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COMMUNICATION FROM THE COMMISSION

"ACTION PLAN on consumer access to justice and the settlement of consumer disputes in the internal market"

TABLE OF CONTENTS

FOREWORD

This Communication is a follow-up to the Green Paper on the access of consumers to justice and the settlement of consumer disputes in the single market (COM(93) 576 of 16 November 1993).

The problems of access to justice demand a concerted response on the part of several institutions at local, national and European level. In consonance notably with the provisions of Article 129a and the principle of subsidiarity, Community measures will of necessity be restricted.

However, in view of the cross-border dimension of the problem, certain objectives can only be realised at Community level: in particular, the objective of creating an environment favourable to the settlement of intra-Community consumer disputes necessarily involves - bearing in mind the dimensions of the envisaged measure - initiatives designed to coordinate certain aspects of national and local policies.

The following measures have been proposed or have already been initiated:

- a proposal for a Directive on the coordination of the laws, regulations and administrative provisions of the Member States relating to actions for an injunction, which the Commission adopted on 24 January 1996;

- the initiatives envisaged in this action plan;

- other actions and pilot projects already in operation or about to be launched.

In consonance with the third paragraph of Article 3b of the Treaty establishing the European Community, the initiatives presented in this action plan do not go beyond what is necessary to achieve the objectives set out in Article 129a of the Treaty, but they are not of an exhaustive nature:

- on the one hand, they are supplementary to the proposal for a Directive adopted by the Commission on 24/1/1996 concerning actions for an injunction;
- on the other hand, they must be underpinned by additional support for the pilot projects designed to ensure consumer access to law and to justice[1] as well as better distribution of information needed to access existing national procedures in other Member States[2].

As regards this latter requirement, priority action was required in order to ensure greater familiarity with national legal aid systems. The consultations on the Green Paper did indeed confirm that legal aid is of crucial importance to the most disadvantaged citizens

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1 As described in the Green Paper, and notably chapters I.B.1 and IV.E, with subsequent follow-up on the same lines.

2 Council Resolution of 13 July 1992 on future priorities for the development of consumer protection policy (OJ No C 294, 22.11.1989, p. 1): paragraph 4, last indent of the Annex.

– and all the more so when they are involved in an intra-Community dispute. With a view to making good the absence of information at European level, the Commission intends to publish a "Guide to Legal Aid in the European Union". This Guide, whose text has already been drafted in cooperation with the Council of the Bars and Law Societies of the European Community, will be sent free of charge to the multipliers who can pass this information on to interested citizens (solicitors, courts, local or regional information agencies, consumer associations).

Other similar publications could be prepared in cooperation with the bodies concerned, hence developing a policy of partnership between the Community institutions and the legal professions, at the service of the citizen.

PART I: THE PROBLEM STATED

I. CONSUMER DISPUTES

The hallmark of a typical consumer dispute is the disproportion between the economic sum at stake and the cost of its legal resolution.

For any rule-of-law State this disproportion raises the question of how to reconcile the requirement that justice be rendered without discrimination[3] with the constraints of the budget for the administration of justice - a budget that in many cases cannot meet the demand.

The way this question is answered also determines the magnitude of the gap between the theoretical construct designed by the legislator and voters' day-to-day lives: it is the small disputes of everyday life that give ordinary citizens an opportunity to gauge the effectiveness of the law - and not the headline-making court cases, which rarely concern them.

In most developed countries, consumer disputes have received particular attention in recent decades[4], also in the context of with the principle of "equality of arms"[5] and in consequence certain specific schemes have been introduced – examples include Article 5 of the Rome Convention on the law applicable to contractual obligations[6] and Section 4 of Title II of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[7]. In particular, Articles 13 to 15 of the Brussels Convention introduce a special scheme governing contracts concluded with consumers stipulating that, under certain conditions, actions brought against consumers may only be brought before the courts of the country in which the consumer is domiciled.[8] In *Shearson Lehman Hutton*[9], the Court of Justice of the European Communities held that this scheme

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3 Article 6 of the European Convention on Human Rights: "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
This principle knows no exceptions as regards the value of the issue at stake, and applies also to what are considered as small disputes (by the administration of justice, but not by the citizens concerned).

4 For the purposes of this Communication, "consumer dispute" means any dispute involving a natural person, acting outside his trade or profession and a natural or legal person acting in the course of business. As regards the notion of "consumer", see Articles 153 and 155 of the Report on the accession agreement of Denmark, Ireland and the United Kingdom to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the Report is published in OJ No C 59, 5 March 1979, pp 71 ff).

5 As regards the principle of "equality of arms" before the courts, see also the case law of the European Court of Human Rights, notably cases Neumeister v. Austria (1968), Bönisch v. Austria (1985), Feldbrugge v. the Netherlands (1986).

6 OJ No L 266, 9.10.1980, p. 1

7 Codified version: OJ No C 189, 28.7.1990, p. 2

8 When the conditions mentioned in Article 13 are satisfied, Article 14 provides in addition that actions brought *by* consumers against the other party to the contract may be heard either before the courts of the country in which the defendant is domiciled or those of the consumer's country of domicile.

