

II

(Preparatory Acts)

COMMISSION

Proposal for a Council Directive on the liability of suppliers of services

COM(90) 482 final — SYN 308

(Submitted by the Commission on 9 November 1990)

(91/C 12/11)

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,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the Council Resolution of 9 November 1989 stressed the priority nature of the implementation at Community level of means of promoting the safety of services as part of the relaunching of the consumer protection policy;

Whereas there is a Community dimension to the market in services;

Whereas, although the laws of the Member States concerning the liability of the suppliers of services for the damage caused by their services all seek to provide greater protection for persons for whom the services are intended and for third parties, they continue to differ in content and as regards the degree of protection provided; whereas such differences may create barriers to trade and unequal conditions in the internal market in services; whereas they do not guarantee the same degree of protection for the injured person against all damage caused to the person, nor to the consumer against damage caused to movable or immovable property by a service;

Whereas action at Community level is the most appropriate in view of these divergences and the Community dimension of services;

Whereas the principle of reversing the burden of proof of a fault on the part of the supplier of the defective service is the most suitable in view of the level of protection afforded by national law in the Member States; whereas such a principle already exists in several

national legislations, but should be formalized and applied in a standard manner;

Whereas the characteristics of services, including their 'one-off' nature, which is sometimes intangible, the fact that the service 'disappears' at the moment that damage is caused, and the respective positions of the injured person with no specific technical knowledge and the trader who possesses such knowledge, justify a reversal of the burden of proof of the fault on the part of the supplier of the service in favour of the injured person;

Whereas a fault on the part of the supplier of the service must be assessed in relation to the reasonable expectation that the service should not cause damage to the physical integrity of persons and of movable or immovable property, including the persons or property which were the object of the service;

Whereas the mere fact that a better service existed or might have existed at the moment of performance or subsequently does not constitute a fault;

Whereas, having regard to the diversity of services on the one hand and the existence of Council Directive 85/374/EEC⁽¹⁾ concerning product liability on the other, a broad definition of service should be adopted based on the traditional distinction between service and the manufacture of goods, services and the transfer of rights *in rem*; whereas, on account of their special nature, public services intended to maintain public safety should be excluded from this Directive; whereas package travel services and waste services already governed by specific Community legislation should also be excluded; whereas the same applies for damage already covered by liability arrangements governed by international agreements ratified by the Member States or by the Community;

Whereas the objective of protecting consumers and compensating persons injured by defective services does not justify a distinction between private and public suppliers of services; whereas, however, only services provided by commercial traders should be covered and not those rendered by one individual to another;

(¹) OJ No L 210, 7. 8. 1985, p. 29.

Whereas protection of the injured person requires compensation for the damage to the health or physical integrity of persons; whereas protection of the consumer requires compensation for the damage to the physical integrity of their movable or immovable property; whereas any material damage resulting therefrom should also be compensated for;

Whereas it falls to the injured person to provide proof of the damage and of the causal relationship between that damage and the service supplied;

Whereas the respective positions of the parties provide justification that there be no reduction in the supplier's liability where damage is caused jointly by the fault of the supplier and the intervention of a third party, but that such liability may be reduced (or even waived) in the event of a joint fault on the part of the injured person;

Whereas the protection of the injured person implies that the supplier of the services should not be able to limit or exclude his liability in relation to the former;

Whereas when liability for a given damage is shared by several persons, protection of the injured person requires that they have joint and several liability;

Whereas the position of the consumer with regard to the franchisor giving his name to the services undertaking and the franchisee to whom he applies justifies joint and several liability of the franchisor, the franchisee and the master franchisee;

Whereas this Directive is without prejudice to the application of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work⁽¹⁾ and the specific Directives deriving therefrom;

Whereas the system of liability established by this Directive and the nature of the services justify reasonably short limitation periods for bringing proceedings for the recovery of damages and the termination of liability, except where services relating to the design and construction of immovable property are concerned,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Principle

1. The supplier of a service shall be liable for damage to the health and physical integrity of persons or the physical integrity of movable or immovable property, including the persons or property which were the object of the service, caused by a fault committed by him in the performance of the service.
2. The burden of proving the absence of fault shall fall upon the supplier of the service.
3. In assessing the fault, account shall be taken of the behaviour of the supplier of the service, who, in normal and reasonably foreseeable conditions, shall ensure the safety which may reasonably be expected.
4. Whereas the mere fact that a better service existed or might have existed at the moment of performance or subsequently shall not constitute a fault.

