

COMMISSION
OF THE EUROPEAN
COMMUNITIES

III/B/5

III/8326/89-EN

Brussels, February 2, 1990

F I N A L R E P O R T

(condensed version)

STUDY OF RESPONSIBILITIES,
GUARANTEES AND INSURANCE IN
THE CONSTRUCTION INDUSTRY
WITH A VIEW TO HARMONISATION
AT COMMUNITY LEVEL

Author : Claude MATHURIN

Ingénieur général des Ponts et Chaussées

LEGAL NOTICE

Neither the Commission of the European Communities, nor any person acting on behalf of the Commission, is responsible for the use which might be made of the following information.

C O N T E N T S

	Page
I - <u>PRELIMINARY REPORT</u>	1 - 9
II - <u>LIST OF 52 TOPICS</u>	10 - 12
III - <u>INITIAL SUGGESTIONS</u>	13 - 33
A - Defects are unavoidable	(14)
B - Procedures are intolerable	(14)
C - Damage insurance	(15)
D - Control is essential	(15)
E - Harmonization is desirable	(16)
F - 12 suggested elements	(18)
G - Objectives to be attained	(28)
H - The structure of a system	(30)
IV - <u>OPINIONS OBTAINED</u>	34 - 40
1 - Architects and engineers	(34)
2 - Contractors and manufacturers	(36)
3 - Insurers and inspectors	(37)
4 - Clients and administrations	(39)
IV - <u>FINAL SUGGESTIONS</u>	41 - 50
I - General ideas	(43)
J - New presentation	(44)
K - No interference with the professions	(44)
L - Barriers and obstacles	(45)
M - Nature of proposals	(47)
N - Outline solutions	(48)
O - New institutions	(49)

S Y N O P S I S

Article 100a of the Single Act states that the internal market must be based on "a high level of protection" with regard to health, safety, the environment and consumers.

On 12 October 1988 the European Parliament adopted a resolution calling for the standardization of contracts and controls in the construction industry, and the harmonization of responsibilities and of the standards governing after-sales guarantees on housing.

The aim of the proposals which follow is to attain these two objectives through:

- a definition of the main functions of those involved in any act of construction, especially the role of the principal designer,
- harmonization of building control in the light of the six recently-adopted 'essential requirements',
- standardization of the responsibility of the various parties involved, from acceptance of the works and for a realistic and reasonable length of time, taking into account the durability of the works and the nature of the work,
- a minimum generalized five-year guarantee of satisfactory completion and durability which it would appear wise to require from European builders competing on the world market,
- effective protection for buyers of new or renovated houses against construction defects and damage, by means of high-quality insurance schemes,
- improvement of the relationships between the parties involved, not confined to public procurement and which overlooks neither specialist contractors nor suppliers of components.

Nowadays few countries have truly satisfactory legal systems. Uncertainties, complications and loopholes abound.

The European Community can play a decisive and beneficial role in this area, provided the political will is there.

In response to the question 'Is harmonization of the 12 national systems desirable?', a very large majority (40 out of 47 bodies questioned) said that it was. An equally decisive majority (36 of the 41) replied 'yes' to the question 'Is it possible to create a Community system?'

Instead of putting forward his own personal view, the author prefers to draw attention, objectively, to:

- the strong trend in favour of a harmonized system
- the misgivings expressed, chiefly in Germany,
- the acknowledged advantage of a minimum Community guarantee
- the need for insurance to protect house-buyers.

I - PRELIMINARY REPORT

1. Throughout the life of a civil engineering or building project, various participants undertake responsibility :
 - at the definition stage, the property developer is responsible for the working programme,
 - at the construction stage, the designer is responsible for the plans, and thereafter the contractor is responsible for the works
 - at the stage of use, the proprietor is responsible for supervision and maintenance of the object built.

Briefly stated, this is the theoretical sequence of the production and use of every building, dwelling, school, bridge, road, etc.

