra-Community infringements.

(7) The ability of competent authorities to cooperate freely on a reciprocal basis in exchanging information, detecting and investigating intra-Community infringements and in taking action to bring about their cessation or prohibition is essential to guaranteeing the smooth functioning of the internal market and the protection of consumers.

(8) Competent authorities should also make use of powers granted to them at national level to initiate or refer matters for criminal prosecution to also bring about the cessation or prohibition of intra-Community infringements without delay as a result of a request for mutual assistance, where this is appropriate.

(9) Information exchanged between competent authorities should be subject to the strictest guarantees of confidentiality and secrecy in order to ensure investigations are not compromised or the reputation of sellers or suppliers unfairly harmed.

(10) In the event of a refusal to provide mutual assistance on the grounds set out in this regulation, the Member State of the applicant authority may, in order to ensure the protection of consumers, take measures to restrict the freedom of the seller or supplier responsible for the intra-Community infringement to supply goods or services to the Member State of the applicant authority, provided that such measures are in conformity with Community law.

(11) The enforcement challenges that exist go beyond the frontiers of the European Union and the interests of European consumers need to be protected from rogue traders based in third countries. Hence, there is a need for international agreements with third

countries regarding mutual assistance in the enforcement of the laws that protect consumers' interests to be negotiated. These international agreements should be negotiated at Community level on the basis of this Regulation in order to ensure the optimum protection of European consumers and the smooth functioning of enforcement cooperation with third countries.

(12) It is appropriate to co-ordinate at Community level the enforcement activities of the Member States in respect of intra-Community infringements in order to improve the application of this regulation and contribute to raising the standard and consistency of enforcement .

(13) It is appropriate to co-ordinate at Community level the administrative cooperation activities of the Member States, in respect of their intra-Community dimension, in order to contribute to the better application of consumer protection laws and this role has already been demonstrated in the establishment of the European extra-judicial network.

(14) Where the co-ordination of the activities of the Member States under this Regulation entails Community financial support, the decision to grant such support shall be taken in accordance with the procedures set out in the Decision of the European Parliament and of the Council of XX establishing a legal framework for Community actions in support of consumer policy 2004-2007, in particular Actions 5 and 10 set out in the Annex to that Decision and successor Decisions.

(15) The measures necessary for the implementation of this regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[6],

(16) The effective monitoring of the application of this regulation and the effectiveness of consumer protection requires regular reports from the Member States.

HAVE ADOPTED THIS REGULATION:

Chapter I
Objective, definitions, scope and competent authorities

Article 1
Objective

This Regulation lays down the conditions under which the competent authorities in the Member States responsible for the enforcement of the laws that protect consumers' interests are to be designated and are to cooperate with each other and with the Commission in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests.

6 OJ L 184, 17.7.1999, p. 22.

Article 2
Scope

1. The provisions on mutual assistance in this regulation shall cover intra-Community infringements.

2. This regulation shall be without prejudice to the rules on private international law, in particular rules related to court jurisdiction and applicable law.

3. This regulation does not affect the application in the Member States of measures relating to judicial cooperation in criminal and civil matters, in particular the operation of the European judicial networks.

4. This regulation shall be without prejudice to Community law relating to the internal market, in particular those provisions concerning the free movement of goods and services.

5. This regulation shall be without prejudice to Community law relating to television broadcasting services.

Article 3
Definitions

For the purposes of this regulation:

a. 'laws that protect consumers' interests' means the Directives listed in Annex I as transposed into the internal legal order of the Member States.

b. 'intra-Community infringement' means any act contrary to the laws that protect consumers' interests that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act originated.

c. 'competent authority' means any public authority established either at national, regional or local level with specific responsibilities to ensure compliance with the laws that protect consumers' interests.

d. 'single liaison office' means the public authority in each Member State designated as responsible for co-ordinating the application of this regulation within that Member State.

e. 'competent official' means the official who can directly request assistance or supply information .

f. 'applicant authority' means the competent authority that makes a request for mutual assistance.

g. 'requested authority' means the competent authority that receives a request for mutual assistance.

h. 'seller or supplier' means any natural or legal person who, in respect of the laws that protect consumers' interests, is acting for purposes relating to his trade, business or profession;

i. ‘surveillance activities’ means the actions of a competent authority designed to detect whether intra-Community infringements have taken place within its jurisdiction.

j. ‘complaint’ means a statement that a seller or supplier has committed, or is likely to commit, an infringement of the laws that protect consumers’ interests.

k. ‘mutual assistance’ means the supply of information or the taking of enforcement measures .

l. ‘collective interests of consumers’ means the general interests of consumers that do not include the cumulation of the interests of individuals who have been harmed by an infringement.

