



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT

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**Common position of the Council on the proposal for a European Parliament and
Council Directive on the sale of consumer goods and associated guarantees**

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1. THE BACKGROUND:

Date of transmission of the proposal to the European Parliament and Council: 23 August 1996.

Date of European Parliament opinion, first reading: 10 March 1998.

Date of transmission of the amended proposal: 1 April 1998.

Date of adoption of the common position: 24 September 1998.

Date of the opinion of the Economic and Social Committee: 27 and 28 November 1996.

2. SUBJECT OF THE COMMISSION PROPOSAL:

This proposal for a Directive is designed to answer two needs:

- give consumers and economic operators the assurance that they can make the most of the internal market;
- improve consumer protection. Article 100a of the EC Treaty provides in effect that the Commission must, in its proposals, take as a base a high level of consumer protection. Likewise, Article 129a makes it incumbent on the Community to contribute to the attainment of a high level of consumer protection.

Two important strands must be distinguished in this proposal, namely provisions concerning the consumer's statutory rights and those concerning commercial guarantees.

First and foremost the proposal for a Directive is designed to provide consumers with the assurance that they can rely on explicit legal rights throughout the European Community if the good they purchase turns out to be defective within two years of delivery. Hence the proposal concerns sales of consumer goods, new or second-hand, excluding buildings, between a consumer and a professional.

The second strand of this proposal concerns commercial guarantees. On the one hand, the idea is to reinforce their legal value by enshrining the principle according to which a guarantee document legally binds whoever offers it, and also to improve consumer information by clearly establishing the essential particulars necessary for making claims under the guarantee.

3. COMMENTS ON THE COMMON POSITION:

3.1 Some brief general remarks on the common position:

The main points highlighted by the Council in the common position concern:

- the hierarchy of the consumer rights,
- the adoption of a single guarantee period of two years, and the parties' freedom to reduce this time limit to one year in the case of second-hand goods,
- Member States' freedom to introduce an obligation to notify on the part of the consumer in order to rely on these rights,
- the three-year period allotted to the Member States to transpose the Directive
- and finally, a Commission report on the implementation of the Directive in which it will study in particular the question of introducing direct liability of the producer vis-à-vis the consumer.

3.2 The fate of the European Parliament's amendments in the first reading:

The Commission accepted 26 out of the 40 amendments approved by the European Parliament. Some of these amendments were accepted either partly, or with changes to the wording, or again with certain changes to the substance.

- Amendments accepted by the Commission and included in the common position:

As regards the European Parliament's amendments concerning the definitions of the main terms used in the Directive, the Council has opted for the same definition of consumer as the one proposed by Parliament and accepted by the Commission, which tends to align this definition with those already used in other consumer protection directives (Article 1(2)(a)).

The new definition of "consumer goods" as proposed by Parliament and endorsed by the Commission is included only in part in the Council's common position (Article 1(2)(b)). The common position allows certain exceptions to this definition (see point 3.3 of this document).

A new definition of the term "producer" was also proposed by the Parliament and subsequently introduced by the Commission into its amended proposal and by the Council in its common position (Article 1(2)(d)).

Parliament proposed that contracts for the delivery of goods to be manufactured or produced should be equated with purchase contracts. The Commission introduced this amendment into its amended proposal. The Council has also endorsed this proposal,

although it qualifies it by stipulating that this identification with contracts of sale shall not apply whenever the consumer has to provide part of the materials necessary for manufacturing the good in question. The Council's amendment is acceptable, because it approximates the wording of this provision to Article 3(1) of the 1980 Vienna Convention.

As regards Article 2(2)(d), the Council now provides, like the Parliament and the Commission, that the quality and performance of the good must correspond to the consumer's expectations. Although the Council's wording is not identical, in practice the results amount to much the same in most concrete cases.

Parliament provides for a single two-year guarantee period, a solution which is also endorsed by the Council.

Parliament then adopted an amendment concerning the seller's remedies and authorising the sellers to pursue remedies against the "persons liable" for the defect. The Council has also accepted this, although the wording is different.

