



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
on the sale of consumer goods and associated guarantees

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. General

A. Context

1. Since its first preliminary programme for a consumer protection and information policy⁽¹⁾, the various Community institutions have on several occasions requested the Commission to present proposals with a view to improving guarantee arrangements and after-sales services. The progressive completion of the single market gives further cause to address these problems at Community level.

Hence, in its proposal for a Council Directive on unfair terms in consumer contracts⁽²⁾, the Commission finally proposed harmonization of certain aspects of the legal and commercial guarantee for movables and the legal guarantee for services. These proposals were backed by the European Parliament. However, the Council thought it more appropriate to deal with these matters separately and in greater depth and refused to include these provisions in the Directive on unfair terms, inviting the Commission to examine the opportunities of harmonizing guarantee schemes in the Member States relating to consumer contracts and, on this basis, to submit to it, if relevant, a proposal for a Directive on the harmonization of national legislation in this domain⁽³⁾.

In the meantime the Commission has conducted an in-depth analysis of the "usefulness and desirability of approximating guarantee arrangements and improving after-sales services for goods and services in the internal market"⁽⁴⁾. This analysis was conducted in the context of wide-ranging consultations in the wake of the Green Paper on guarantees for consumer goods and after-sales services⁽⁵⁾. The impact assessment annexed to this proposal surveys the results of these consultations.

This proposal is also a necessary complement to Directive 93/13/EEC concerning unfair contract terms. This Directive assures all consumers a uniform minimal level of protection throughout the European Union with regard to contract terms governing all transactions with professionals. Irrespective of the place of purchase, European consumers have the same protection everywhere with regard to unfair general conditions of sale. However, this Directive only concerns clauses governing the modalities of a transaction and is silent as regards the consumer's rights in the event of bad performance of a contract. Thus, at present, a clause in a sales contract

⁽¹⁾ Council Resolution of 14 April 1975, OJ No C 92, 25.4.1975, p. 1.

⁽²⁾ Initial proposal - see OJ No C 243, 28.9.1990, p. 2; amended proposal - see OJ No C 73, 24.3.1992, p. 7.

⁽³⁾ Statement in the Council minutes in connection with the adoption of the Directive on unfair terms in consumer contracts of 5 April 1993.

⁽⁴⁾ As the Council had also requested in its Resolution of 13 July 1992 on future priorities for the development of consumer protection policy, OJ No C 186, 23.7.1992, p. 1.

⁽⁵⁾ COM(93) 509 of 15 November 1993.

excluding the vendor's liability for any defects in the good sold is void as against the consumer, while the concrete rights that the consumer can rely on in such a case are somewhat quite different according to the State where the good was purchased. This proposal seeks to guarantee a uniform minimal level of protection for consumers throughout the Union.

The need for a directive on this subject was also underlined in the European Parliament's Opinion on the Commission's Green Paper⁽⁶⁾. The Parliament, in fact, requested the Commission to present, without delay, a proposal for a Directive.

2. Studies in the different Member States show that problems concerning the quality of goods and the operation of guarantees and after-sales services are the main source of consumer complaints in connection with the purchase of goods⁽⁷⁾. The situation is similar in the case of cross-border transactions. The information provided to the Commission, notably by the European consumer infocentres operating in certain border regions, shows that the bulk of consumer complaints relating to the purchase of movables concern the legal and commercial guarantees. An analysis of the latest 100 cases reported to the Commission by one of the European infocentres concerning disputes associated with the cross-border purchase of goods (France, Luxembourg, Belgium, Germany) shows that approximately 70% of complaints relate to this domain.

It goes without saying that in the case of cross-border transactions, the consumer's plight is aggravated because of the nature of the dispute: the problem of the applicable law, divergences between national laws, problems of invoking the commercial guarantee, etc.

3. Against this backdrop, it is not surprising that European consumers are still quite reluctant to shop abroad, although in theory European citizens consider the freedom to buy products and services abroad to be one of the main attractions of the single market. According to a Eurobarometer survey conducted in 1993⁽⁸⁾, 52% of consumers mentioned the difficulties they encountered in exchanging goods or having repairs done to products purchased abroad as the main barrier to cross-border purchases. The percentage of consumers who mentioned this barrier is far higher in

⁽⁶⁾ Resolution of 6 May 1994, OJ No C 205, 25.7.1994, p. 562.

⁽⁷⁾ For example, the statistics published by the Office of Fair Trading on consumer complaints reported to the national authorities in the United Kingdom. These quarterly statistics are published in the review Fair Trading and highlight the preponderance of problems relating to defective goods and the difficulties of getting them repaired in complaints concerning such goods. A calculation based on complaints received during the second quarter of 1994 (Fair Trading No 9, Winter 1994/95) gives the following percentages for different types of goods: furniture (not upholstered) 60.6% upholstered furniture 75.6% radio, TV, other electrical goods and hire 66.4%, major appliances 72.2%, clothing 61.3%, footwear 81.1%, toilet article, perfumery, hairdressing 39.9%, jewellery, silverware, clocks and watches 66.6%, new motor cars, 59.5%, secondhand cars 61.9%.

⁽⁸⁾ Eurobarometer No 39, September 1993.

some countries than in others (68% in Denmark, 63% in the Netherlands and 61% in Germany for example). The language barrier is mentioned by 40% of consumers and, in third place, the difficulty of settling disputes, mentioned by 34% of consumers. Interestingly, the fourth barrier mentioned is uncertainty with regard to the terms of sale: the percentage of consumers who mention this barrier rose from 24% in 1991 to 31% in 1993.

4. In its general conclusions concerning the Green Paper adopted on 17 May 1994, the Council reaffirmed its conviction that the benefits of the internal market should accrue to all consumers; that consumers must be encouraged to play a more active role in the operation of this market; that measures of this kind are essential if Europe is to be brought closer to the European citizen.

Already in its second three-year action plan on consumer policy (1993-1995)⁽⁹⁾, the Commission emphasized that "transfrontier shopping can only flourish if the consumer is assured that he can enjoy the same after-sales and guarantee terms no matter where the supplier is domiciled" and that, if the internal market is to work properly, it is necessary to guarantee consumers that, independently of the country of purchase of a good within the single market, they will always be able to benefit from an effective after-sales service and to challenge possible defects in the goods purchased⁽¹⁰⁾.

This proposal for a Directive follows from the above and aspires to provide European consumers with a minimum common corpus of rights throughout the European Union. This can only be done by approximating national legislation governing the legal guarantee. In all Member States the legal guarantee is the bedrock of consumer rights as regards the quality and conformity of the goods purchased. Commercial guarantees are add-ons to these basic rights, but generally they cannot waive them. Hence the legal guarantee is the foundation for the development and operation of the commercial guarantees.