Article 4
Competent authorities

1. Each Member State shall designate the competent authorities and single liaison office responsible for the application of this regulation.

2. Competent authorities shall have the investigation and enforcement powers necessary for the application of this regulation and shall exercise them in conformity with national law.

3. These powers shall include, at least, the right:

(a) to have access to any document in any form whatsoever;

(b) to request information from any person, and if needed, to obtain judicial orders requiring the supply of information by any person;

(c) to carry out on-site inspections;

(d) to request in writing that the seller or supplier cease the intra-Community infringement;

(e) to obtain from seller(s) or supplier(s) responsible for intra-Community infringements a binding commitment to cease the intra-Community infringement; and to publish the resulting commitment;

(f) to require the cessation or prohibition of any intra-Community infringement or to obtain judicial orders requiring the cessation or prohibition of any intra-Community infringement; and to publish resulting decisions;

(g) to obtain judicial orders against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with a decision;

(h) to obtain judicial orders requesting the freezing and/or sequestration of assets;

4. Competent authorities shall have adequate resources necessary for the application of this regulation. The staff of such authorities shall observe professional standards and be subject to appropriate internal procedures or rules of conduct that ensure, in particular, the

protection of personal data, procedural fairness and the proper observance of the confidentiality and professional secrecy provisions established in Article 12.

5. Each competent authority shall make known to the general public the rights and responsibilities it has been granted under this regulation.

6. Each competent authority shall designate competent officials who can directly request assistance or exchange information on the basis of the provisions set down in Article 11.

Article 5
Lists

1. Each Member State shall communicate to the Commission and other Member States the identities of the competent authorities and single liaison office designated under Article 4(1).

2. Each single liaison office shall keep an up-to-date list of competent officials designated under Article 4 (6) and communicate it to the other single liaison offices.

3. The Commission shall publish and update the list of single liaison offices and competent authorities in the *Official Journal of the European Union.*

Chapter II
Mutual assistance

Article 6
Exchange of information on request

1. A requested authority shall, on request from an applicant authority, supply any information required to establish whether an intra-Community infringement has occurred or is likely to occur. The requested authority shall supply the information requested without delay.

2. The requested authority shall undertake the appropriate investigations or any other necessary measures, in order to gather the required information.

3. On request from the applicant authority, a competent official of the applicant authority may accompany the officials of the requested authority in the course of their investigations.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Article 7
Spontaneous exchange of information

1. When a competent authority becomes aware of an intra-Community infringement, or considers that a serious risk of such an infringement exists, it shall notify the competent authorities of other relevant Member States and the Commission, supplying all necessary information, without delay.

2. When a competent authority takes further enforcement measures or receives requests for mutual assistance in relation to the intra-Community infringement, it shall notify the competent authorities of other Member States and the Commission.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Article 8
Requests for enforcement measures

1. A requested authority shall, on request from an applicant authority, take all necessary measures to bring about the cessation or prohibition of the intra-Community infringement without delay. These measures shall include, where appropriate, an appeal to a higher court, in the event that any action before a court is not successful.

2. In order to fulfil its obligations under paragraph 1, the requested authority shall exercise the powers set out under Article 4 (3) and any additional powers granted to the requested authority under national law. The requested authority shall determine the measures to be taken to bring about the cessation or prohibition of the intra-Community infringement in the most efficient and effective way.

3. The requested authority shall consult the applicant authority in the course of taking the enforcement measures. The requested authority shall notify the applicant authority, the competent authorities of other Member States and the Commission of its measures without delay.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Article 9
Co-ordination of surveillance and enforcement

1. Competent authorities shall co-ordinate their surveillance and enforcement activities. They shall exchange all information necessary to achieve this.

2. When competent authorities become aware that an intra-Community infringement harms consumers in more than two Member States, the competent authorities concerned shall coordinate their enforcement actions and requests for mutual assistance. In particular they shall seek to conduct simultaneous investigations and enforcement measures.

3. The competent authorities shall inform the Commission in advance of this co-ordination and may invite the Commission to participate.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Chapter III
General conditions governing mutual assistance

Article 10
General Responsibilities

1. Competent authorities shall fulfil their obligations under this regulation as though acting on behalf of consumers in their own country and on their own account or at the request of another competent authority in their own country.