2. Anyone deciding to build must obviously clearly define the function of the future works.

It is up to the person using the works to maintain and repair them as necessary.

The scope of this study, undertaken with a view to the harmonisation of responsibilities, could not extend either to the definition or to the use of the works.

Indeed, it is hard to see what purpose would be served by Community action in these areas.

3. The same is not true of the construction stage, during which a particular property developer from country A might deem it wise to retain, if necessary after inviting architectural or engineering proposals, a particular designer from country B and then to enter into a contract, having invited tenders, with a contractor from country C.

The property developer may well consider that it is in his interest to call on an inspector from country D in order to avoid defects during construction and then an insurer from country E to make good subsequent damage due to construction defects.

4. The free movement of goods and services would be achieved more easily in the field of construction if the Member States of the Community could reach agreement on the context in which operations take place :
- essential requirements
 - role of the participants
 - drawings and specifications
 - invitations to tender
 - contract documents
 - responsibilities
 - etc.

The Commission has already initiated action in the first four of these major areas.

5. The subject of liability cannot really be divorced from the construction process as a whole. Although there are various types of process, there is always a property developer who decides and who pays.

How has the property developer, in his capacity as employer, distributed the roles amongst the participants ?

What tasks has he assigned to the principal designer ?

Has he felt it necessary to call on an outside inspector ?

Has he stipulated that the contractor must use such and such a supplier or sub-contractor ?

Has he entered into a contract with one or more contractors ?

What significance is attached to the concept of "acceptance" of the works ?

The proprietor responsible must subsequently supervise, use and maintain the works with reasonable care.

6. The subject of guarantees and insurance must be tackled from two angles :

- that of the experienced property developer, who will require both from the contractor and also from the suppliers and subcontractors an undertaking of satisfactory completion and a high standard of the various parts of the works;

- that of the inexperienced buyer, who expects the property developer to sell him an object guaranteed to last a long time without premature deterioration.

7. In all the countries of the Community, the responsibilities of property developers, designers, contractors, suppliers and proprietors can be undertaken under various systems.

These systems are more or less well established. Construction everywhere is subject to public regulations and these are obviously applicable to all the participants in the construction industry, property developers included.

Common Law, or the Civil Code, imposes general obligations on all citizens and in particular on those who build, cause to be built or own real estate.

This common law is supplemented in almost every country by specific building laws, as for example in the section of the French Civil Code on "works contracts".

In certain countries, standard forms of contracts drawn up on a joint basis have a legal force which goes beyond the subject matter of the contract because they sanction certain uses and practices.

- The contract itself is of course the basis for the contractual obligations, either between the property developer and the builder or between the vendor and the purchaser.

8. The co-existence of these different systems of responsibility - sectoral regulations, common law, specific law, model contracts - can obviously lead to multiple complications.

It can even deter clients and participants in the construction industry and constitute in itself a source of misunderstandings and disputes.

Hence, in countries with a liberal tradition, the contract can derogate from the law.

On the other hand, the law in countries with a tradition of state intervention is so detailed and limiting that it not only makes free drafting of contracts impossible, but it also indirectly exerts a profound and sometimes unexpected influence on the behaviour of the participants.

How can one comprehend the system of responsibilities, guarantees and insurance without an understanding of the role of the public services responsible for building control in a number of Northern European countries ?

These services have their own responsibilities and can, to some extent, be sentenced by the courts if they fail to discharge their obligations.

9. These are the various reasons why it was considered essential to conduct a survey before thinking in terms of a study, at Community level, of a possible integrated system of guarantees and insurance, not to mention liability, in the construction sector.

This survey, which took place between August 1987 and April 1988, enabled the collection in situ in each of the 12 Member States of all the information necessary to describe and understand the different national "systems".

What it shows is that each country has its own, generally coherent, system based in some cases on a positive view of the role of the State and the citizen and in others merely serving to record differing practices and customs.