The notion of the "legal guarantee" includes all legal protection of the purchaser in respect of defects in the goods acquired, resulting directly from the law, as a collateral effect of the contract of sale. The key feature of the legal guarantee is that it is designed to protect purchasers' confidence in the context of the contract of sale - their legitimate expectations concerning the product purchased - and that it operates independently of the will of the contracting parties, its effects being binding in law. On the other hand, the notion of "commercial guarantee" expresses the will of one person, the guarantor, who assumes personal liability for certain defects which may be present in the goods sold. These guarantees take the form of a written promise accompanying the product or delivered at the time of purchase, pursuant to which the guarantor undertakes to repair or replace the product if a defect emerges within a certain time.

⁽⁹⁾ COM(93) 378 final of 28 July 1993.

⁽¹⁰⁾ COM(93) 509 final of 15 November 1993.

Divergences in national legal guarantee regimes concern both how defects are defined and the rights accorded to consumers and how they can exercise them. Divergences are most striking notably as regards the legal guarantee period, which ranges from an indeterminate period (F, B, L, NL, FIN) to a short period of six months (D, E, P, G, A) and, in mid-field, the period of six years (UK, IRL), two years (S) and one year (DK, I).

Again, many of the national laws hark back to a time when manufacturing and marketing conditions were very different from what they are today. Traditional civil law rules governing the contract of sale were based on the paradigm of two equal citizens concluding a contract for the transfer of title from one to the other. Hence they are ill adapted to current manufacturing and marketing realities. For example, the traditional effects of the legal guarantee - the right to rescind the contract and to secure a reduction in price - are both overly rigid and inadequate, and so they may suit neither the consumer nor the seller. And we should remember that the traditional remedies associated with the commercial guarantee - replacement or repair of the good - are a statutory requirement only in half the Member States and even then only in certain strictly defined circumstances.

5. Member States also seem to be aware of the need to overhaul domestic law. This trend may be observed in several Member States. Let us mention some of the more recent initiatives: the United Kingdom has just amended its general legislation on the sale of goods with an eye to protecting buyers against minor defects and shortcomings in product durability. Greece has just promulgated a new Consumer Protection Act which contains landmark provisions concerning after-sales services: suppliers are now obliged to provide operating instructions with their products and to inform the consumer of the product's normal lifespan, during which period repair and maintenance services must be made available to consumers. Finland has also reformed its consumer protection law, mainly with an eye to establishing joint and several liability of the manufacturer and seller in the context of the legal guarantee. Germany has not yet got around to reforming its rules but an expert committee which has long been working on a plan to reform the law pertaining to contractual obligations has stated clearly that the existing provisions are obsolete. Notably it has proposed that the legal guarantee be extended to three years as opposed to six months at present. And Austria is already discussing a bill to amend the existing legal guarantee regime, notably with a view to establishing a three-year legal guarantee. In Sweden, the two-year legal guarantee currently in force is felt to be inadequate and a bill currently under debate provides for a mandatory five-year guarantee period. It is likely that other Member States will also take initiatives in a domain which is so crucial to the protection of consumers in the context of purchasing goods.

This proposal for a Directive will also contribute to simplifying existing national rules, by approximating them to the law in force on the international sale of goods between professionals (Vienna Convention of 1980) and by reducing distortions to competition which may result from divergences in national legislation. The proposal

for a Directive also takes into consideration the European Parliament's endeavours to encourage approximation of the private law of the Member States at Community level⁽¹¹⁾.

6. An analysis of consumer complaints and commercial practices shows that minimum harmonization of the legal guarantee must be accompanied by certain framework rules governing commercial guarantees. Very often the way commercial guarantees are drafted leads to their being confused with the legal guarantee, with the result that consumers may be misled as to their rights. And far too often commercial guarantees are less than candid as to their scope and content, or lay down unconscionable terms as to the circumstances in which the guarantee may be relied on - hence effectively negating the very rights they seemingly grant.
7. In this Explanatory Memorandum, the terms "legal guarantee" and "commercial guarantee" are used for reasons of clarity. However in the text of the proposal for a Directive the terminology is somewhat different, so as to avoid difficulties as regards certain legal traditions to which the concept of the "legal guarantee" is foreign. Hence the term "guarantee" will be reserved for commercial guarantees only, and indeed this is generally what the consumer understands by the term. Thus the first four Articles (approximation of sales law) concern the "legal guarantee", although the term is not mentioned, while Article 5 concerns the "commercial guarantee", which is simply referred to as the "guarantee".

B. Essential aspects of the proposal

The proposal for a Directive has two strands. The first part - the main section - addresses the legal guarantee, while the second part concerns the commercial guarantee.

As regards the legal guarantee, the text of this proposal for a Directive is very precise: its purpose is to regulate aspects which are strictly linked to the protection of consumers when they buy goods which are not in conformity with the contract. In no way does it attempt to completely harmonise sales law. For this reason, all questions concerning the formation of the contract between the parties, defects in the contract, the effects of the contract, including those linked to performance or non-performance of the contract, or forms of imperfect performance other than non-conformity of the product with the contract, are not addressed by the text and remain entirely and completely subject to national law.

Moreover, the proposal merely specifies that the guarantor must resolve the problem, i.e. through refund or price reduction, replacement or repair of the product. The proposal for a Directive in no way regulates liability for possible direct or indirect damage caused by the lack of conformity.

⁽¹¹⁾ Resolutions of 26 May 1989 and 6 May 1994, OJ No C 158, 26.6.1989, p. 400 and OJ No C 205, 25.7.1994, p. 518 respectively.

If it provides the consumer with a minimum corpus of legal rights throughout the European Union, the text also tries to maintain a certain balance between the obligations of the various parties. Hence it lays down obligations which consumers must fulfil on pain of forfeiting their rights.

The second aspect of the proposal for a Directive concerns the commercial guarantee, but it does not endeavour to regulate it in its entirety. It merely lays down certain principles concerning transparency and the relationship with the legal guarantee as well as certain rules designed to furnish a legal framework for commercial guarantees. Any additional features are a matter for commercial policy where competition is of the essence and fall within the competence of the firm. Hence there is no obligation to provide commercial guarantees in the first place, although certain countries have already adopted this approach. The content of the guarantees, the guarantee period and the procedures for invoking the guarantees are also left to the offerers' discretion.