2. Member States shall take all necessary measures to ensure effective co-ordination of the application of this regulation by the competent authorities designated by them, through the single liaison office.

Article 11
Request and information exchange procedures

1. The applicant authority shall ensure that all requests for mutual assistance contain sufficient information to enable a requested authority to fulfil the request.

2. Requests shall be sent either to single liaison offices, to competent authorities or competent officials.

3. Requests for assistance and the communication of information (including notifications to the Commission) shall be made in writing, using a standard form and communicated electronically. Requests for assistance or the communication of information between competent officials may be made in another way, if both agree.

4. The languages used for requests and the communication of information shall be agreed by the competent authorities or competent officials in question before requests have been made.

5. Information communicated as a result of a request shall be communicated directly to the applicant authority or competent officials who made the request. Competent authorities or competent officials shall ensure that single liaison offices are informed of all requests sent or received and information communicated following a request.

6. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Article 12
Use of information exchanged

1. Information supplied may only be used for the purposes of ensuring compliance with the laws that protect consumers' interests.

2. Competent authorities may invoke as evidence any information, documents, findings, statements, certified true copies or intelligence communicated pursuant to this regulation on the same basis as similar documents obtained in their own country.

3. Information communicated in any form pursuant to the mutual assistance provisions of this regulation, including when notified to the Commission and stored on the database referred to in Article 15, shall be confidential and be covered by the obligation of professional secrecy, unless:

a. the authority communicating the information consents to its disclosure;

b. it is invoked as evidence;

c. it is disclosed as part of the publication of the commitment or decision referred to in Article 4(3) (e) or (f)

4. Member States shall for the purpose of applying this regulation adopt the legislative measures necessary to safeguard the interests referred to in Article 13(1)(d) and (f) of Directive 95/46/EC[7].

Article 13
Information exchange with third countries

1. When a competent authority receives information from an authority of a third country, it shall supply the information to the relevant competent authorities of other Member States, in so far as it is permitted by bilateral assistance agreements with the third country.

2. Information communicated under this Regulation may also be supplied to an authority of a third country by a competent authority under an assistance agreement with the third country, provided the consent of the competent authority that originally supplied the information has been obtained.

Article 14
Conditions

1. Member States shall waive all claims for the reimbursement of expenses incurred in applying this regulation. However, the Member State of the applicant authority shall remain liable to the Member State of the requested authority for any costs and any losses incurred as a result of measures held to be unfounded by a court as far as the substance of the intra-Community infringement is concerned.

2. A requested authority may refuse to comply with a request for mutual assistance if:

a. the request would impose a disproportionate administrative burden on the requested authority in relation to the scale of the intra-Community infringement, in terms of the potential consumer detriment.

b. judicial proceedings have already been initiated or final judgement has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested authority.

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[7] OJ L 281, 23.11.1995, p 31

c. the request is not well founded.

3. The requested authority shall inform the applicant authority and the Commission of the grounds for refusing a request for assistance.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Chapter IV
Community activities

Article 15
Complaints and Database

1. The Member States shall regularly notify to the Commission statistics on consumer complaints received by competent authorities.

2. The Commission shall maintain an electronic database in which it shall store and process the information it receives under Articles 7, 8, 9 and this Article. The database shall be made available for consultation by the competent authorities.

3. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Article 16
Enforcement coordination

1. Member States shall, with the Commission, co-ordinate the following activities:

a. the training of their officials, including language training and the organisation of training seminars;
b. the collection and classification of consumer complaints;
c. the development of sector-specific networks of competent officials;
d. their strategy, planning and risk analysis activities related to surveillance and enforcement;
e. the development of information and communication tools;
f. the development of standards, methodologies and guidelines for enforcement officials.
g. the exchange of their officials.

2. Where appropriate, the competent authorities shall exchange competent officials in order to improve cooperation. The competent authorities shall take the necessary measures to enable exchanged competent officials to play an effective part in activities of the competent authority. To this end such competent officials shall be authorised to carry out the duties entrusted to them by the host competent authority in accordance with the laws of that Member State.

3. During the exchange the civil liability of the competent official shall be treated in the same way as that of the officials of the host competent authority. Exchanged competent officials shall observe professional standards and be subject to the appropriate internal rules

of conduct of the host competent authority that ensure, in particular, the protection of personal data, procedural fairness and the proper observance of the confidentiality and professional secrecy provisions established in Article 12.

4. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Article 17
Administrative cooperation

1. Member States shall, with the Commission, co-ordinate their activities designed to:

   a. inform, advise and educate consumers;
   b. support the activities of consumer representatives;
   c. support the activities of bodies responsible for the extra-judicial settlement of consumer disputes;
   d. support consumers' access to justice;
   e. gather statistics, research or other information relating to consumer behaviour, attitudes and outcomes;

2. The measures necessary for the implementation of this Article shall be adopted in accordance with the procedure referred to in Article 19 (2).

Article 18
International agreements

The Community shall cooperate with third countries and with the competent international organisations in order to enhance the protection of consumers' economic interests. The arrangements for cooperation, including the establishment of mutual assistance arrangements, may be the subject of agreements between the Community and the third parties concerned.

Chapter V
Final provisions

Article 19
Standing Committee

1. The Commission shall be assisted by a Standing Committee on Consumer Protection Cooperation, hereinafter referred to as 'the Committee', composed of representatives of the Member States and chaired by the representative of the Commission. However, matters regulated by the provisions of Directive 89/552/EEC, as amended, shall continue to be examined only by the Contact Committee set up by that Directive.

2. Where reference is made to this paragraph, Article 3 and 7 of Decision 1999/468/EC shall apply having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its Rules of Procedure.

Article 20
Committee tasks

1. The Committee may examine all matters relating to the application of this Regulation raised by its chairman, either on his own initiative or at the request of the representative of a Member State.

2. In particular, it shall examine and evaluate how the arrangements for cooperation provided for in this regulation are working.

3. Where appropriate, the Committee may also invite qualified entities notified under Article 3 of the Injunctions Directive to participate in its meetings.

Article 21
National Reports

1. Member States shall communicate to the Commission the text of any provisions of national law that they adopt or of agreements, other than to deal with individual cases, that they conclude on matters covered by this Regulation.

2. Every two years from the date of entry into force of this Regulation, the Member States shall report to the Commission on the application of this Regulation.

3. National reports shall address:

   a. any new information about the organisation, powers, resources or responsibilities of the competent authorities.
   b. any information concerning trends, means or methods of committing intra-Community infringements, particularly those that has revealed shortcomings or lacunae in this regulation or in the laws that protect consumers' interests.
   c. any information on enforcement techniques that have proved their effectiveness.
   d. statistics relating to the activities of competent authorities such as actions under this regulation, complaints received, enforcement actions and judgements.
   e. summaries of significant national interpretative judgements in the laws that protect consumers' interests.
   f. any other information relevant to the application of this regulation.

Article 22
Other mutual assistance obligations

The provisions of this Regulation shall be without prejudice to the fulfilment of any wider obligations in relation to mutual assistance, including in criminal matters, ensuing from other legal acts, including bilateral or multilateral agreements.

Article 23
Entry into force

This Regulation shall enter into force on the 20thday following that of its publication in the *Official Journal of the European Union*.

It shall apply from [ ] [ ] 20[ ].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

ANNEX I

LIST OF DIRECTIVES COVERED BY ARTICLE 2 (*)

1. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ L 250, 19.9.1984, p. 17) and Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ L290, 22/10/1997 P.18-22).

2. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).

3. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48), as last amended by Directive 98/7/EC (OJ L 101, 1.4.1998, p. 17) [and Directive XX/XX/EC of X].

4. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities: Articles 10 to 21 (OJ L 298, 17.10.1989, p. 22 as amended by Directive 97/36/EC (OJ L 202,30.7.1997, p. 60)).

5. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23. 6.1990, p. 59).

6. Directive 2001/83/EC of the European Parliament and of the Council of 23 September 2001 on the Community code relating to medicinal products for human use: Articles 86 to 100 (OJ L 311, 28.11.2001, p. 67)"

7. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993,p. 29).

8. Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).

9. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

10. Directive 1999/44/EC of the European Parliament and of the Council of 25 may 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, p12).

11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic

commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.07.2000 p. 1)

12. Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services. (OJ L L271, 9/10/2002, p.16-24)

13. European Parliament and Council Regulation XXXX/XX/EC on sales promotions.

14. European Parliament and Council Directive XXXX/XX/EC concerning unfair business-to-consumer commercial practices in the internal market (the unfair commercial practices directive).