As regards commercial guarantees, Parliament proposed an amendment, introduced by the Commission in its amended proposal, designed to reinforce consumer information mainly by requiring that the guarantee document state that the consumer's statutory rights are in no way affected by the commercial guarantee. The Council has also introduced this proposal, although with a slightly different wording.

Finally, the provision concerning the private international law clause was amended by Parliament and the Council has adopted this amendment (Article 7(2)).

Amendments accepted by the Commission but not included in the common position:

The Commission first accepted the amendments whose purpose was to bring within the scope of the Directive contracts for the supply of goods in exchange for another asset in place of the purchase price (Article 1(2)(c) and recital 5). The Council has not included this provision or the associated recital. However, this extension of the Directive's scope may be introduced in the course of transposition by the Member States in the framework of the minimum clause (Article 8(2)).

The term "commercial guarantee" had been introduced by the European Parliament and subsequently accepted by the Commission. In order to avoid terminological confusion the Council rejected this wording. The choice of the term "guarantee" or "commercial guarantee" is not of crucial importance. It is the definition of the (commercial) guarantee in Article 1(2)(c) that is decisive in applying the rules governing the (commercial) guarantees. The wording chosen by the Council is very similar to Parliament's. The only difference is a restriction of the definition, which includes only guarantees offered at no supplementary cost. To the extent that a guarantee provided at supplementary cost (extended guarantee) may, in certain national legal systems, lead to the involvement of third-party guarantors who are not normally covered by this Directive, it is reasonable to accept this restriction.

Neither has the Council included the definition of "producer's representative" as proposed by the European Parliament and accepted by the Commission. A definition of

“producer’s representative” is not really indispensable. Since the notion of representative is a familiar one in the general civil law of the Member States, it is perhaps wiser to leave it to the Member States to regulate this question in their transposition of Article 2(2)(d).

According to Article 2(2)(c) of the initial proposal for a Directive, goods are deemed to be in conformity with the contract if they are, *inter alia*, fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract, except where the circumstances show that the buyer did not rely on the seller’s explanations. Parliament proposed eliminating this final restriction, and the Commission did so. However, the Council maintained this provision, which now features in Article 2(2)(b) of the common position. This clause originates in Article 35(2)(b) of the 1980 Vienna Convention. While it is of great importance in the case of sales between professionals, to which this Convention applies, it is on the contrary of minor consequence in the framework of sales between professionals and consumers. It only concerns sales in which the consumer is more familiar with the product or its use than the seller, which is rarely the case.

Pursuant to Article 3(1) of the Commission’s initial proposal, the seller is not liable for any lack of conformity whenever the consumer “at the moment of conclusion of the contract or sale... knew or could not be unaware of the lack of conformity”. Parliament, in integrating this proposal in Article 2(3), proposed limiting exclusion of the seller’s liability exclusively to cases in which the consumer was actually aware of the lack of conformity. The Commission endorsed this amendment. The Council also accepted this provision, but put back in the words deleted by Parliament. However, the Council also inserted the term “reasonably”, with the ultimate effect of restricting the scope of this provision – in effect, the threshold above which the consumer could not be unaware of lack of conformity is higher than before. Hence the difference between these two solutions is now pretty small.

The European Parliament then proposed stipulating that any lack of conformity resulting from incorrect installation of the good by the consumer himself performed in compliance with incorrect instructions provided by the seller should be considered as a lack of conformity of the good with the contract. The Commission endorsed this amendment. The Council did not, and provides only that a lack of conformity resulting from installation of the good on the part of the seller or under his responsibility, as already set out in the Commission’s initial proposal, be treated as a lack of conformity with the contract, provided however that installation is part of the contract of sale. The Council’s amendment introduces a useful distinction. However, Parliament’s amendment was also a useful modification reflecting a need that crops up in practice.

Pursuant to the Commission’s initial proposal, the seller is no longer liable when the goods are not in conformity with the public statements made by the producer or his representative, if he can show that he did not know and could not reasonably know the statement in question. Parliament proposed removing the word “reasonably”, which the Commission accepted. However, the Council did not accept this amendment. That said, and seeing that to prove a hypothetical situation - *viz.* to show that the seller could not know the statement in question - reference would have to be made to his putative knowledge in any case. The reasonable nature of his knowledge would hence appear to be implicit. Hence the difference between these two wordings is not very great.