Certain countries with a liberal tradition have, nevertheless, long had public control over construction; others have chosen to place more emphasis on compensation for damage, rather than on the prevention of defects.

Whilst some countries feel it is essential to define clearly the role of the principal participants, others have preferred to set down nothing at all, even at the expense of encouraging the emergence of unorthodox procedures.

10. In one country, the laws are numerous and change frequently; in another, there may be few laws but they embody essential values and they are well established. In one case, decentralisation works effectively; elsewhere it gives rise to confusion, disorder and arbitrary decisions; certain countries are even recentralising.

Control of operations may or may not exist; it may be detailed or superficial; it may cover only quantities or include technical aspects; it may be limited to inspection of plans or also cover site supervision; it may or may not include public acceptance.

11. In some countries the architect plays a predominant role and takes total responsibility; in others he leaves it to others to finish off projects and supervise the works.

In one country government technical services are powerful, respected and efficient; in another they have neither powers nor resources.

In some cases, the State tries to get to grips with the difficult problem of the competence of participants : in others, it does not involve itself at all and leaves clients and suppliers to "sort themselves out".

12. Certain countries have taken it upon themselves to make legible and at the same time to limit regulations. Others have given free rein to the avalanche of texts and ministerial circulars.

Here, sub-contracting is frowned upon, elsewhere it is widespread. Some countries have introduced an official qualification for contractors, and regulated the tasks of and fees charged by architects and engineers.

In one country, there are two jurisdictions and two different sets of legislation, one for public contracts and the other for private contracts; in another, there is no distinction between the two.

13. In some countries, on completion of the works, the liability of the contractor and that of the designer lasts 10 years for damages and 30 years for fraud or gross negligence.

Elsewhere, it is only 5 years, but sometimes it is 15 years in case of damages and only 15 years in case of fraud.

In one case, the principal designer is not civilly liable; in another, he can be held to be jointly liable in court.

In one country, after acceptance and in case of damages, the onus of proof rests on the builder, and in others it is up to the client to adduce proof of the defect.

14. In some countries, only the virtual collapse of the works can involve post-construction liability, whilst elsewhere the mere threat of collapse is sufficient, as is the unsuitability for use or the reduction in the current value of the works.

In one country it is a question of apparent defects, in another of defects found at the practical completion stage; elsewhere, the builder is liable for defects even if they are not the cause of damage.

In some countries, a two-year liability clause can be invoked, not only for a defect but also for breach of contract.

15. Some countries have made it possible to limit by contract the civil liability of the architect or engineer. Others have concentrated on protecting sub-contractors.

Here, the purchaser of a building has the benefit of excellent protection in case of damage after acceptance : elsewhere, there is none after two years or even immediately after acceptance.

In some countries, post-construction professional liability insurance is obligatory for all participants and in others it is only necessary for the architect who is the leader of the design team. In many countries construction insurance is very poorly developed.

16. Briefly, these are the main general characteristics which emerge from a comparison of the 12 national systems.

The survey covered legislation, regulations, control, professions, contracts, liability, guarantees, insurance and in some instances litigation and arbitration.

It has been published in the form of 12 monographs preceded by some 30 tables, which summarize the national situation measured according to the 7 criteria.

The diversity highlighted in this way is no surprise. To some extent it reflects the real capacity of the production machine and of the power of the technical administration of each country.

17. This diversity is not, in itself,¹ justification for harmonising the national systems at Community level.

Neither the Treaty of Rome, nor even the Single Act, provide a specific basis for Community action on matters of liability and insurance. However, it must first be acknowledged in dealing with the very important area of construction, that :

¹ Many believe that the argument set out in 3) above militates in favour of bringing the national systems closer together and that it is sufficient justification in principle for an attempt at harmonization.