For reasons linked to application of the subsidiarity principle, after-sales services as such, i.e. services relating to the use, maintenance and repair of goods, independently of the implementation of any legal or commercial guarantee, are not covered by this proposal for a Directive. This is a complex domain which is more adequately addressed, at Community level, through voluntary instruments (for example codes of conduct for individual sectors), than in the form of statutory rules.

C. Consistency with other Community policies

Since consumers and economic operators need to know for certain that they can fully and fairly benefit from the single market, the Council has made a point of stressing its determination to ensure that the single market must work effectively for the good for all Community citizens by assuring respect for the four freedoms⁽¹²⁾, hence offering consumers a greater choice of quality goods and services and improving the competitiveness of Community firms⁽¹³⁾. These declarations by the Council highlight the interaction between the policy concerning the creation and operation of the single market and the other Community policies and, in general, all the objectives of the European Union.

⁽¹²⁾ In this context it should be remembered that the Court of Justice has ruled that the free movement of goods also implies that "(...) consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population." GB-INNO-BM judgment of 7 March 1990, Case C 362/88, ECR 1990, p. 667, grounds 8.

⁽¹³⁾ Council Resolution of 7 December 1992 on making the single market work, OJ No C 334, 18.12.1992, p. 1.

The role of improving consumer protection in this context has already been stressed by the Commission. On the one hand the single market was not created for business alone and cannot function properly without active and genuine consumer participation. Another point is that informed consumers can, by shopping wisely, accelerate the positive economic effects of an integrated market⁽¹⁴⁾.

The Commission considers that this proposal dovetails perfectly with the goals of all Community policies, particularly those concerning quality and competition policy.

II. Justification of the proposal in the light of the subsidiarity principle

(a) What are the objectives of the proposed measure, and how do they relate to the Community's obligations?

Article 129a of the Treaty stipulates that the Community shall contribute to the attainment of a high level of consumer protection through measures adopted pursuant to Article 100a in the context of the completion of the internal market and through specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

The Community measure is designed to approximate the essential features of the domestic legal orders pertaining to the sale of consumer goods, so as to improve the functioning of the single market and to reduce distortions to competition which may be caused by differences in the legislations, by providing European consumers with a minimum standard of protection, no matter where they shop.

More specifically, the envisaged measure would have the following benefits:

- strengthen consumer confidence in the single market;
- facilitate cross-border shopping and strengthen the role of consumers as active market players;
- simplify existing national rules;
- bring Community law closer to European citizens by giving them direct and very tangible benefits. Hence strengthen the Community citizen's support for European integration;
- have positive effects on competition, business competitiveness and the European economy.

⁽¹⁴⁾ "Making the most of the single market: strategic programme", COM(93) 632 of 22 December 1993. In this document, the Commission already pointed out that it considered legal and commercial guarantees a priority area for legislative measures at Community level, with a view to making the Union a genuine single market from the consumer's perspective.

(b) Is the measure an area where the Community has sole jurisdiction or where it shares jurisdiction with the Member States?

The measure concerns an area where the Community has sole jurisdiction, namely the creation and operation of the single market.

(c) What options are available to the Community?

The objective pursued can only be achieved by Community Directive laying down minimum rules.

Independent measures taken by the Member States can ensure neither a minimum standard of protection for consumers throughout the Union nor adequate protection of consumers in the context of cross-border transactions. The Directive's main objective - the approximation of national rules governing the legal guarantee - is incompatible with solutions based on "soft law" or codes of conduct. Moreover, the sectors under consideration are so heterogeneous that the establishment of pan-European codes of conduct seems to be an unrealistic option.

(d) Are uniform rules needed, or is it enough to adopt a Directive setting out general objectives, while leaving implementation to the Member States?

Considering the existing differences between national laws, both in respect of issues of principle and legislative techniques, partial harmonization is required.

As required by the principle of subsidiarity, the proposal for a Directive is however strictly limited to the essential aspects concerning legal guarantees and commercial guarantees. Hence the proposal concerns only consumers' rights relating to direct "repair" of the deficiency: Member States remain completely free to determine the rules on damages, both direct and indirect, applicable to consumers who have purchased a defective good⁽¹⁵⁾. Likewise, the proposal for a Directive says nothing about the general rules applicable to sales contracts, those relating to the formation of the contract, absent of consent, etc. The proposal does not regulate the substance of commercial guarantees and there is no general requirement to provide guarantees.

Moreover, within the strict limits of partial harmonization, the proposal for a Directive provides only for minimum harmonization; hence Member States will be free to adopt or maintain in force more stringent rules with a view to protecting consumers. Thus the national margin of discretion will be very wide.

⁽¹⁵⁾ In contrast to the amended proposal for a Directive on unfair terms in consumer contracts (COM(92) 66 of 4 March 1992, OJ No C 73, 24.3.1992), where this aspect was expressly included in Article 6.

Finally, the very nature of the text - rules applicable in the context of sales of consumer goods - means that practical enforcement of most of the provisions will be a task for the national courts, which will apply these rules on a case-by-case basis.

III. Detailed comments on the Articles

Article 1

The definitions in Article 1 broadly outline the scope of the Directive by linking the criterion of the contracting parties (contracts concluded between professionals and consumers) and the criterion of the subject of the contract (consumer goods).

Paragraph 2(a)

The definition of the consumer is inspired by the classical definitions already contained in other Directives. All sales of consumer goods by a professional seller to a private individual are covered by the proposal provided the latter is not acting in the course of business.

Paragraph 2(b)

As suggested in the Green Paper, immovables are excluded. However, the definition of consumer goods is not limited to new and durable goods. Most of the replies to the Green Paper argued that such a restriction would be unwise. Moreover, national laws do not distinguish between these types of goods in the context of the legal guarantee. It would also be very difficult to define what exactly is meant by a durable good: should it be defined as one that is destroyed by use (entirely or partly?), as one that can only be used for a determinate (short?) period, etc? Anyhow, the rules provided for in this proposal can quite readily be adapted to accommodate different types of goods.

Paragraph 2(c)

The proposal covers only sales by professional sellers. Hence, private sales are completely outside its scope and remain fully subject to the applicable national rules.

Paragraph 2(d)

This paragraph defines what in the Green Paper was called the "commercial guarantee". It covers all commercial guarantees independently of the offerer. It also covers commercial guarantees offered against payment and extended warranties provided against payment over and above free guarantees. This definition is directly linked to Article 5 of this proposal and recalls that guarantees must always place the beneficiary in a more advantageous position than that resulting from the national provisions governing the sale of consumer goods.