15. European Parliament and Council Regulation XXXX/XX/EC on nutrition and health claims made on foods.

16. Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, OJ L 36 of 8.2.1991

17. Council Regulation XXXX/XX/EC establishing common rules for compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights

(*) Directive Nos. 1, 6, 7 and 9 contain specific provisions on injunctive actions.

LEGISLATIVE FINANCIAL STATEMENT

Policy area: HEALTH AND CONSUMER PROTECTION
Activity: Consumer policy

TITLE OF ACTION: REGULATION ON CONSUMER PROTECTION COOPERATION

1. BUDGET LINE(S) + HEADING(S)

170201 (B5-100) Community activities in favour of consumers

2. OVERALL FIGURES

2.1. Total allocation for action (Part B): 150,000 per year for commitment

2.2. Period of application:

From 2004, unlimited

2.3. Overall multiannual estimate of expenditure:

(a) Schedule of commitment appropriations/payment appropriations (financial intervention) *(see point 6.1.1)*

€ million (*to three decimal places)*

	2004	2005	2006	2007	2008	2009+ subs yrs	Total
Commitments	0.150	0.150	0.100	0.050	0.050	0.050	0.550
Payments	0.045	0.090	0.135	0.105	0.070	0.050	0.495

(b) Technical and administrative assistance and support expenditure*(see point 6.1.2)*

Commitments							
Payments							

Subtotal a+b							
Commitments	0.150	0.150	0.100	0.050	0.050	0.050	0.550
Payments	0.045	0.090	0.135	0.105	0.070	0.050	0.495

(c) Overall financial impact of human resources and other administrative expenditure *(see points 7.2 and 7.3)*

Commitments/ payments	0.229	0.229	0.229	0.229	0.229	0.229	1.374

TOTAL a+b+c							
Commitments	0.379	0.379	0.329	0.279	0.279	0.279	1.924
Payments	0.274	0.319	0.364	0.334	0.299	0.279	1.869

2.4. Compatibility with financial programming and financial perspective

Proposal is compatible with existing financial programming.

2.5. Financial impact on revenue:[1]

Proposal has no financial implications (involves technical aspects regarding implementation of a measure)

3. BUDGET CHARACTERISTICS

Type of expenditure		New	EFTA contribution	Contributions from applicant countries	Heading in financial perspective
Non-comp	Diff	NO	YES	YES, subject to negotiations on participation	No 3

4. LEGAL BASIS

Article 95 and 153(3)b TEC and the proposal for a decision of the European Parliament and of the Council establishing a general framework for financing Community actions in support of consumer policy for the years 2004-2007.

5. DESCRIPTION AND GROUNDS

5.1. Need for Community intervention [2]

The need for Community budgetary intervention in this area has already been set out in the proposal for a decision of the European Parliament and of the Council establishing a general framework for financing Community actions in support of consumer policy for the years 2004-2007. In particular that proposal established the effective enforcement of consumer protection rules as a central policy objective. Action 5 of the proposed general framework refers specifically to the actions necessary for the co-ordination of surveillance and enforcement actions referred to in this regulation to be financed 100% from the Community budget. In addition joint action 10 provides for the possibility of co-financing the same actions with one or more Member States.

The Community contribution envisaged in this regulation concerns measures to support, supplement and monitor the consumer protection policy pursued by the Member States. In particular the proposed actions with budgetary consequences are designed to:

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1 For further information, see separate explanatory note.
2 For further information, see separate explanatory note.

– ensure the maintenance of two databases (of intra-Community infringements and complaints received by competent authorities) under Article 7 and Article 12.

– support the co-ordination of national enforcement activities (Article 17)

– support the co-ordination of national administrative actions designed to improve consumer education, information and representation (Article 18).

The only direct budgetary consequences of the present regulation arise from the commitments to maintain the databases established under Articles 7 and 12. The provisions on cooperation in Article 17 and 18 do not themselves give rise to annual budgetary consequences, only providing a decision-making framework for non-budgetary issues. Any budgetary decisions arising from of the activities foreseen in Articles 17 and 18 will be taken under the procedures foreseen in the general framework for 2004-2007. Only the budgetary consequences of the databases established under Articles 7 and 12 are therefore addressed in this legislative financial statement.

5.1.1. Objectives pursued

The proposed databases are designed to contribute to meeting the Treaty objective that refers to the monitoring of national policies. They aim more specifically:

– to provide easily accessible information to competent authorities relating to intra-Community infringements reported by other competent authorities;

– to provide Member States and the Commission with information about trends in complaints about sellers or suppliers. This information is an important contribution to policymakers responsible for consumer protection regulation and enforcement.