- certain disparities or peculiarities constitute a real obstacle to the construction business, which is detrimental to professionals because it represents an insurmountable barrier, and also to consumers if only because it leads to higher costs;
 - a large number of economic operators and those responsible at the political and administrative levels regard a study of coherent action pertaining to contracts, responsibilities, guarantees and insurance as desirable,
 - after having identified the topics which this action should or could cover, formulated guidelines for research and outlined possible solutions, some leading experts now agree that the creation of a Community system is realistic.
 - wide-ranging discussions have served to identify the principles on which such an action should be based : simple removal of obstacles, protection of consumers and builders, mutual understanding in a very specific sector where multi-disciplinary teams are formed not at the start of the project but stage-by-stage.
18. On the other hand, it is necessary to be vigilant and in particular not to reject the idea of doing something beneficial under the influence of those who will want - without admitting it - to maintain national or regional situations for their own benefit or who regard the Community as nothing more than new source of finance for large infrastructure works.

The major contractors and certain large engineering companies will probably see no advantage in the harmonisation of invitations to tender, contracts and specifications.

This will not be the view, however, of the small or medium-sized companies, sub-contractors or frontier companies, nor that of professionals such as architects and engineers, who are not used to international competition and who will appreciate that the clarification and simplification of administrative and contract documents will make it easier for them to read and understand the clauses and conditions, whatever the country of origin.

19. There are those who will see Community action as an opportunity to attain their corporatist aims of reducing their obligations without any concession in return.

The result of harmonisation must not be the adoption of the "lowest common denominator", but nor must it be the sum total of the 12 systems.

Therefore, two solutions must be ruled out as unacceptable from the outset :

That which would consist of five-year liability, self-certification, no external control, tacit acceptance and optional insurance, which broadly speaking is what is being recommended in certain quarters.

That which would cumulate specific ten-year liability, public control of construction, compulsory insurance, 30-year limitation period for gross negligence; this would amount to an amalgamation of the French and German systems.

On the other hand, various other solutions can be entertained, one of which would consist in standardizing contractual obligations and specific responsibilities : it would require a firm political will but this is by no means impossible, especially since the European Parliament voted on 12 October 1988 in favour of the standardization of the construction market.

20. At this point in the study it is too early to say whether one particular solution is preferable to any other, but it is probable that the contractual route would be the easiest and the most realistic. As a minimum measure, standard contractual guarantees could be introduced, with or without damage insurance : this would already be a step forward. The thorny problem of responsibilities would thus be avoided.

Whatever the solution chosen, two or three simple ideas must be borne constantly in mind.

21. In every country, there are general legal provisions allowing an injured party to obtain redress from the instigator of the damage.

Two "limitation periods" are often provided for: a long limitation period taking effect from the date of accrual of the damage and a short period taking effect from the date of knowledge (i.e. when the damage was discovered). At first sight, there are grounds for believing that these rules might be sufficient, even in the area of construction.

22. Nevertheless, in most countries the construction field is also governed by specific laws.

Generally, these laws serve a number of purposes : they provide a legal framework for construction contracts, they define the concept of damages and they shorten the periods of limitation.

In spite of the existence of these often very antiquated laws, the courts rarely have an easy task in establishing liability for damage after acceptance of the works.

As a first step it therefore seems wise to try at least to reach agreement at Community level on a number of legal concepts which have shown themselves in practice to be difficult to interpret.

23. In certain countries, it is possible to derogate from these general and specific laws by contract.

This is not the case in Anglo-Saxon countries, which have no Civil Code and where common law is applicable to all.

Neither is it the case in BELGIUM, SPAIN, FRANCE or ITALY, where the provisions of the Civil Codes are stronger than those of contract.

It is applicable, however, in DENMARK, the NETHERLANDS and the Federal Republic of GERMANY.

Also superficially attractive, the idea of a Community solution that derogates from national legal provisions is not the solution we should adopt.

It is better not to harmonize at all than to introduce two competing systems in the same Member State.

II - LIST OF 52 TOPICS

The topics, which may need to be discussed by experts before outlining possible solutions for harmonization, are presented in the following tables. Detailed descriptions are set out in Annex II.