9 Judgment of 19 January 1993, case C-89/91 (ECR I-139).

"... derived from a concern to protect the consumer as the party to the contract who was considered to be economically weaker and less experienced in the law than his co-contractor".

A summary description of the replies given by the Member States to the problem regarding consumer disputes allows us to categorize these replies into two strands[10]:

- the establishment of out-of-court procedures specifically devoted to consumer disputes;
- the establishment of simplified procedures and/or simplified modalities for instituting proceedings, for claims up to a specified ceiling.

II. OUT-OF-COURT PROCEDURES IN THE MEMBER STATES

In Denmark, Sweden and Finland, most consumer disputes are handled by "consumer complaints commissions" created during the 70s; these commissions[11], are a kind of administrative authority and make their decisions on the basis of a written procedure whose details are regulated by statute.

In the Netherlands the "Geschillencommissies" (dispute commissions)[12] play a similar role in what is basically a written procedure. They deliver a binding opinion ("bindend advies") which must be complied with by the parties. The Geschillencommissies are subject to an approval procedure designed to ensure that certain conditions are met and are members of a Foundation set up in 1970.
More recently, Geschillencommissies/ Commissions des litiges were created in Belgium as well.

In Portugal a free conciliation and arbitration procedure for consumer disputes was established in Lisbon in the context of a pilot project backed by the Commission and the Portuguese authorities, whose very positive results[13] have lead to the opening of other similar centres.

In Spain a "sistema arbitral del consumo" was established by Royal Decree of 30 April 1993; in the framework of this system, each arbitration commission consists of a chairman (representing the administration), a consumer representative and a representative of the professionals[14].

In several countries a mediator (known as "private ombudsman" in the United Kingdom and Ireland) has been created in certain economic sectors (most commonly banking and insurance)[15]. The British and Irish Ombudsman Association has recently drawn up

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10 The two approaches are complementary, in most Member States – for example, the United Kingdom has developed both simultaneously.

11 Chaired by a lawyer and made up of representatives of consumers and professional circles. For example, in the 1993-94 financial year the Swedish commissions received 6 327 complaints.

12 Consisting of a consumer representative, a representative of the professional organisation of the sector concerned, and an independent chairman. In 1994 the Geschillencommissies registered 7 167 cases (as opposed to 6 594 in 1993 and 6 027 in 1992 – the annual growth rate is over 8%).

13 Almost 2 000 cases settled within 40 days.

14 Since their creation, the "Juntas arbitrales" have registered over 14 992 complaints.

15 The task of these mediators is to deal with consumer disputes through mediation, conciliation and (in certain cases) they may deliver a decision which is binding on the professional. For example,

minimum criteria binding on its members; in the case of mediators created for certain public services these criteria are normally established by statute.

In other Member States a similar role is played by the Chambers of Commerce (Germany and, more recently, Italy).

III. NATIONAL INITIATIVES CONCERNING ACCESS TO COURT PROCEDURES

In **France** a simplified procedure was established by Decree No 88-209 which facilitates the introduction of claims of up to FF 13 000 before the courts: the "declaration au greffe" (indicating the identity of the parties and the nature of the claim, as well as a summary of the grounds) is standardised in a simplified form which is binding on the defendant when submitted to him by the registrar; likewise, the defendant is provided with a simplified form for setting out his comments.

In **England** a "simplified summons" may be used for all claims of up to UKL 3 000 in the County Courts. This is a simplified form (of exemplary clarity) which is filled in by the complainant and a copy of which is sent by the court to the defendant, together with a reply form (which is just as clear as the first one).
If the defendant does not respond within 14 days, the complainant may request the court to issue a payment order; if the defendant contests the grounds the case is referred to a hearing. The "County Court Rules" (1981) specify that the hearing shall be informal and strict rules of evidence shall not be applicable.

In **Ireland** a similar mechanism was introduced three years ago for small claims by consumers. This procedure, initially introduced for claims of up to 500 punts, now applies to claims of up to 600 punts and it is planned to raise the ceiling to 1000 punts. The court registrar helps the consumer fill in the form which - after entry in the register - is sent to the defendant; all he has to do is to fill in the special form created for this purpose. If the defendant contests the application, the registrar attempts to reconcile the parties; to this end he may allow them to put their case and/or invite them to negotiate a solution.

In other Member States, such as Germany, equivalent forms exist for certain categories of disputes. In Belgium, forms have been drafted to make it easier for to institute proceedings before justices of the peace.

In Sweden and Finland, simplified forms have been prepared for bringing complaints to the attention of the "Consumers Complaints Committees".

The forms mentioned above exist only in the national language of the legal orders concerned.

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in 1993 in the United Kingdom 8 133 complaints were registered by the Insurance Ombudsman and 9 578 by the Banking Ombudsman.