Article 2

Article 2 lays down the straightforward principle that the goods must be in conformity with the contract. This groundrule will make it possible to cover a whole range of situations, not just the criterion of "conformity with the consumer's legitimate expectations" as suggested in the Green Paper. Although it has been very warmly welcomed by consumer advocates, professional circles take a dim view of this criterion.

Paragraph 1

The principle of conformity with the contract may also be considered as common to different national legal traditions. Conformity with the contract is also the criterion enshrined by the Vienna Convention of 1980 on the international sale of goods between professionals. Conformity with the contract derives not only from conformity with the express terms of the contract, but also from conformity with certain criteria laid down in the second paragraph. In continental legal systems the criteria may be considered as imperative rules applicable to contracts governing the sale of consumer goods, while in common law systems they may be seen as part of the notion of "implied terms" of the contract which the parties cannot waive.

In conformity with the most modern legal systems (the new Netherlands Civil Code, legislation in the Nordic countries) and the Vienna Convention, the traditional distinction in certain legal orders between the obligation to deliver and the legal guarantee covering hidden defects is abandoned and replaced by the new and shared concept of conformity of the goods with the contract. The theoretical and practical difficulties engendered by this distinction can clearly be seen in French case law which, over the years, has oscillated between conflating and distinguishing these two notions, without coming to any definitive conclusion.

Paragraph 2

Different elements, explicating the principle of conformity, have been taken into account in this paragraph in the light of different national traditions. The wording was to a large degree inspired by Article 35(2) of the Vienna Convention.

Paragraph 3

The Green Paper discussed the possibility of extending the rules governing the legal guarantee to services associated with goods (installation, repair, maintenance, etc.). Most of the responses were favourable. However, the Commission considers that the complexity and diversity of services do not lend themselves to a simple extension to services of rules governing the sale of goods. On the other hand, as regards the installation of goods linked to the sale, this extension is unproblematic and even necessary since in practice it is difficult to distinguish between the two and because it is necessary to protect the consumer consistently.

Article 3

Paragraph 1

The first sentence of paragraph 1 stipulates the seller's liability for lack of conformity and also specifies the moment at which conformity of the goods with the contract is to be determined. It is based directly on Article 36(1) of the Vienna Convention but - contrary to this Convention and the law of certain Member States - it provides that conformity be assessed the moment the consumer receives the good and not at the time the contract is concluded. This seems to be the only appropriate solution in transactions involving consumers. The overwhelming majority of replies to the Green Paper were agreed on this point.

When the consumer knew of or could not have been unaware of the lack of conformity at the time of purchase (i.e. a patent defect present in the good which the consumer has examined prior to purchase), there is strictly speaking no lack of conformity with the contract because the consumer has accepted the good as such and so it will be "in conformity with the contract". Exclusion of the seller's liability would therefore in these cases already ensue, in principle, simply from applying the concept of conformity with the contract. Nevertheless, it seemed preferably to provide a specific reference to this solution.

The period of two years seems to be an adequate compromise between the periods laid down by the different Member States.

Paragraph 2

The purpose of paragraph 2 is to restrict the seller's liability for public statements made by third parties, the conformity criterion referred to in Article 2(2)(d). The seller may waive liability for all the cases referred to in each indent.

Paragraph 3

Generally, definition of rules governing the burden of proof is a national prerogative. According to the traditional rules governing proof, it will normally be up to the consumer to prove that the non-conformity of the good with the contract already existed, at least in embryonic form, at the time he received the good.

However, when the non-conformity arises from the existence of a defect which does not become manifest until later (and sometimes very much later), it is well-nigh impossible for consumers to prove that the defect existed at the time they received the good. Generally, it is far easier for the professional to demonstrate that the lack of conformity was not present at the time of delivery and that it resulted, for example, from improper handling by the consumer. This is why over the years case law in several Member States has tended to reverse the burden of proof in the case of goods purchased by consumers from professionals. Hence this paragraph provides for a partial reversal of the burden of proof as regards the moment of the existence of the lack of conformity in favour of the consumer for a short period of six months after delivery.

Paragraph 4

When the lack of conformity is non-trivial, the consumer may choose between the four traditional remedies: reimbursement or reduction of the price, replacement or repair of the good. These four remedies are also provided for in the Vienna Convention and in the most modern national legislations. More traditional systems allow only the first two remedies: to add the latter two would certainly help bring the law more into line with economic realities.

The first remedy (cancellation of the contract with return of the good and reimbursement of the price) is normally challenged by professionals who often think that it should be excluded when the good can be repaired or exchanged. This corresponds to economic and social realities: the consumer, unless he has lost confidence in the product or seller, is normally happy to exchange the product or have it repaired. However, the remedy should be retained because:

- given the broad notion of lack of conformity, this remedy is the only appropriate one in certain cases;
- it is a good way for consumers to exercise pressure in order to ensure that the product is repaired or exchanged at the earliest opportunity;
- it is the classical remedy found in all legal traditions.

There is no reason to fear that consumers will abuse this remedy. First, when a refund is not sought within a short period following sale, the amount reimbursed will normally be reduced so as to take into account the value of the use of the good by the consumer. Secondly, the consumer must purchase a new good to replace the one he has returned to the professional. Finally, the experience of sellers who sell on a "satisfaction or money back" basis show that consumers normally behave reasonably. In this context, it should be remembered that even motor cars have been sold on a "satisfaction or money back" basis within a one-month period.

The guarantee period is two years (paragraph 1), as in the Vienna Convention. However consumers may not pursue all the remedies at their disposal throughout this period: the right to rescind the contract and to have the good replaced applies only during the first year following delivery.

This differentiated solution is based on the idea that rescission and replacement are remedies which, as time passes, become increasingly inappropriate as the period of use grows longer. Moreover, it is envisaged as a compromise to accommodate the traditions of the common law countries which have quite a long guarantee period (six years) for seeking damages, but where consumers are entitled to replacement and refunds only for quite a short period.

Again with an eye to compromise and in order to accommodate different national traditions, Member States are allowed to limit the consumer's options in the case of a minor lack of conformity.

Paragraph 5

National provisions governing sales between professionals are normally less strict than those governing sales between a professional and a consumer. Thus, sellers may often include in these contracts clauses disclaiming their liability for the legal guarantee. These clauses will also be valid under Community law, because the scope of Directive 93/13/EEC on unfair terms is limited to contracts concluded between "a seller or supplier and a consumer".

This situation may also create an injustice in that the entire liability for defects ultimately resulting from an act of commission or omission on the part of another party falls upon the final sellers. This is notably the case as regards manufacturing defects, defects caused by improper handling on the part of an intermediary or indeed any lack of conformity resulting from the statements referred to in Article 2(2)(b).