The following amendments were not accepted by the Council in its common position:

- the hierarchy of consumer rights chosen by Parliament;
- the Parliament's amendment which provided that consumers should benefit from new rights, applicable under the same conditions, when they receive a new good to replace the old, defective one. Parliament also proposed that the guarantee period of two years recommence at the time of replacement or repair of the good;
- the amendment making sellers liable for all costs incurred in connection with defects - transport, travelling, materials and labour;
- the amendment concerning instalment payments pursuant to which payments between the buyer and seller are suspended until the lack of conformity is put right;
- the provisions putting the guarantee period on hold until the seller has met his obligations.

All these amendments directly or indirectly affect consumer rights. The Council chose its own model (see point 3(3) of this document), while approximating at least the principle adopted in the solution proposed by Parliament.

The Council rejected the amendment on commercial guarantees adding an explicit mention to Article 6 providing that the guarantee document must set out the name and address of the person to be contacted and the procedure the consumer must follow to make claims under the guarantee. Since this is included in "the essential particulars necessary for making claims under the guarantee," featuring in this provision, this modification is useful but not indispensable. Parliament's amendment, pursuant to which a guarantee that covers only specific parts of the good must indicate this limitation, failing which the limitation is invalid, was also turned down by the Council. This provision could be left to the discretion of the Member States.

The Council did not accept the amendment on consumer information which provides that Member States must in particular inform consumers of national provisions adopted to implement the Directive. This amendment had been accepted by the Commission.

The amendment introducing this Directive into the annex to the Directive on injunctions adopted in April 1998, and accepted by the Commission, has not been adopted by the Council. However, this amendment would have strengthened the rights of consumers mainly as regards provisions governing commercial guarantees.

3.3 New provisions introduced by the Council and the Commission's position:

The Council introduced certain amendments in Article 1. First of all, it introduces certain exceptions as regards "consumer goods", because it excludes all goods sold by way of execution or otherwise by authority of law, water and gas where they are not put up for sale in a limited volume or set quantity, and electricity. Likewise the Council provides that Member States may exclude sales by auction of second-hand goods when the consumer is present at the sale. These exceptions, partly deriving from Article 2 of the

1980 Vienna Convention, are useful clarifications. Besides, it also introduced a definition of the term "repair", which consists in restoration of the goods to the condition described in Article 2. This is also very useful.

One of the most sensitive provisions on which the Council has taken a stand concerns the hierarchy of the consumer's rights. The Council preferred to retain the text of the common position as a compromise solution. Hence, in the Council's approach, the consumer would first have the choice of repair or replacement free of charge of the defective good, unless this proved impossible or disproportionate. He may seek a price refund or rescission of the sale if the two first options turn out to be impossible, or disproportionate, or have not been performed within a reasonable period and without significant inconvenience to consumer. However, rescission of the sale cannot be required if the defect is just a minor one. It is also stated that a remedy is considered as disproportionate if it imposes costs on the seller which, in comparison with the other remedy, are unreasonable taking into account the value of the good, the significance of the lack of conformity, whether the alternative remedy could be completed without significant inconvenience for the consumer. Finally, it is explained in a recital that the seller's costs are unreasonable if the costs of a given remedy are significantly higher than the costs of an alternative remedy.

As regards implementing the consumer's rights, the Council also introduced new recitals specifying that, in the case of refund of the purchase price, Member States may provide that the amount of this refund be reduced as a function of the use the consumer has already made of the good. As regards rescission of the contract, it has been clarified that the procedures for exercising this right will be spelled out in the national transposition laws and that replacement will generally not be possible for second-hand goods, which are unique by nature. The Council also specifies in the recitals that the seller and consumer may in all cases settle their dispute amicably, and that Member States are free, in the case of repair, replacement or negotiations between these parties with a view to an amicable agreement, to stipulate the putting on hold or interruption of the guarantee period.

In the text itself the Council takes the day of delivery of the good as the time the guarantee period begins to run. This generic term "delivery" leaves it to the Member States to address the problem of the burden of risks. Hence a new recital has been introduced to flesh out this point.