PART II: THE COMMUNITY DIMENSION OF THE PROBLEM

I. THE COST OF "JUDICIAL" FRONTIERS

In the context of a single market created against a background of different legal traditions and commercial practices it is only natural that a certain number of transactions should give rise to certain difficulties in interpretation or indeed in the performance of obligations linked to the transaction, creating disputes between the parties.

The possibility of rapidly and fairly settling these disputes at a reasonable cost was highlighted by all the parties concerned during the consultations on the Green Paper as a sine qua non for the development of intra-Community transactions and, hence, for the success of the internal market.

The implementation of appropriate procedures is indispensable, given that not all the operators concerned have a "legal service" specialised in the very complex issues of dispute resolution when the parties are domiciled in different countries: few firms (below a certain size) and even fewer consumers are able to navigate the maze of private international law (whose application in a Union of 15 Member States give rise to 210 different potential combinations), the existing conventions (none of which is yet applicable throughout the European Union in its entirety) and the national procedural rules (which have in no way been approximated).

The fear of "complications" as well as the cost of finding one's way through the "maze" exercise a strong dissuasive effect on transactions involving consumers: since consumers (taken singly) do not normally possess large sums of money, the costs of hiring a lawyer will often be quite out of proportion with the value of a potential claim. In certain countries this dissuasive effect is compounded by the sluggishness of the legal procedures and in others by rules governing the payment of lawyer's fees: in several Member States the party who "wins" the case can only recover a small part of the costs incurred - and in consumer disputes this means that the plaintiff is certain to bear costs over and above the damage suffered, in the uncertain perspective of obtaining a "favourable" ruling awarding a sum which may be less than the cost of "winning" the case.

The specific and supplementary barriers which complicate the settlement of intra-Community consumer disputes may thus hinder the smooth functioning of the internal market, on the same lines as technical and tax barriers.

In order to verify the truth of this hypothesis, the Community employed an independent research institute to conduct an in-depth study on the "Cost of legal barriers to consumers in the single market". The results of this study – which covers the 15 Member States and was conducted in 1995 – may be summarised as follows:

1 The average cost[16] of in-court settlement of an intra-Community dispute[17] over an amount equivalent to ECU 2 000 corresponds in the best conceivable circumstances (see below) to approximately ECU 2 500 for the plaintiff.

This cost (which hence represents the "minimal" average cost) does **not** include:

- VAT on lawyer's fees (which private individuals, as opposed to firms, cannot recuperate);
- experts' fees;
- costs of travelling abroad (when the parties have to attend court in person);
- reimbursement of witnesses' fees;
- the cost of notifying and serving judicial documents.

2 The average duration of a case before a lower court for the same intra-Community dispute is between 23.5[18] and 29.2[19] months for the European Union as a whole, and in certain combinations of countries it exceeds 40 months, while at national level it is normally under 20 months.

In other words the backlog of pending court cases in certain Member States has a "cumulative" effect and this affects the nationals of other Member States even if they seem to be protected at national level [20].

It should be noted that the above-mentioned periods relate to the courts of first instance and assume a dispute which is free of technical "complications" (no expert reports, no letters rogatory) and procedural difficulties (no counterclaims) and assume that the court decision is not appealed to a higher court and that the case is not referred to the European Court of Justice for a preliminary ruling. Like the estimate concerning costs, this is in some way the "best" hypothesis.

3 Summarising in cost/benefit terms the perspectives of a "standard" court case, the study shows that for a "simple" inter-Community dispute the situation is as follows:

- a party who has suffered damage in the amount of ECU 2 000 must, in order to have "access to justice", first pay an "entrance fee" of ECU 2 500 (court cost + lawyer's fees, exclusive of VAT), in the (uncertain) perspective of recovering his loss within 12 to 64 months (depending on

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16 court costs + lawyer's fees

17 For the purposes of this study we use the notion already employed in the Green Paper of a "dispute between two parties domiciled in two different Member States".

18 For an action brought in the country in which the defendant is domiciled.

19 For an action brought in the parties in which the plaintiff is domiciled, followed by the recognition and exequatur procedures in the defendant's country. However, it should be noted that in two Member States the duration of this second stage alone exceeds 20 months and in four other Member States it is equal to or greater than 10 months.

20 The average duration of a procedure brought in one Member State and followed by enforcement of the decision in another Member State in conformity with the Brussels Convention may be as long as 72 months in certain countries, according to the results of the study.

the country) - all this on the assumption that the defendant will (still) be solvent when the court makes its decision.

- If the second condition is not (or no longer) met at the time of judgment, the plaintiff (while "winning" the case) will have lost ECU 4 500 (his initial loss + expenses).

- If the condition is met, and if the court finds for the plaintiff, he will be awarded damages; in most of the Member States (11 out of 15 according to the study) he will however recover only a part of his outgoings (in addition, certain legal orders simply rule out compensation for the fees charged by "foreign" lawyers).

  Since these costs amount to ECU 2 500 on average, the plaintiff's "balance" (damages minus non-reimbursed outgoings) will often be close to zero if not indeed negative.