5.1.2. Measures taken in connection with ex ante *evaluation*

The measures taken are set out in the legislative financial statement attached to the proposal for a decision of the European Parliament and of the Council establishing a general framework for financing Community actions in support of consumer policy for the years 2004-2007.

5.2. Action envisaged and budget intervention arrangements

The two actions will put in place and maintain two databases, one of intra-Community infringements (Article 7), one of complaints received by competent authorities (Article 12). The databases will be made available to the competent authorities. The ultimate beneficiaries will be consumers in the EU.

The following budget intervention arrangements are foreseen:

- Actions taken by the Commission through contracts following procurement procedures, such as calls for tenders. Appropriate technical specifications will be defined for each action.

These arrangements for budget intervention will be applied in accordance with the relevant provisions of the Financial Regulation applicable to the general budget of the European Communities.

5.3. Methods of implementation

The actions under the framework will be implemented and managed directly by the Commission using either permanent or temporary staff.

6. FINANCIAL IMPACT

6.1. Total financial impact on Part B - (over the entire programming period)

(The method of calculating the total amounts set out in the table below must be explained by the breakdown in Table 6.2.)

6.1.1. Financial intervention

NB. These credits have already been foreseen in the proposal for a decision of the European Parliament and of the Council establishing a general framework for financing Community actions in support of consumer policy for the years 2004-2007.

Commitments (in € million to three decimal places)

Breakdown	2004	2005	2006	2007	2008	2009+ subs yrs	Total
Databases	0.150	0.150	0.100	0.50	0.50	0.50	
TOTAL	0.150	0.150	0.100	0.50	0.50	0.50	

6.1.2. Technical and administrative assistance, support expenditure and IT expenditure (commitment appropriations)

n/a

6.2. Calculation of costs by measure envisaged in Part B (over the entire programming period)[3]

n/a

7. IMPACT ON STAFF AND ADMINISTRATIVE EXPENDITURE

7.1. Impact on human resources

Types of post		Staff to be assigned to management of the action using existing resources		Total	Description of tasks deriving from the action
		Number of permanent posts	Number of temporary posts		
Officials or temporary staff	A B C	1 (50%) 1 (50%) 1 (50%)		162,000	*If necessary, a fuller description of the tasks may be annexed.*
Other human resources					
Total		1.5		162,000	

[3] For further information, see separate explanatory note.

7.2. Overall financial impact of human resources

Type of human resources	Amount (€)	Method of calculation *
Officials Temporary staff	162,000	1.5*108,000
Other human resources (specify budget line)		
Total	162,000	

The amounts are total expenditure for twelve months.

7.3. Other administrative expenditure deriving from the action

Budget line (number and heading)	Amount €	Method of calculation
Overall allocation (Title A7)		
A0701 – Missions	2,292	1*8*286.45
A07030 – Meetings	-	-
A07031 – Compulsory committees [1]	65,000	4*25*650
A07032 – Non-compulsory committees [1]		
A07040 – Conferences		
A0705 – Studies and consultations		
Other expenditure (specify)		
Information systems (A-5001/A-4300)		
Other expenditure - Part A (specify)		
Total	67292	

The amounts are total expenditure for twelve months.

[1] Specify the type of committee and the group to which it belongs.

I.	Annual total (7.2 + 7.3)	€ 229,292
II.	Duration of action	indeterminate
III.	Total cost of action (I x II)	n/a

8. FOLLOW-UP AND EVALUATION

8.1. Follow-up arrangements

The arrangements to be taken are set out in the legislative financial statement attached to the proposal for a decision of the European Parliament and of the Council establishing a general framework for financing Community actions in support of consumer policy for the years 2004-2007.

8.2. Arrangements and schedule for the planned evaluation

See 8.1.