The hierarchy model adopted by Council is not very different to the text approved by Parliament and introduced by the Commission in its amended proposal. It is true that Parliament's text, as a whole, is more consumer-friendly, because it does not - for example - rule out the option of rescinding the contract in the case of a minor lack of conformity. However the Council's model is a workable compromise that strives to accommodate all viewpoints.

The Council has also added a provision and a recital pursuant to which periods of limitation provided for in national law may not expire before the end of the two-year period following delivery. This provision is a significant and very useful addition.

The Council has also provided in Article 5(2) that Member States are free to make it incumbent on consumers to notify the seller of the defect, and this within a period of two

months of discovery of the lack of conformity. In the absence of such notification, the consumer forfeits his rights.

It is true that the Commission had provided for a notification requirement in its initial proposal. But this obligation was mandatory for all the Member States and was intended to counterbalance the consumer's freedom to choose from among the four rights. Following the introduction of the hierarchy of rights by Parliament, the Commission removed the obligation to notify, so as to restore the balance.

The solution chosen by the Council raises two problems - one concerning the internal market and one concerning the principle of a minimum standard for consumer rights.

The problem of the internal market may be illustrated in the following scenario. A consumer from Member State A, which has not introduced a notification obligation in its domestic law, goes shopping in Member State B, which does however impose such a requirement. This consumer is not aware of the notification requirement of Member State B, because in his national law transposing the Directive no such obligation exists. If a defect crops up, the risk is that he will not notify it in good time and hence will forfeit his right. To attenuate this problem the Council has introduced into the text itself and into two new recitals the provision that Member States must inform the Commission of their approach to this notification requirement. The Commission will in turn have to prepare a report describing the different approaches of the Member States and publish them in the Official Journal. The purpose, according to the Council, is to inform consumers and their organisations.

The second problem concerns the very objective of the proposal for a Directive. The Directive's basic rationale is to approximate very different national legal systems so as to invest the same rights in consumers throughout the Community should they purchase a defective product. For this reason harmonisation of consumer rights and the way they are exercised would be desirable. By leaving Member States free to introduce such an obligation, the way in which these rights are exercised would remain partly heterogeneous. It would then be a matter for national law to stipulate whether consumers retain their rights or not, in the event of failure to notify the defect. This provision reduces the added value of the proposal, as preferred by the Commission, even if the Directive leads to a desirable harmonisation of consumer rights.

The Commission also expressed its misgivings about this solution at Council. However, in order to reach a global compromise, it ultimately endorsed the common position.

In the field of commercial guarantees, the Council introduced a new provision pursuant to which failure to comply with obligations concerning commercial guarantees does not affect their validity. The provision according to which the commercial guarantee must put the beneficiary in a more advantageous position than that resulting from the sale of consumer goods on the basis of the national rules applicable to such sales has been removed because of difficulties of applying it in practice. However, a new provision concerning the use of languages in drafting the guarantee documents has been introduced.

A special provision has been introduced governing the sale of second-hand goods: Member States may authorise the parties to reduce by common consent the guarantee

period applicable in the case of sale of a second-hand good, provided this period is not less than one year. This provision is also the subject of a recital.

Finally the Council has provided for a Commission report four years after the end of the extended transition period (three years) on the application of the Directive. The report must in particular examine the case for introducing producer liability and, if appropriate, may be accompanied by proposals.

4. CONCLUSIONS:

At the Luxembourg Council, the Commission finally endorsed the political agreement, which represents a global compromise on the part of the qualified majority of the Member States.

This decision was based on a comparison of the pros and cons of the text under discussion.

The main merits include:

- harmonisation of the concept of lack of conformity;
- a practicable system of consumer rights attuned to existing commercial realities
- a single two-year guarantee period
- reversal of the burden of proof, and
- an incipient regulation of commercial guarantees providing for a certain degree of consumer protection as regards transparency.

The downside is that Member States are still free to introduce a notification requirement that consumers must comply with if they want to avoid forfeiting their rights, a provision which is difficult to reconcile with the idea of a minimum standard of consumer rights.

In the light of the above, it is clear that the merits of the common position outweigh the demerits, and ultimately justify the position taken by the Commission.

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