4 Bearing the above points in mind, the study's fourth conclusion is hardly surprising: very few intra-Community disputes involving consumers come to court.

Quite apart from the fundamental problems posed by such a situation in a rule-of-law state or community[21] it remained to be seen whether (in regard to out-of-court mechanisms) the problem's dimensions could be quantified in some manner. To this end, the Commission launched two initiatives whose results provide an initial answer to the question:

I) One of the conclusions of the Green Paper concerned the "creation of a mechanism to follow up cross-border disputes with a view to inventorising the problems encountered in practice". Here the reactions to the Green Paper were unanimous.

On an experimental basis, and drawing on a limited sample of border sides, the Commission thus began to collect useful information and particulars (quantity, origin and classification of complaints) so as to get a better idea of the magnitude of the problem: in eight border regions, organisations and/or bodies whose mission is to inform consumers collected complaints against professionals established in a Member State other than that of the consumer ("intra-Community" complaints). From December 1994 to September 1995 2 615 complaints of this kind were registered for a total value of ECU 39 492 315.

II) Eurobarometer survey 43.0, conducted in spring 1995, also offers two significant indexes:

- 24% of the interviewees (3 799 out of 15 800) conducted at least one intra-Community transaction in the past 12 months, but only 3.2% purchased durable goods (this last percentage is indeed lower than the figure for 1992);

- 8,7% of persons who conducted an intra-Community transaction (332 out of 3 799) encountered problems.

[21] Issues of principle irrespective of the number of concrete cases

In the second part of the studied mentioned above, the authors estimate that the above-mentioned legal barriers create an atmosphere of uncertainty whose macroeconomic costs partly explain the "foregone profits" of the internal market (in other words the difference between the forecasts and the real benefits of the internal market).

According to the study's conclusions:
"That legal uncertainty (or judicial barriers) impede economic growth and stability in an economy is a central hypothesis in development economics as well as in the political economy of transformation in Eastern European reform countries. On the contrary, this aspect has hardly been recognised in the research on European integration. It has not been considered in the planning of the European Union that economic integration induces an increase in legal uncertainty (...) that can destroy or at least reduce the expected positive effects of an internal market programme and also of a European economic and monetary Union".

Among the effects of legal uncertainty, the study notably indicates that:
"Even expected transaction costs let consumers shy away from buying abroad. The reason is that, when regarding the higher transaction costs, foreign goods have lower utility for the potential buyers even at the same or at a lower market price for those goods compared with home goods. The same is valid for producers. The risk of having to use higher transaction costs to get payment for delivered goods reduces the profit or incentive for selling abroad" (...) "Another static effect refers to a concentration process that is produced by transborder legal uncertainty. As transborder legal uncertainty is relatively more important for small enterprises than for big ones, small enterprises tend to be outcompeted".

The study's authors emphasise that a quantitative estimate of the macro-economic costs is very difficult; however, in their conclusions they estimate that:
"By far the highest costs are caused by consumers not making use of price differentials within the European Union due to legal uncertainty (...) Adding up the direct static costs leads to costs in the range of 7 230 to 73 790 million ECU. The sum of the hypothetical average scenarios we regarded as plausible is 27 530 million ECU".

II. THE RESULTS OF THE CONSULTATION ON THE GREEN PAPER

The Green Paper was the subject of very extensive consultations whose results confirmed the necessity for as well as the urgency of a Community initiative.

The European Parliament (Resolution of 22 April 1994)[22], the Committee of the Regions (opinion of 17 May 1994)[23], the Economic and Social Committee (opinion of 1 June 1994)[24] as well as a large majority of organisations representing the interests concerned (consumers, business and the legal professions) have come out clearly in favour of such an initiative.

In all the Commission received 110 written reactions representing all the interests concerned from all over the European Union; all parties who responded by a specified

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22 OJEC No C 128, 9.5.94, p. 459

23 OJEC No C 217, 6.8.94. p. 29

24 OJEC No C 295 of 22.10.94, p. 1

deadline (31 May 1994) were invited to a hearing which took place on 22 July 1994. A certain number of options derived from the replies received by the Commission were also discussed at the first European Consumer Forum (4 October 1994), which hosted almost 350 participants from 19 countries and representing all circles concerned.

In the summary report on the internal market presented on 9 December 1994 to the Essen European Council, the Commission confirmed it would "base its measures on the consultations in the context of the Green Paper".

On 22 December 1994 the French government presented the Council with a "Memorandum for an Active Consumer Policy" in which it emphasised that "the problems of access to justice have not been resolved and jeopardise the creation of a genuine European area. In other words the Green Paper on access to justice is a response to an essential and priority need". Other Member States, as well as the EFTA countries, have invited the Commission to take concrete initiatives in the field of consumer disputes.