Groups of topics (left-hand column)

- A - Regulations and control
- B - Definition of roles
- C - Choice of participants, contract documents
- D - Responsibilities and arbitration
- E - Guarantees and insurance

Presentation of topics (centre columns)

- HOW ? Standardise S, Harmonise H, Encourage E
- WHY ? Obstacle O, Language L, Protection P, ALL +
- WHAT ? Civil engineering CE, Building B, Housing Ho, ALL +
- WHERE ? Public sector PS, Private contracts PC, ALL +

Each topic is discussed by reference to a particular country (right-hand column).

The 52 topics presented in Chapter V in the form of a network are intended to serve as a basis for the 14 components or 'elements' of a possible harmonized system, and for the three Directives and three guides which would be the practical expression of that system.

This is designed simply as a reference to facilitate discussion.

LIST OF TOPICS

N°	TOPICS	HOW	WHY	WHAT	WHERE	REFERENCE
0	Language	S	+	+	+	SCOTLAND
AB1	Process	S	L	+	PS	GB - NL
A 2	Quality and permissions	H	P	B	PC	GB - FRG
A 3	Final certification	S	P	H	+	DENMARK
A 4	Role of the State	H	+	B	PC	FRG - B
AB5	Participants	S	+	+	+	FRG - S
AB6	Building owner	S	+	+	+	FRG
AB7	Principal designer	S	+	+	+	FRG
AB8	Contractor	S	+	+	+	FRG
A 9	Construction control	H	P	B	PC	GB - FRG
AC10	Qualification of companies	H	OP	+	+	B - GB
CD11	Tasks of designers	S	+	+	+	FRG - F
AC12	Purchase and sale	H	LP	Ho	PC	B - FRG
CE13	Securities and bonds	S	OP	+	PS	I - Ir
AC14	Payment of builders	H	P	+	+	FRG - F
C 15	Guide for building owners	S	OP	+	PS	F - FRG
C 16	Submission of tender documents	S	+	+	PS	F
C 17	Specifications	H	+	+	+	FRG
AC18	Organisation of tenders	S	+	+	PS	F - FRG
D 19	Permanent arbitration	H	P	+	PS	I
CD20	Acceptance (practical completion)	S	+	+	+	GB
CD21	Work supervision	S	+	+	PS	FRG - P
CD22	Supervision of plans	H	+	+	+	DK
CD23	Competitions for architects	H	+	B	PS	F - FRG

N°	TOPICS	HOW	WHY	WHAT	WHERE	REFERENCE
CD24	Standard works contracts	S	+	+	PS	NL
CD25	Chain of responsibilities	H	P	B	PS	DK
CD26	Model building contract	S	LP	H	PC	FRG
CD27	Model sale contract	S	LP	H	PC	FRG
CD28	Model Lease contract	S	LP	H	PC	FRG
CD29	Control of materials	S	P	+	PS	F, S
CD30	Direct or sub-contractors	H	P	B	PS	FRG
CD31	Fixed or unit price	H	P	B	PS	GB
CD32	Systems of liability	H	+	+	+	ALL countries
D 33	French system	H	+	B	+	B, S, G, I, L, NL
D 34	Canadian system	H	+	+	+	FRG, DK, P, GB
D 35	Burden of proof	H	P	+	+	F GB
D 36	Exoneration of liability	H	P	+	+	ALL countries
D 37	Derogations from Civil Code	H	O	+	+	FRG, DK, NL
D 38	Builders responsible	H	LP	+	+	CANADA, I
D 39	Model "Civil Code"	S	+	+	+	CANADA
D 40	Level of duties	S	+	+	+	Model
D 41	Duration of civil liability	S	+	+	+	Model
D 42	Content of civil liability	S	+	+	+	Model
D 43	Interpretation of Civil Codes	H	+	+	+	ALL countries
CE44	Guarantee G5/G10/G15	S	+	+	+	DK, F, GB
CE45	Purchaser's guarantee	H	P	Hb	PC	B, L
E 46	Technical performance bond	E	P	H	PC	CANADA, GB
E 47	Designer's insurance	E	P	+	+	NORWAY
E 48	Housing insurance	H	P	Hb	PC	GB
E 49	Control insurance	H	P	+	+	B, F
E 50	Sub-contractors	S	OP	+	+	F
E 51	All-risks insurance	H	LP	+	+	Model
E 52	Builder's civil liability insurance	H	LP	+	+	Model