Although this proposal for a Directive concerns the sale of goods to the final consumer, it is also necessary to include a provision granting the final seller the right to pursue remedies against those responsible so that he can recover the costs caused by defects which can be imputed to them. The procedures for pursuing remedies are to be regulated by national law.

Article 4

Article 5 provides for a period which starts to run the moment the lack of conformity is discovered, and compliance with which is a formal condition for exercising the rights granted in the preceding Articles.

Paragraph 1

The obligation on the buyer to notify the seller of any lack of conformity within a certain period following discovery of the defect already exists in certain countries (Denmark, Sweden, Finland, Italy, Luxembourg, the Netherlands, Portugal) and is also enshrined in Article 39(1) of the Vienna Convention. This obligation reinforces legal certainty and encourages diligence on the part of the buyer, taking the seller's interests into account.

As in the Vienna Convention, the period begins to run from the moment the consumer detects or ought normally to have detected the lack of conformity. The last sentence makes it incumbent on the consumer to take normal care in examining the goods after reception, but does not establish a strict obligation to carry out a detailed inspection of the good or to conduct tests to evaluate its functioning or performance.

Paragraph 2

The choice of a single period, at once procedural and substantial, means that the limitation period must be frozen once the notification provided for in paragraph 1 has been brought. Unless this principle is enshrined, consumers would be forced to bring legal proceedings so as not to forfeit their rights, hence discouraging speedy

and amicable settlement between the professional and the consumer. The detailed procedures governing this interruption (notably as regards the moment the limitation period begins to run again) are laid down by national law.

Article 5

Paragraph 1

This paragraph establishes the principle, which seems self-evident, that any guarantee legally binds the guarantor in accordance with the conditions laid down in the guarantee document. This does not imply any legal qualification in respect of the guarantee (contract, unilateral promise, etc.), which could also vary depending on the person of the guarantor and national legal traditions. This paragraph, however, also gives guarantee references in advertising the same status as actual guarantee conditions. In reality, consumers never have access to guarantee documents prior to purchase. Hence, the only contact the consumer has with guarantees is through advertising. It is on the basis of advertising pertaining to guarantees that the consumer's confidence and expectations are built up. Thus, advertising statements must be looked on as an integral part of the guarantee conditions. A similar principle was also established at Community level in the context of Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Article 3(2) of which prescribes that "[t]he particulars contained in the brochure are binding on the organiser or retailer ...".

This paragraph thus establishes the principle that guarantees must put the consumer in a more advantageous position than that resulting from the arrangements established by the national rules applicable. It is not necessary that all features of the commercial guarantee offered should go beyond the national rules applicable; it is enough that the consumer's position should be improved in some respect.

Paragraph 2

To ensure transparency and adequate information of consumers, all guarantees must be in writing and contain certain minimum particulars. However, when a guarantee infringes the rules, just as when it infringes Article 5(1), this should not in any way affect the guarantee's validity: the consumer may still rely on the guarantee and require that it be honoured. But Member States must take effective measures to prevent such guarantees from being offered, to ensure that the objectives are achieved and to reduce sources of potential disputes.

In order to ensure absolute transparency, this paragraph also establishes the right that consumers who wish to do so shall be free to consult the guarantee documents before purchasing goods.

Article 6

Paragraph 1

Paragraph 1 is a "classical" provision designed to enshrine the imperative nature of the rules contained in this proposal in favour of the consumer. These rules may not be waived, even with the consumer's consent.

Paragraph 2

A similar provision already features in Directives 93/13/EEC (unfair terms) and 94/47/EEC (timeshares).

Article 7

Paragraph 1

As is clear from the text of the proposal and explained at length in the Explanatory Memorandum, the Commission's intention in presenting this proposal is to cover only a very limited number of the questions raised by the sale of consumer goods. As far as lack of conformity is concerned, the aim of the Commission, fully in keeping with the principle of proportionality, is merely to resolve, by the means established by Article 4, the problems relating to the goods themselves as a result of such lack of conformity. The general (and of course specific) provisions of national law normally go much further and in some cases extend the liability of the seller (or other parties, e.g. the producer) to include other harms done to the consumer as a result of lack of conformity. This may cover a carpet damaged by a faulty cleaner, or the cost of hiring a replacement car, etc. This proposal is, of course, without prejudice to the cumulative application of such national provisions.

Paragraph 2

This is a traditional provision in the context of consumer protection directives.

Article 8

Since the proposal for a Directive mainly concerns the legal guarantee, and since it is restricted to prescribing a minimum common corpus of consumer rights, a transposition period of two years seems adequate.

Proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE
on 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 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⁾,

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 persons acting in the course of a business but also 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 minimum set of fair rules governing the purchase of consumer goods;

Whereas the laws of the Member States concerning the sale of consumer goods are quite disparate, with the result that national consumer goods markets differ from one another and that competition between sellers may be distorted;

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 by preventing the artificial reconstruction of new frontiers and the compartmentalization of markets; whereas these opportunities have been greatly broadened by new communication technologies which allow ready access to distribution systems in other Member States or at international level; whereas in the absence of minimum harmonization of the rules governing the purchase of consumer goods, the development of the sale of goods through the medium of new distance communication technologies risks being impeded;

Whereas the creation of a common minimum corpus of consumer law, valid no matter where goods are purchased within the Community, will further strengthen consumer confidence and enable consumers to make the most of the internal market;

(1)

(2)

(3)

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;

Whereas the goods must, above all, conform with the contractual specifications; whereas the notion of conformity with the contract may be considered as common to the different national legal traditions; 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 to pursue remedies against his own seller or the producer when the non-conformity is the result of an act of commission or omission on their part;

Whereas, in the case of non-conformity of the product with the contract, consumers should be entitled to request that the product be repaired or replaced, or to a reduction in the price paid by way of damages or cancellation of the contract of sale; whereas, however, exercise of these rights should be limited in time and time-limits laid down during which these rights may be invoked against the seller;

Whereas, in the interest of a stable business environment and good faith in the relations between the contracting parties, it should be incumbent on the consumer to notify the seller of any non-conformity he detects within a short period; whereas in order to allow the parties to reach amicable settlements without immediately having to institute legal proceedings to safeguard their rights the limitation period should be interrupted once the consumer draws attention to the lack of conformity of the goods;

Whereas it is current practice, for certain categories of goods, for sellers and producers to offer guarantees on their products designed to insure consumers against any defect which becomes manifest within a certain period; whereas this practice can stimulate competition; whereas, however, these guarantees may be a simple publicity ploy and deceive the consumer; whereas to ensure market transparency certain common principles applicable to the guarantees offered by the economic operators should be laid down;