As regards the objectives of the Community initiative, a significant consensus arose during the consultation process around certain strands in the Green Paper, notably:

I) the coordination of national provisions concerning actions for an injunction which may be brought in respect of certain infringements of Community law[25];

II) the promotion of an environment favourable to the out-of-court settlement of consumer disputes[26];

III) the creation of a mechanism for monitoring intra-Community disputes and the establishment - in the shape of a pilot project - of coordinated mechanisms for instituting cross-border proceedings.[27]

As regards the first point (actions for an injunction) a proposal for a Directive was presented by the Commission on 24 January 1996. This is a problem which can only be resolved by the adoption of a legal instrument at Community level.

As regards the other points (settlement of disputes) the Commission favours a voluntary approach and wants to create better conditions for cross-border cooperation.

To this end the third part of this plan proposes specific measures which, because of their European dimension, may contribute to realising the objectives pursued. These objectives concern both the smooth functioning of the internal market (Article 100a of the Treaty) and the protection of consumer interests (Article 129a).

The existence of appropriate procedures for settling consumer disputes favours the "spontaneous" respect of obligations arising from the contract and/or the applicable legal

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25 Conclusion No 1 of the Green Paper, paras 13 and 14 of the Resolution of the European Parliament

26 Conclusions No 4 and 5 of the Green Paper, para. 22 of the Resolution of the European Parliament

27 Conclusions No 3 and 6 of the Green Paper, paras 7 to 9 of the Resolution of the European Parliament which however are a lot mor far-reaching than the perspectives described in this Communication.

provisions; on the other hand, the absence of procedures designed to settle intra-Community disputes rapidly constitutes an uncertainty factor for the economic players. From the micro-economic perspective this factor favours the party who defaults, allowing him to profit from his negligence, while the other party bears the loss.

At macro-economic level, the same factor exercises a dissuasive effect which (by gradually "eroding" the economic operators' confidence in the reliability of intra-Community transactions) may diminish the expected benefits of the internal market for the economy as a whole.

As indicated in the foreword, the initiatives envisaged in Part III are not exhaustive: in consonance with the European Parliament's suggestion, the idea is rather to draw up an "interim report with a timetable for implementing the necessary measures"[28]. This timetable is reproduced in Annex I to this Communication.

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28 Resolution of 22 April 1994, mentioned above.

PART III: THE INITIATIVES PROPOSED

I. THE PROMOTION OF OUT-OF-COURT PROCEDURES

At Community level the Commission considers that the initial focus must be on out-of-court procedures, for the following reasons:

- markets are evolving far more swiftly than legal codes, and infinitely more swiftly than the negotiations between 15 Member States;
- the spectacular growth of out-of-court procedures relating to consumer disputes may be interpreted either as a response to sluggishness (and difficulties) in the adaptation of certain legal codes (adopted at a time when disputes were far less numerous and did not cover the typical problems of contemporary society), or as a "filter" to be encouraged so as to overcome the court backlog, or as a challenge to the principle of the unicity of the courts; but however one may judge its merits and demerits, this trend applies to most Member States;
- the experience gained by several Member States proves that the "selective" encouragement of out-of-court procedures for settling disputes - providing certain essential criteria are respected - has been welcomed both by consumers and firms (by reducing the cost and duration of consumer disputes) and is currently supported by all sides concerned.

In the framework of the internal market, the lessons we can draw from these experiences may be invaluable. Given the proliferation of "out-of-court" bodies of all kinds (mediators, conciliators, arbitrators) and at all levels (sectoral, national, regional and even local) there are two options: Either we ignore the phenomenon, fully aware that for most intra-Community consumer disputes the cost of a lawsuit would be disproportionate; or we try to establish "benchmarks" to accommodate the "foreign" consumer, on the same lines practised by the countries who lead the field in this area (See Chapter II of Part I).

The experience of these countries is that certain out-of-court procedures may play an important role in settling consumer disputes whenever certain minimum criteria have been established to ensure the transparency of the procedure and the independence of the body responsible for dealing with the disputes.

By contrast, the absence of such criteria goes a long way to explaining consumer distrust in certain countries in regard to all forms of out-of-court dispute resolution. The results of the consultation on the Green Paper were revealing in this respect: most of the parties involved would welcome minimum criteria at European level, including the professionals concerned, as well as the European Parliament and the Economic and Social Committee.

On the basis of the comments and suggestions received, the Commission is urged to define and/or propose a list of minimum criteria, applicable to the treatment of intra-Community consumer disputes in order to facilitate the creation and/or "networking" of out-of-court procedures at internal market level.
The establishment of such criteria at European level would make it possible to support and supplement the policies of the Member States that have chosen to promote a "conciliation culture" in the domain of consumer disputes, and should obviously draw inspiration from criteria established at national level.

A draft working outline comprising six minimum criteria is annexed to this Communication (Annex II); three stages are envisaged, in line with the timetable featured in Annex I.

STAGE 1: The working outline is sent to the interested parties for consultation, with an eye to finalising the definition of the proposed criteria.

STAGE 2: The criteria adopted, in their definitive version, are the subject of a Commission Recommendation.

This text should stipulate an observation period (three years) during which the existence of common criteria could facilitate the creation of "approved" bodies in each Member State, on a voluntary basis.