III - INITIAL SUGGESTIONS

- A. In construction, which is not an industry in the strict sense, totally fault-free buildings are an unattainable dream, but the consequences of material damage in construction are frequently socially intolerable.
- B. In the absence of insurance, clients and builders are subjected to the hazards of interminable procedures, whereas the French system of compulsory ten-year dual construction insurance offers a satisfactory overall solution.
- C. Some countries have already instituted effective systems of housing-guarantees, but lacking a common base the development of such systems throughout the Community poses a problem.
- D. Before bringing in liability and insurance, priority must be given to a screening process, with checks carried out both on carefully selected firms and on the construction process itself to remove errors.
- E. The need for harmonisation of national regulations and practices is already recognized in various quarters, though for sometimes opposite reasons (1st question).
- F. The harmonised system should limit itself to a few key elements of the construction process, but it should hinge around a standardised specific liability of the builder and a minimum Community guarantee of five years on all new building and civil engineering works (2nd question).
- G. Harmonisation is justified first in order to protect the inexperienced purchaser and also - though to a lesser extent - the client and the builders themselves, to avoid misunderstandings and to facilitate consultations, whilst respecting national traditions (3rd question).
- H. The harmonised system could consist of three directives and three recommendations, plus a number of operational annexes which could be used both for public and for private construction works (4th question).

- A. In the construction sector, where the level of industrialisation is low, it is impossible to guarantee the erection of a new or renovated project "without defects".

Unknown defects (German concept) or latent defects (British concept) at the time the finished project is accepted are a fact of life ... Errare humanum est.

Defects can arise from an error of scheduling or laying out, but also from errors in the choice of materials, in the drawings, specifications or the execution of the works. Good management by the designer and on the site can reduce these.

Priority must be given to combating defects, particularly by :

- choosing competent builders,
- establishing a clear division of roles and responsibilities,
- encouraging all the participants to respect their commitments,
- screening out errors by ad hoc controls,
- accepting completed works carefully.

Even though such cases are tending to become rarer, defects can involve damage that a proprietor or a tenant will frequently find difficult to cope with financially and morally. Lawsuits are long, hazardous and intolerable. For economic and social reasons it is absolutely essential to introduce a Community guarantee against construction damage.

- B. The advantages of the French system of compulsory ten-year dual construction insurance covering both damage and liability are obvious, as are the disadvantages of no insurance underlined by Prof. BISHOP in a recent report on construction insurance in the non-residential sector in the UK:

- uncertainty of the outcome of lawsuits, connected with proof of responsibility and the solvency of the accused; intolerably high costs of lawsuits for many plaintiffs; judgments handed down after many years and inadequate awards;
- complicated procedures, with several parties involved, claiming on many counts; the failure of English professional liability insurance : poorly viewed by insurers, costly to manage and leaving only a pittance for the financing of repairs...
- clients who are uncertain as to whether they will be compensated for the consequences of hidden defects; who are obliged to prove breach of contract or negligence in court, and to finance proceedings, and who are frequently forced to drop the case owing to lack of funds...

- builders confronted too with uncertainties, potentially liable many years after completion of the works, having to bear multi-party lawsuits, and legal procedures possibly leading to a rough-and-ready sharing of responsibility.
- possible deterioration of the damaged buildings during the long period of litigation.
- quality of construction is not encouraged, and builders tend to adopt attitudes aimed at limiting their personal liability (defensive design...).