Whereas the rights granted to consumers should not be excludable by common consent between the parties since otherwise the legal protection afforded would be vitiated; whereas consumers should always be entitled to rely on the rights resulting from this Directive or any other applicable national provision, even if they accept the implementation of the guarantee; whereas consumer protection resulting from this Directive should not be reduced on the grounds that the law of a non-member country is applicable to the contract;

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 these trends and the experience acquired in implementing this Directive it may be necessary to envisage more far-reaching harmonization, notably by stipulating the producer's direct liability for defects for which he is responsible;

Whereas Member States must be allowed to adopt or maintain in force more stringent provisions, in the field covered by this Directive, to ensure a yet higher level of consumer protection,

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 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" means any natural person who, in the contracts covered by this Directive, is acting for purposes which are not directly related to his trade, business or profession;
 - (b) "Consumer goods" means any goods, excluding buildings, normally intended for final use or consumption;
 - (c) "Seller" means any natural or legal person who sells consumer goods in the course of his trade, business or profession;
 - (d) "Guarantee" means any additional undertaking given by a seller or producer, over and above the legal rules governing the sale of consumer goods, to reimburse the price paid, to exchange, repair or handle a product in any way, in the case of non-conformity of the product with the contract.

Article 2
Conformity with the contract

1. Consumer goods must be in conformity with the contract of sale.
2. Goods shall be deemed to be in conformity with the contract if, at the moment of delivery to the consumer:
 - (a) they 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) they are fit for the purposes for which goods of the same type are normally used;
 - (c) they are fit for any particular purpose for which the consumer requires them and which he had made known to the seller at the time of conclusion of the contract, except where the circumstances show that the buyer did not rely on the seller's explanations;

- (d) their quality and performance are satisfactory given the nature of the goods and the price paid and taking into account the public statements made about them by the seller, the producer or his representative.
3. Any lack of conformity resulting from incorrect installation of the goods shall be considered to be equivalent to lack of conformity of the goods with the contract, if the goods were installed by the seller or under his responsibility.

Article 3

Obligations of the seller

1. The seller shall be liable to the consumer for any lack of conformity which exists when the goods are delivered to the consumer and which becomes manifest within a period of two years unless, at the moment of conclusion of the contract of sale, the consumer knew or could not be unaware of the lack of conformity.
2. When the goods are not in conformity with the public statements made by the producer or his representative, the seller shall not be liable if:
 - the seller shows that he did not know and could not reasonably know the statement in question;
 - the seller shows that at the time of sale he corrected the statement; or
 - the seller shows that the decision to buy the goods could not have been influenced by the statement.
3. Until proof of the contrary any lack of conformity which becomes manifest within six months of delivery 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.
4. When a lack of conformity is notified to the seller, pursuant to Article 4, the consumer shall be entitled to ask the seller either to repair the goods free of charge within a reasonable period, or to replace the goods, when this is possible, or to demand an appropriate price reduction or rescission of the contract. Exercise of the right of rescission or replacement of the good is limited to one year.

Member States may provide that the scope of the rights referred to in the first subparagraph be limited in the case of a minor lack of conformity.

5. When the final seller is liable to the consumer because of a lack of conformity resulting from an act of commission 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 responsible person, under the conditions laid down by national law.

Article 4

Obligations of the consumer

1. In order to benefit from the rights referred to in Article 3(4) the consumer must notify the seller of any lack of conformity within a period of one month from the date on which he detected the lack of conformity or ought normally have detected it.
2. Notifications made pursuant to paragraph 1 shall interrupt the limitation period provided for in Article 3(4).

Article 5

Guarantees

1. Any guarantee offered by a seller or producer shall legally bind the offerer under the conditions laid down in the guarantee document and the associated advertising and must place the beneficiary in a more advantageous position than that resulting from the rules governing the sale of consumer goods set out in the national provisions applicable.
2. The guarantee must feature in a written document which must be freely available for consultation before purchase and must clearly set out 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.

Article 6

Binding nature of the provisions

1. Any contractual terms or agreements concluded with the seller before notification of the lack of conformity which waive or restrict the rights resulting from this Directive shall not be binding on the consumer.
2. Member States shall take the necessary measures to ensure that, irrespective of the law applicable to the contract, and when the contract has a close connection with the territory of the Member States, consumers are not deprived of the protection afforded by this Directive.

Article 7

National law and minimum protection

1. The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may rely on 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 8
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than [two years after its publication in the Official Journal of the European Communities]. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these 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 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,

For the European Parliament
The President

For the Council
The President

IMPACT STATEMENT

Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees

1(a) Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

The main aims of the proposal are:

- to improve the functioning of the single market;
- to strengthen consumer confidence in the single market and enable consumers to benefit fully from the abolition of frontiers and to contribute actively to better integration of the European economy;
- to secure for European consumers a minimum corpus of rights which will provide them with a high level of protection when purchasing consumer goods, irrespective of the Member State in which the purchase is made.

These objectives cannot be realized adequately by the Member States and hence, given the dimensions and effects of the envisaged measure, can better be accomplished at Community level, in the form of a Directive designed to approximate existing national laws and to create a minimum corpus of rights for consumers throughout the Community.

1(b) What other merits or demerits might the proposal have?

The proposal has additional merits over and above its primary objectives. Advantages include global improvement in product quality in the European market, enhanced competitiveness of the European economy and greater product durability, with beneficial effects on the environment (by reducing over-exploitation of natural resources and waste) and unemployment (through the growth of repair and inspection services, which are by definition labour-intensive).

Moreover, the proposal contributes to simplifying the legal framework relating to the sale of consumer goods and commercial guarantees that currently exist, hence making things easier for firms, notably when planning commercial strategies in the field of guarantees.

1(c) Are other solutions envisaged and what would be the results (for example: codes of conduct, self-regulation at sectoral level)?

The Directive's main objective - the approximation of national legislation pertaining to the legal guarantee - is incompatible with a code of conduct type solution. Moreover, the sector concerned is so heterogenous that it would be difficult to establish codes of conduct at European level. The consultations in the

context of the Green Paper were proof enough: although the Commission, in the Green Paper, invited the economic operators to submit any self-regulation proposals they found desirable and although it even published, by way of example, a code of conduct for commercial guarantees drawn up by the British retail trade, no concrete proposal or initiative has yet been received by the Commission in this area.

Nonetheless, the proposal for a Directive gives enormous latitude to self-regulatory initiatives. Moreover, the provisions concerning commercial guarantees merely lay down certain basic general principles and rules which ideally should be fleshed out in the context of self-regulation. The Commission will do its utmost to encourage initiatives in this regard.