Moreover, the existence of national bodies employing similar criteria might make it easier to manage mechanisms for handling intra-Community complaints on a voluntary basis (for example, by creating a single "post office box" to which consumers could direct their complaints, hence obviating potentially arduous research when the professional belongs to a "foreign" system).

STAGE 3: At the end of the observation period, the follow-up given to the Recommendation would be the subject of an assessment report accompanied, where relevant, by a proposal designed to ensure compliance with the criteria, in accordance with procedures yet to be determined, and after further consultations.

By way of example, compliance with the criteria could be guaranteed using a scheme similar to the one in force in certain Member States (examples: United Kingdom, Ireland, Sweden, Finland, Denmark, the Netherlands).

The purpose of such a scheme would not be to "regulate" intra-Community disputes but to help the interested parties establish procedures applicable to such disputes, on the same lines as the Office of Fair Trading, for example, in the United Kingdom.[29]

II. SIMPLIFIED ACCESS TO COURT PROCEDURES

The establishment of out-of-court procedures as recommended in Chapter I can only be envisaged on a strictly voluntary basis; neither professionals nor consumers can be "obliged" to rely on them.
The situation was aptly summarised by the European Parliament in its Resolution of 22 April 1994 on the Green Paper (paragraph 5) : "when all amicable procedures have failed, parties must be able to seek legal redress at a cost commensurate with the small sums involved".

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[29] Under the Fair Trading Act, the OFT's task is "to encourage the relevant associations to prepare and to disseminate to their members codes of practice for guidance in safeguarding and promoting the interests of consumers in the United Kingdom"; in this context, a standard procedure has been adopted for handling complaints.

To this end, Parliament considers "that it would be appropriate to harmonise to a certain extent the rules governing legal proceedings in the Member States, in order to establish a Community procedure, for claims up to a certain amount, for the rapid settlement of individual transfrontier consumer disputes" (paragraph 9 of the Resolution).
This view is shared by a large number of bodies and organisations that represent users and call for harmonisation of the "ceiling" of jurisdiction for courts of this kind (*justices de paix*, County Courts, *Amtsgericht*) as well as the global introduction of simplified proceedings (simplified summons, *declaration au greffe*) in order to ensure a certain "parity of treatment" of small disputes in all the Member States[30].

Given the present state of Community law, the suggestions summarised in the preceding paragraph must be approached with a fair measure of caution. However, a "Community" contribution to solving the problem is conceivable, provided the legal traditions and idiosyncrasies of each Member State are fully respected. Such a contribution could in fact be based on the existing corpus of national rules (see below), while making it possible to improve access to existing national procedures (which for at least one of the parties, in the case of an intra-Community dispute, remains a "foreign one"). In this context the sample forms mentioned in Part I, Chapter III pay help illustrate the objective in mind.

Drawing inspiration from these examples the Member States could adopt a simplified European form for intra-Community disputes[31] with a view to facilitating access to the national courts.
Far from involving harmonisation of procedures, such an initiative would bring them closer to users, namely those justiciable, and provide greater transparency at the very first stage of gaining access to an essential "public service".
Forms have been created (or harmonised) at European level in the context of other problems of everyday life - for example the "E 111" form (to enable citizens to draw sickness insurance benefits in a country other than their country of residence) and other forms adopted in the social security field. Experience shows that these documents, which exist in all Community languages, facilitate access for users and also lighten the workload of the bodies responsible for handling the dossier in question.

From this perspective the idea would not be to harmonise procedures but to provide better access to the procedures that exist in each country, as they stand at present - hence encouraging an approximation of the circumstances facing the parties to an intra-Community dispute, currently separated by certain specific barriers.[32]

The form would be prepared in the 11 Community languages and the "usage instructions" could be defined as follows:

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30 In most Member States a "simplified" procedure applies to disputes whose value is less than a certain sum; however this sum can vary greatly. For example, a claim for up to 1 500 Ecus is considered as a "small dispute" (with a view to applying simplified procedures) in France or in Germany, but not in Spain or the United Kingdom. The cost and duration of the "treatment" varies as a result, for claims relating to the same amount, depending on the country whose courts have jurisdiction.

31 By European "form" we mean a form whose basic structure should be "harmonised" (with an eye to facilitating the translation as well as the handling of the complaint), but there is nothing to prevent Member States from adapting the form to their national traditions and legal orders.

32 Green Paper, Chapter III A.2 (page 72)

I. The claimant would fill in the form in one of the Community languages having the status of an official language in the claimant's country of residence[33]; the claim, formulated in this way, would then be transcribed to the equivalent form in an official Community language of the addressee's country and sent to the latter, via the relays indicated by the Member States;

II. In the section of the form reserved for him, the addressee could either propose a solution as to the substance, or inform the complainant of the existence of an instance which could settle the dispute amicably (mediator, conciliation commission, etc.);

III If the addressee did not respond within a given period, or rejected the proposed solution, the form would be forwarded to the competent authority (which would find there the background to the dispute as well as the subject of the complaint and the identity of the parties, in the two languages).