9. ANTI-FRAUD MEASURES

See 8.1.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION RECOMMENDATION

of 30 March 1998

on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (*)

(Text with EEA relevance)

(98/257/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community and in particular Article 155 thereof,

Whereas the Council, in its conclusions approved by the Consumer Affairs Council of 25 November 1996, emphasised the need to boost consumer confidence in the functioning of the internal market and consumers' scope for taking full advantage of the possibilities offered by the internal market, including the possibility for consumers to settle disputes in an efficient and appropriate manner through out-of-court or other comparable procedures;

Whereas the European Parliament, in its resolution of 14 November 1996 ([1]), stressed the need for such procedures to meet minimum criteria guaranteeing the impartiality of the body, the efficiency of the procedure and the publicising and transparency of proceedings and called on the Commission to draft proposals on this matter;

Whereas most consumer disputes, by their nature, are characterised by a disproportion between the economic value at stake and the cost of its judicial settlement; whereas the difficulties that court procedures may involve may, notably in the case of cross-border conflicts, discourage consumers from exercising their rights in practice;

Whereas the 'Green Paper on the access of consumers to justice and the settlement of consumer disputes in the single market' ([2]) was the subject of wide-ranging consultations whose results have confirmed the urgent need for Community action with a view to improving the current situation;

Whereas the experience gained by several Member States shows that alternative mechanisms for the out-of-court settlement of consumer disputes — provided certain essential principles are respected — have had good results, both for consumers and firms, by reducing the cost of settling consumer disputes and the duration of the procedure;

Whereas the adoption of such principles at European level would facilitate the implementation of out-of-court procedures for settling consumer disputes; whereas, in the case of cross-border conflicts, this would enhance mutual confidence between existing out-of-court bodies in the different Member States and strengthen consumer confidence in the existing national procedures; whereas these criteria will make it easier for parties providing out-of-court settlement services established in one Member State to offer their services in other Member States;

(*) A communication on the out-of-court settlement of consumer disputes was adopted by the Commission on 30 March 1998. This communication, which includes this recommendation and the European consumer complaint form, is available on the Internet (http://europa.eu.int/comm/dg24).

([1]) European Parliament resolution on the Commission communication 'Action plan on consumer access to justice and the settlement of consumer disputes in the internal market' of 14 November 1996 (OJ C 362, 2. 12. 1996, p. 275).

([2]) COM(93) 576 final of 16 November 1993.

Whereas one of the conclusions of the Green Paper concerned the adoption of a Commission recommendation with a view to improving the functioning of the ombudsman systems responsible for handling consumer disputes;

Whereas the need for such a recommendation was stressed during the consultations on the Green Paper and was confirmed during the consultation on the 'Action Plan' communication [1] by a very large majority of the parties concerned;

Whereas this recommendation must be limited to procedures which, no matter what they are called, lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution; whereas, therefore, it does not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent;

Whereas the decisions taken by out-of-court bodies may be binding on the parties, may be mere recommendations or may constitute settlement proposals which have to be accepted by the parties; whereas for the purposes of this recommendation these various cases are covered by the term 'decision';

Whereas the decision-making body's impartiality and objectivity are essential for safeguarding the protection of consumer rights and for strengthening consumer confidence in alternative mechanisms for resolving consumer disputes;

Whereas a body can only be impartial if, in exercising its functions, it is not subject to pressures that might sway its decision; whereas, therefore, its independence must be guaranteed without this implying the need for guarantees that are as strict as those designed to ensure the independence of judges in the judicial system;

Whereas, when the decision is taken by an individual, the decision-maker's impartiality can only be assured if he can demonstrate that he possesses the necessary independence and qualifications and works in an environment which allows him to decide on an autonomous basis; whereas this requires the person to be granted a mandate of sufficient duration, in the course of which he cannot be relieved of his duties without just cause;

Whereas, when the decision is taken by a group, equal participation of representatives of consumers and professionals is an appropriate way of ensuring this independence;

Whereas, in order to ensure that the persons concerned receive the information they need, the transparency of the procedure and of the activities of the bodies responsible for resolving the disputes must be guaranteed; whereas the absence of transparency may adversely affect the rights of the parties and cause misgivings as to out-of-court procedures for resolving consumer disputes;

Whereas certain interests of the parties can only be safeguarded if the procedure allows them to express their viewpoints before the competent body and to acquaint themselves with the facts presented by the opposing party and, where applicable, the experts' statements; whereas this does not necessarily necessitate oral hearings of the parties;

Whereas out-of-court procedures are designed to facilitate consumer access to justice; whereas, therefore, if they are to be effective, they must remedy certain problems associated with court procedures, such as high fees, long delays and cumbersome procedures;

Whereas, in order to enhance the effectiveness and equity of the procedure, the competent body must play an active role which allows it to take into consideration any element useful in resolving the dispute; whereas this active role is all the more important when, in the framework of out-of-court procedures, the parties in many cases do not have the benefit of legal advice;