2(a) Who will be affected by the proposal? Which sectors of business? Which sizes of business and what is total employment in the sector?

The sector of activity concerned by the proposal is that of the sale of consumer goods. Obviously the size of the affected firms varies greatly - since large firms are to be found side by side with small and medium-sized ones.

2(b) Does this sector have specific characteristics - for example, do a small number of firms enjoy a dominant position?

No.

2(c) What will the proposal's impact be on very small firms, skilled trades and the liberal professions?

In the case of very small retailers, the proposal will give them the right to seek remedies against their suppliers in the distribution chain.

2(d) Are there particular geographical areas of the Community where these businesses are found?

No.

3(a) What obligations will the proposal impose on firms?

What are the costs of compliance?

Compliance costs are negligible. In so far as the proposal extends the duration of the legal guarantee - by comparison with the laws of certain Member States - and makes it easier for the consumer to seek remedies from the economic agents liable, in the case of defective products, one might expect a small increase in costs associated with handling defective products. Nonetheless, these costs are very limited and can be assessed perfectly in advance on the basis of the product's reliability record. After all, the proposal for a Directive concerns only the defective good itself (repairs, recall, etc.), to the exclusion of any other direct or indirect injury to the consumer caused by the defective good.

To avoid this hypothetical increase in costs, economic agents may be encouraged to improve or adapt global quality control systems so as to identify and rectify internal sources of inefficiency, hence contributing substantially to a progressive reduction in costs. Specialists estimate that the potential reduction in costs associated with introducing appropriate quality management may exceed 10% of turnover. Moreover, the proposal, by clarifying the liability regime, may contribute to reducing the number of disputes and the attendant costs.

The approximation of national laws on the sale of consumer goods, guarantees and after-sales services will also simplify the existing legal framework at European level and may thus contribute, in a general manner, to reducing the costs incurred by economic operators in interpreting and applying different national laws.

3(b) Are there other administrative procedures or documents to be filled in?

No.

3(c) Are licences or authorizations for placing on the market required?

No.

Will charges be levied?

No.

4(a) What economic effects is the proposal likely to have (costs, advantages, etc.)? on employment?

In so far as the proposal for a Directive *inter alia* provides for the repair of goods and may encourage the production of more durable goods, there will be an increased demand for maintenance and quality control services, which by definition are very labour-intensive.

4(b) on the investment and creation of new businesses

For the reason mentioned above, the proposal should encourage the creation of new firms providing repair and maintenance services.

4(c) on the competitive position of businesses, both in the Community market and elsewhere?

The proposal will encourage competitiveness. First, it will significantly bolster consumer confidence in the single market and encourage consumers to shop around. The increase in cross-border consumer shopping will contribute to removing barriers to trade and the artificial compartmentalization of markets. There will be greater competition and this will make firms more competitive.

Secondly, the proposal will encourage better working relations between economic operators at different levels in regard to marketing, with a view to satisfying the final consumer.

Thirdly, the proposal may lead economic operators, in particular producers of consumer goods, to establish appropriate quality control systems, with the attendant growth in competitiveness.

Fourthly, the proposal will encourage economic agents to make more accurate representations in regard to their goods and discourage the use of dubious or indeed fraudulent claims concerning goods. This will improve market transparency and consumers will find it easier to compare products, which in turn will also encourage competition.

Finally, the Directive will enlighten consumers as to their rights in connection with the purchase of defective products and will make it easier for consumers to exercise these rights. The consumers' obligation to notify any defect discovered within a short period (on pain of forfeiting their rights) makes them the final link in the "quality control" chain, and gives the economic operators the feedback they need in order to identify and eliminate sources of inefficiency.

4(d) on the authorities responsible for implementing the provisions?

The proposal will not lead to any particular costs for the national authorities.

4(e) Are there other indirect effects?

No.

4(f) What are the costs and benefits of the proposal?

- **Costs**

In certain circumstances, particularly in the case of less efficient firms operating in Member States where the legal guarantee is less protective than the one provided for in the proposal, there may be a slight increase in costs associated with the handling of defective goods.

- **Advantages**

- The stimulus given to quality policy, which may lead to savings. Greater competitiveness.
- Greater market transparency. More intensive competition.
- Greater consumer confidence in the single market; More cross-border purchases. Strengthening of economic integration. Strengthening of competitiveness and competition.

- Positive effects on employment and the environment.

- **Conclusion:** the benefits exceed the costs.

5(a) Impact on SMEs. Does the proposal contain measures to take account of the specific situation of SMEs - if not, why not? Are reduced or different requirements appropriate?

There are no particular measures for SMEs in this proposal. Nonetheless, given that one of the weak points of SMEs is their problem in coping with the complexity of the legal environment, the proposal may make life easier because it simplifies this environment. The clarification of the rules governing liability contained in the proposal may also contribute to reducing the number of disputes between SMEs and consumers, because the latter will be in a better position to assess the scope of their rights and will be less likely to submit complaints that have no foundation in law.

Moreover, by stimulating the creation of repair and maintenance firms, the proposal will benefit SMEs most of all. It also seems that sellers and even producers will tend increasingly to subcontract after-sales services to independent specialized firms.

5(b) Are higher thresholds, which exclude SMEs without compromising the measures' effectiveness, envisageable?

No.

Consultation

6(a) When did consultations take place and what was the date of publication of the plan to introduce regulatory measures?

In January and February 1993 the Commission organized two hearings, one with the Member States and the other with the business circles concerned. The ongoing work was presented, followed by a debate, at the CCD (Committee on Commerce and Distribution) in April of the same year. These consultations were organized in tandem with bilateral contacts with all the social players who evinced an interest in the subject. In the second three-year action plan on consumer policy (1993-1995), called "Placing the single market at the service of European consumers" (COM(93) 378 final of 28 July 1993), the Commission officially announced the forthcoming publication of a Green Paper on the subject.

On 15 November 1993 the Commission published the Green Paper on guarantees for consumer goods and after-sales services (COM(93) 509). This Green Paper contains an in-depth analysis of the law in force in each of the 12 Member States and at Community level which directly or indirectly governs guarantees and after-sales services, as well as an examination of trade practices concerning the guarantee offered by the economic operators. The Green Paper also recapitulates

the main bugbears facing consumers and economic operators in the context of the single market and sets out a range of concrete proposals for Community measures with a view to resolving them. These proposals focus on possible harmonization of the legal guarantee and a full specific regime is proposed in this regard. The deadline for consultations was 30 April 1994. In a communication published in OJ No C 338 of 15 December 1993, the Commission invited all interested parties, notably the social players concerned, to supply all information and data of an economic, social and/or legal nature which they considered relevant, to propose any measure they deemed suitable for improving the functioning of guarantees and after-sales services in the context of the single market and, more specifically, to comment on the solutions aired in the Green Paper. The Commission also stated that anyone who sent in a written submission could be invited to a hearing.