A provisional version of such a form is annexed to this Communication (Annex III); the final version will be established on the basis of wide-ranging consultation with the Member States, the legal professions, associations representing potential users, on the understanding that recourse to the form by users (consumers and firms) should be optional and not rule out other forms of dispute settlement. In introducing the form, two stages may be envisaged.

Stage I: the form is tested in a limited number of border regions

In order to respect cultural and legal, national and regional particularities, the multipliers are selected on the basis of consultations with the Member States and interested parties. A group of experts representing the Member States supporting the initiative is in responsible for follow-up and drafts recommendations on expiry of an appropriate trial period.
The timetable for prior consultations in the context of implementing the initiative is reproduced in Annex I to this Communication.

Stage II: the final version of the form is presented by the Commission in the context of a proposal for a regulation which will also define its "usage instructions" on the basis of the results of the trial period.
In this case the "scope" of the form could be the subject of prior consultations with an eye to determining the ceiling for what the Member States consider to be "small claims".

III. PERSPECTIVES

In the absence of Community initiatives designed to improve individual access to justice, consumer associations and certain Member States suggest that persons who have been harmed by the behaviour of a given professional be afforded the opportunity to sue collectively. This objective may be achieved in the form of a "class action" as is already the case in most of the Common Law countries, or via a series of authorisations granted to a representative organisation, on the lines of the "joint representation" action introduced in France by the Law of 18 January 1992.

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[33] Where relevant, in agreement with the competent authorities of the Member States, the form could also be filled in the Community language of the country of origin of the consumer.

However, at present Member States seem far from agreement on this particular option.

Hence other avenues should be explored and a debate should be launched on the possibilities of consolidating related actions, as - for example - when the behaviour of a given professional harms several consumers.

To this end, it should be remembered that provisions already exist in the national legislations, applying to "actions... 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 22, third paragraph, of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters).

Application of these provisions is currently stymied by the fact that consolidation operates "ex post" in regard to a multiplicity of claims submitted successively (rather than simultaneously) to a number of different courts; this poses substantial if not to say unsurmountable technical problems in the case of intra-Community disputes[34]: in the case of related actions, the solution adopted by the Brussels Convention refers to the notion of "court first seised" but this is not defined by the Convention and gives rise to incompatible interpretations in the national legal orders[35].

To get round these problems the Commission might propose that consumers harmed by the actions of a given professional could instruct their organisations to group complaints "ex ante", hence facilitating the consolidation of related actions: while remaining individual cases (in no circumstances would they be equivalent to a "class action") they could be lodged at the same time before the same court (normally, the court having jurisdiction over the defendant's domicile).
Writs and notifications concerning persons issuing such an instruction could thus be addressed to the authorised association (leading to substantial savings in the administration of justice) and lawyers' fees would be considerably reduced (both for consumers who "consolidate" their actions and for the professional concerned), by comparison with the cost of the same cases if they were treated in isolation[36].

Eventually, the consolidation of related actions" could be proposed as an add-on to the policy of promoting out-of-court procedures, in that it would apply only to circumstances where an out-of-court mechanism is not available (because it does not exist or because the defendant rejects it). In this case the following approach could be adopted:

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34 Green Paper, pages 76 ff.

35 See the report drawn up by the Working Party for the approximation of the law on civil procedure: in certain Member States, a dispute is considered to be "pending" from the date the defendant is notified of the writ; in other countries the case may have to be entered by the court registrar; in yet other countries "lis pendens" is born when the claim is admitted, or when it is sent to the defendant.

36 Instead of having to face a host of procedures being dealt with by different courts (with the attendant risk of inconsistent decisions and hence legal uncertainty) the professional concerned would also benefit from a single procedure allowing him to plan his costs more reliably and hence, if he wished, to negotiate an amicable settlement with an interlocutor acting on behalf of the consumers concerned.

- a transitional period could be accorded during which out-of-court procedures for settling intra-Community disputes could be established (by the professionals concerned) provided they respect the minimum criteria laid down at European level (see Chapter I);

- on expiry of the transitional period concrete proposals on the consolidation of related actions could be presented and would apply to the disputes which cannot be resolved by any of the abovementioned procedures.

ANNEX I

Indicative timetable concerning measures to be taken to implement the envisaged initiatives

THE PROMOTION OF OUT OF COURT PROCEDURES
(Chapter I of Part III of this Communication)

- Consultation of interested parties concerning the working outline featured in Annex II: March – September 1996

- Adoption of the Recommendation: end 1996

- Observation period: December 1996 – November 1999

- Preparation and presentation of an assessment report on the operation of the system: December 1999 – May 2000.