Article 2

Definition of service

For the purpose of this Directive, 'service' means any transaction carried out on a commercial basis or by way of a public service and in an independent manner, whether or not in return for payment, which does not have as its direct and exclusive object the manufacture of movable property or the transfer of rights *in rem* or intellectual property rights.

This Directive shall not apply to public services intended to maintain public safety. It shall not apply to package travel or to waste services.

Nor shall it apply to damage covered by liability arrangements governed by international agreements ratified by the Member States or by the Community.

Article 3

Definition of supplier of services

1. The term 'supplier of services' means any natural or legal person governed by private or public law who, in the course of his professional activities or by way of a public service, provides a service referred to in Article 2.
2. Any person who provides a service by using the services of a representative or other legally independent intermediary shall continue to be deemed to be a supplier of services within the meaning of this Directive.

(¹) OJ No L 183, 29. 6. 1989, p. 1.

3. If the supplier of the service referred to in paragraph 1 is not established within the Community, and without prejudice to his liability, the person carrying out the service in the Community shall be considered as the supplier of that service for the purpose of this Directive.

Article 4

Definition of damage

The term 'damage' means:

- (a) death or any other direct damage to the health or physical integrity of persons;
- (b) any direct damage to the physical integrity of movable or immovable property, including animals, provided that this property:
 - (i) is of a type normally intended for private use or consumption, and
 - (ii) was intended for or used by the injured person, principally for his private use or consumption;
- (c) any financial material damage resulting directly from the damage referred to at (a) and (b).

Article 5

Proof

The injured person shall be required to provide proof of the damage and the causal relationship between the performance of the service and the damage.

Article 6

Third parties and joint liability

1. The liability of the supplier of the service shall not be reduced where the damage is caused jointly by a fault on his part and by the intervention of a third party.
2. The liability of the supplier of the service may be reduced, or even waived, where the damage is caused jointly by a fault on his part and by the fault of the injured person, or a person for whom the injured person is responsible.

Article 7

Exclusion of liability

The supplier of a service may not, in relation to the injured person, limit or exclude his liability under this Directive.

Article 8

Joint and several liability

1. If, in applying this Directive, several people are liable for a given damage, they shall be jointly liable, without prejudice to the provisions of national law relating to the law of recourse of one supplier against another.

2. The franchisor, the master franchisee and the franchisee, within the meaning of Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements ⁽¹⁾ shall be deemed to be jointly and severally liable within the meaning of paragraph 1.

However, the franchisor and the master franchisee may absolve themselves of liability if they can prove that the damage is due to a product which, on the basis of Regulation (EEC) No 4087/88, they themselves had not been able to supply or impose.

Article 9

Extinction of rights

The 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 five years from the date on which the supplier of services provided the service which caused the damage, unless in the meantime the injured person has instituted legal, administrative or arbitration proceedings against that person.

However, this period shall be extended to 20 years where the service relates to the design or construction of immovable property.

Article 10

Limitation period

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, beginning on the day on which the plaintiff became aware or should reasonably have become aware of the damage, the service and the identity of the supplier of the service.

However, this period shall be extended to 10 years where the service relates to the design or construction of immovable property.

2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.

⁽¹⁾ OJ No L 359, 28. 12. 1988, p. 46.

*Article 11***Transitional provision**

This Directive shall not apply to services provided before the date on which the provisions referred to in Article 12 (1) enter into force.

*Article 12***Implementing provisions**

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992.

They shall immediately 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 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 area governed by this Directive.

*Article 13***Final provision**

This Directive is addressed to the Member States.