Several conferences were also organized on this subject. The European Commission participated in a study day organized by the University of Utrecht in the Netherlands and a two-day conference at Buxton, organized by the University of Sheffield in the United Kingdom. Attendees included representatives of the academic community, consumer advocates, and the economic operators concerned.

The hearing on the Green Paper took place on 18 July 1994. Approximately 50 persons, representing the main interest groups, participated.

The first European Consumer Forum, held in Brussels on 4 October 1994, had the Green Paper as one of its main discussion topics. A total of 350 persons participated in the European Consumer Forum, representing various professional groups from 19 countries (producers, distributors, representatives of consumer associations and the legal world, academic experts in consumer law, members of the Community institutions, etc.).

6(b) List the organizations which have been consulted about the proposal, which have communicated their general view in a detailed manner, including any misgivings or objections concerning the final proposal. Why is it not possible - or desirable - to accommodate their demands?

There were a total of 77 formal replies, broken down as follows:

- five replies from the "institutions" (European Parliament, EP-Legal Affairs Committee, Economic and Social Committee, Consumers' Consultative Council, and the Committee on Commerce and Distribution);
- 36 replies from professional bodies;
- 13 replies from consumer associations;
- 12 replies from states or institutions belonging to the States;

- one reply from a university group (ECLG – European Consumer Lawyers Group);
- two replies from individual firms;
- eight replies from individuals (law professors or company lawyers).

6(c) Member States

Only four Member States officially replied in writing via their Permanent Representations. However, certain ministries or semi-public agencies in four other Member States replied directly to the Commission. The EFTA countries agreed to submit a common position, with the exception of Sweden which made an independent contribution.

As a rule the Member States' replies are quite positive and encouraging. Some have come out clearly in favour of Community measures to harmonise the legal guarantee and to adopt a Community legal framework for commercial guarantees (this is also the position of the EFTA countries). Others are more circumspect but say they will support initiatives in at least one of these domains (legal guarantee and commercial guarantee).

6(d) The European Parliament

The two EP committees responsible (Committee on the Environment and Consumer Protection - chef de file; Legal Affairs Committee - for opinion) submitted very positive reports. The European Parliament adopted its resolution on 6 May 1994. This resolution was quite detailed and urged the Commission to prepare by the end of 1994 a proposal for a Directive designed to ensure minimum harmonization of the legal guarantee and to establish a legal framework for commercial guarantees. The resolution also invites the Commission to scrutinize the question of after-sales services more closely than it did in the Green Paper.

6(e) The Economic and Social Committee

The ESC delivered its opinion at its plenary session on 1 June 1994. This report is by and large very positive, albeit somewhat general. The ESC welcomes gradual harmonization in regard to the legal guarantee, and also supports framework rules and a European consumer code concerning the commercial guarantee; as regards after-sales services, it favours the establishment of codes of conduct in preference to legally binding rules.

6(f) Consumer associations

Consumer associations clearly and vigorously support the Community initiatives. At the hearings the Forum consumer organizations were emphatic in defending their stance. Some of the Commission proposals in the Green Paper were criticized for not being consumer-friendly enough. Generally speaking, consumer

associations want the Community to give priority to harmonizing the legal guarantee, while also interested in far-reaching measures in regard to commercial guarantees and after-sales services.

6(g) Professional bodies

Reactions from the professional bodies fall into one of three classes:

- professional bodies that are opposed to any Community initiative;
- professional bodies that are in favour of minimum harmonization of the legal guarantee and agree that it would be good to adopt codes of conduct so as to improve the situation in regard to commercial guarantees;
- professional bodies that in principle reject harmonization of the legal guarantee but do not object to Community measures in regard to commercial guarantees, at least in the form of codes of conduct.

The main professional bodies opposed to Community initiatives argue that there are no major problems and that no Community action is necessary. However, few concrete criticisms were made regarding specific aspects of the proposed schemes, and sometimes there was even general agreement as to the substance (for example the Green Paper's proposed option of a legal framework governing commercial guarantees).

Moreover, the business world has been very divided in its reaction to the Commission proposals. While the large Europe-wide horizontal organizations often came out quite vociferously against harmonization of the legal guarantee (UNICE, Eurocommerce, Committee of Commerce and Distribution, Orgalime), the national bodies - often members of these European federations - have been more positive or have even clearly support harmonization of the legal guarantee - this applies to the CNPF (Confédération Nationale du patronat français), the Chambre de Commerce et de l'Industrie de Paris, the CGPME (Confédération Générale des Petites et Moyennes Entreprises, France), the British Retail Consortium and AMADEA (Association of Manufacturers of Electrical Appliances - UK). Likewise, the more branch-specific organizations, both national or European, are by no means averse to harmonising the legal guarantee. For example, this holds for the Fédération de l'Horlogerie (France), ACEA (the European carmakers' association) the British Photographic Importers Association, the Software Publishers Association Europe and FEDSA (Federation of European Direct Selling Associations).

Generally speaking, the professional bodies have been far more open to harmonizing the legal guarantee than to far-reaching Community intervention in the domain of commercial guarantees and after-sales services.

6(h) How have the comments and suggestions made been taken into account?

Close consideration has been given to the suggestions and comments made by the contributors in the consultation process in drafting the proposal for a Directive. Examples include the definition of the scope of the proposal for a Directive, the notion of lack of conformity, the very fact that the Directive focuses on the legal guarantee, and the abandonment of the idea of creating a Euro-guarantee label.

6(i) Have the professional bodies of the SMEs been formally consulted? If not, why not?

The professional bodies of the SMEs were consulted in the general context of the Green Paper. Moreover, before and after adoption of the Green Paper, Commission officials discussed the proposal with SME representatives in the context of meetings organized by the Commission or the organizations themselves.

7. Follow-up and re-examination. Indicate the procedures for following up and re-examining the proposal in regard to the effects and costs associated with its implementation. Will it be easy to amend the proposal once it is adopted?

No formal procedure for following up and re-examining the proposal is envisaged. However, the Commission will not fail to conduct studies and surveys necessary to evaluate the proper implementation of the Directive, once adopted.

In the absence of a comitology procedure, all amendments to the Directive will be subject to the usual legislative process.

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