Whereas the out-of-court bodies may decide not only on the basis of legal rules but also in equity and on the basis of codes of conduct; whereas, however, this flexibility as regards the grounds for their decisions should not lead to a reduction in the level of consumer protection by comparison with the protection consumers would enjoy, under Community law, through the application of the law by the courts;

Whereas the parties are entitled to be informed of the decisions handed down and of grounds for these decisions; whereas the grounds for decisions are a prerequisite for transparency and the parties' confidence in the operation of out-of-court procedures;

Whereas in accordance with Article 6 of the European Human Rights Convention, access to the courts is a fundamental right that knows no exceptions; whereas since Community law guarantees free movement of goods and services in the common market, it is a corollary of those freedoms that operators, including consumers, must be able, in order to resolve any disputes arising from their

[1] Action Plan on consumer access to justice and the settlement of consumer disputes in the internal market, COM(96) 13 final of 14 February 1996.

economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State; whereas out-of-court procedures cannot be designed to replace court procedures; whereas, therefore, use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised;

Whereas in some cases, and independently of the subject and value of the dispute, the parties and in particular the consumer, as the party who is regarded as economically weaker and less experienced in legal matters than the other party to the contract, may require the legal advice of a third party to defend and protect their rights more effectively;

Whereas, in order to ensure a level of transparency and dissemination of information on out-of-court procedures in line with the principles set out in the recommendation and to facilitate networking, the Commission intends to create a database of the out-of-court bodies responsible for resolving consumer disputes that offer these safeguards; whereas the database will contain particulars communicated to the Commission by the Member States that wish to participate in this initiative; whereas, to ensure standardised information and to simplify the transmission of these data, a standard information form will be made available to the Member States;

Whereas, finally, the establishment of minimum principles governing the creation and operation of out-of-court procedures for resolving consumer disputes seems, in these circumstances, necessary at Community level to support and supplement, in an essential area, the initiatives taken by the Member States in order to realise, in accordance with Article 129a of the Treaty, a high level of consumer protection; whereas it does not go beyond what is necessary to ensure the smooth operation of out-of-court procedures; whereas it is therefore consistent with the principle of subsidiarity,

RECOMMENDS that all existing bodies and bodies to be created with responsibility for the out-of-court settlement of consumer disputes respect the following principles:

I

Principle of independence

The independence of the decision-making body is ensured in order to guarantee the impartiality of its actions.

When the decision is taken by an individual, this independence is in particular guaranteed by the following measures:

— the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function,

— the person appointed is granted a period of office of sufficient duration to ensure the independence of his action and shall not be liable to be relieved of his duties without just cause,

— if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its members or for the enterprise concerned.

When the decision is taken by a collegiate body, the independence of the body responsible for taking the decision must be ensured by giving equal representation to consumers and professionals or by complying with the criteria set out above.

II

Principle of transparency

Appropriate measures are taken to ensure the transparency of the procedure. These include:

1. provision of the following information, in writing or any other suitable form, to any persons requesting it:
   — a precise description of the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute,
   — the rules governing the referral of the matter to the body, including any preliminary requirements that the consumer may have to meet, as well as other procedural rules, notably those concerning the written or oral nature of the procedure, attendance in person and the languages of the procedure,
   — the possible cost of the procedure for the parties, including rules on the award of costs at the end of the procedure,
   — the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.),
   — the decision-making arrangements within the body,
   — the legal force of the decision taken, whereby it shall be stated clearly whether it is binding on the professional or on both parties. If the decision is binding, the penalties to be imposed in the event of non-compliance shall be stated, as shall the means of obtaining redress available to the losing party.
2. Publication by the competent body of an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified.

III

Adversarial principle

The procedure to be followed allows all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statements.

IV

Principle of effectiveness

The effectiveness of the procedure is ensured through measures guaranteeing:

— that the consumer has access to the procedure without being obliged to use a legal representative,

— that the procedure is free of charges or of moderate costs,

— that only short periods elapse between the referral of a matter and the decision,

— that the competent body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.

V

Principle of legality

The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

All decisions are communicated to the parties concerned as soon as possible, in writing or any other suitable form, stating the grounds on which they are based.

VI

Principle of liberty

The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.

The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

VII

Principle of representation

The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

THIS RECOMMENDATION is addressed to the bodies responsible for the out-of-court settlement of consumer disputes, to any natural or legal person responsible for the creation or operation of such bodies, as well as to the Member States, to the extent that they are involved.

Done at Brussels, 30 March 1998.

For the Commission

Emma BONINO

Member of the Commission