ACCESS TO COURT PROCEDURES (Chapter II of Part III)

- Consultation of the interested parties on the draft form featuring in Annex III: March – September 1996 (Member States, Association europoéenne des magistrats, Council of the Bars and Law Societies of the European Community, representative associations of users: consumers and firms)

- Definition of the working outline concerning the procedures for using the form and selection of the frontier regions in which the form will be tested: October – December 1996 (new round of consultation with the Member States)

- Nomination of the members of the group of experts responsible for following up the initiative: March – April 1997

- Trial period: June 1997 - May 2000

- Recommendations of the group of experts on the follow-up to the trial period: June – September 2000

ANNEX II

WORKING OUTLINE FOR A RECOMMENDATION ESTABLISHING CRITERIA FOR THE CREATION OF OUT-OF-COURT PROCEDURES APPLICABLE TO CONSUMER DISPUTES

FIRST CRITERION

The **impartiality** of the body responsible for handling the disputes must be guaranteed by all appropriate means and notably:

- in the case of mediators, by according them adequate guarantees of independence in the performance of their tasks;
- in the case of collegiate bodies, by ensuring joint representation of consumers and professionals in the bodies that handle the disputes, as well as the independence of the third party that chairs the body, whenever provision is made for such a party.

SECOND CRITERION

The **effectiveness** of the procedure must be ensured by measures guaranteeing:

- the existence of clear and simple forms for submitting claims, available in the eleven Community languages;
- establishment of and compliance with time limits, including preliminary steps which may be imposed on the consumer (example: all remedies internal to the firm have been exhausted);
- attribution of appropriate investigatory powers to the body responsible for taking the decision;

THIRD CRITERION

Adequate publicity must be guaranteed using appropriate means to ensure **the transparency** of the following elements:

- the existence and scope of the procedure;
- the maximum time limit and possible cost of the procedure for the consumer;
- the criteria governing the "decision" of the body responsible for handling the dispute;

- the legal import of this "decision", spelling out whether it is binding on the professional or whether it is a mere recommendation; in the first case the sanctions for non-compliance must be set out.

These particulars must always be provided **in writing** to any consumer who has expressed an interest in availing of the procedure.

The decisions, or at least a summary thereof, must be the subject of an **annual report** accessible to the public.

All decisions must be **reasoned** and in writing and must be communicated to the parties concerned as soon as possible.

FOURTH CRITERION

When the parties are domiciled in different countries, each party must be informed in writing, and in a language having the status of official Community language in his/her country of residence, of the decision on the dispute, setting out the grounds.

FIFTH CRITERION

Application of the codes of conduct must never result in depriving the consumer of protection afforded to him/her by the mandatory rules of the law of the country in which he/she habitually resides, in conformity with the Rome Convention on the law applicable to contractual obligations.

SIXTH CRITERION

Terms in a contract which have not been individually negotiated may under no circumstances be invoked to prevent consumers from bringing an action before the courts having jurisdiction for the judicial resolution of the dispute.

CLAIM

(In certain circumstances this document may replace the letter of formal notice)

SENDER
Name: .....
First name: .....
Address: .....
.....
.....

ADDRESSEE
Name: .....
First name: .....
Address: .....
.....
.....

THE BACKGROUND[1]
.....
.....
.....
.....
.....
.....

(1) Specify as precisely as possible:
(a) the dates, places and conditions of purchase, sale or signature of the contract
(b) problems encountered with the product or service

SUBJECT OF THE APPLICATION[2]
.....
.....
.....
.....
.....

(2) Specify the precise nature of your request (examples: amount of reimbursement, repair or replacement of a product, etc.).

ANNEXES[3]
.....
.....
.....
.....
.....

(3) Indicate here all details you consider necessary and annex all documents supporting your request

Done at ....., ...
Signature

IMPORTANT:

The Addressee has 15 days to reply from receipt of this document. If no reply is received within this period, the Sender may lodge a copy of the letter of formal notice with the clerk of the court having jurisdiction. This submission will be equivalent to a declaration before the clerk of the court.

Note for the sender:
If the addressee is domiciled abroad, always consult a lawyer or a consumer organisation: they will be able to inform you on the law applicable to the dispute, indicate to you the court having jurisdiction and help you at all stages of the procedure, in accordance with the rules applicable in each country.
If the addressee is domiciled in a Member State of the European Union, your claim may be transcribed to a form equivalent to this one, which exists in all official languages of the Union.

- REPLY -

(Failure to reply within the ordained time limit may lead to an action being brought before the court having jurisdiction)

I accept your claim and agree to .....
.....
.....
within a period of .....

I do not accept your claim because .....
.....
and, moreover, request as follows .....
.....

I certify that I have received your claim and propose the following:

A) record our agreement on the following solution (1): .... B) submit the dispute to the body mentioned below (2):		(1) Example: partial or full reimbursement of the price, repair or replacement of the product. (2) Example: conciliator, arbitration, mediation centre. Specify clearly: - the cost and duration of the procedure, - the legal status of the decision issued by this body (is it binding on the two parties or only on the professional or is it merely a recommendation?)

Done at ....., ...
Signature

Sender's reply to the proposals:

concerning proposal A)

.....
.....
.....
concerning proposal B)
.....
.....
.....
.....
.....
Signature .....