- C. These disadvantages are probably felt to differing degrees in the other Member States, except obviously in FRANCE. This is why, not only GREAT BRITAIN, with the NHBC system and recently Foundation 15, but also DENMARK, with the State Fund for Construction Damage and the NETHERLANDS, with its GIW system, have already instituted a housing guarantee.

In order for protection of this kind to develop in EUROPE, it is certainly necessary to fix a common basis for the duties and obligations of builders. This common basis would aim not to standardise national regulations or practices but to define some essential principles, without which there would be uncertainty as to builders' actual liability, making it impossible to introduce guarantees and insurance.

- D. Every builder in his own interest exercises control within his own company.

Some external control must nevertheless be exercised in one way or another on builders as a whole. This could be done by the authorities or by approved technical inspectors.

It is essential that this external control covers both the design and the execution phase. This control has no value or purpose unless it is carried out by very responsible and competent persons.

Since their role is to detect construction defects, it would seem natural for them to bear "strict" liability, although they could be insured against their own professional errors either by a mutual insurance company or by private insurance.

It would be better to concentrate responsibility for this control of compliance with the essential requirements on one person, it being understood that it is usually the designer who checks during execution of the works that technical contractual instructions and especially the level of quality chosen are being observed.

In certain Member States statutory external control is subject to a fee collected when planning permission is given⁽¹⁾. In other countries it is the building owner who must himself hand over command to the technical controller, with the risk that the control might not be carried out.

With the protection of the public in mind, a worthwhile step might be to introduce Community building permit for which a fee would be charged, thus ensuring that the control is (a) financed and (b) actually carried out.

In the next section, we attempt to give an initial reply to the questions raised by Mr. GARVEY.

E. First question : Is there a need to harmonise the different national conditions and practices ? Provided that the question is confined to the key elements, the answer is yes. For different reasons, clients and builders have already expressed a wish in that direction.

1) In the European Parliament a resolution tabled by Mr. BUENO VICENTE drew attention to the idea of the life cost of works and called for :

- the standardisation of contract clauses,
- the harmonisation of responsibilities,
- the promotion of housing insurance.

Numerous reports from national and international meetings point to the need for harmonisation of responsibilities and construction insurance.

2) The FIEC - to which most European contractors belong, except for co-operatives - has been considering the possibility of such harmonisation since September 1988.

It is itself carrying out a study in conjunction with other participants in the construction sector on the basis of a five-year guarantee limited to the impossibility of using the works and their collapse.

3) Architects seem to be divided on this issue. Within a loosely-knit body representing architects, the CLAEU, a working group has already called for responsibilities and insurance to be harmonised within the framework of a ten-year liability provision, subject to a ceiling, without joint liability, and generalised construction insurance.

Since the beginning of 1989, a number of European designers and insurance companies have taken a clear stance on this issue, as set out in Chapter IV.

(1) This does not mean that all control operations are carried out by civil servants.

- 4) Manufacturers of materials and components, who have recently set up their own organisation, do not appear convinced of either the need for or the feasibility of harmonisation, even though some reject the idea of joint responsibility with builders.
- 5) It cannot be said that a common desire for harmonisation has developed, and even less that such a desire is clearly expressed, in the different countries of the Community. See Annex I regarding the UK, GERMANY and FRANCE.

In ENGLAND, the committee chaired by Prof. BISHOP has proposed a damage insurance called BUILD but does not propose to review the 15 year limitation period for latent defects due to negligence.

In GERMANY, the report recently presented to the Bundestag underlines the seriousness for the nation and its citizens of construction damage, but is guarded on the subject of lengthening the duration of legal guarantees.

In FRANCE, the criticism from various quarters of the Spinetta Law has not led to a coherent counter-proposal, with the result that the Minister responsible for construction has no plans for changing the Law unless it is in order to adapt to Community harmonisation.

In ITALY, the 10-year liability of the contractor alone is not contested but incentives for designers to insure themselves are seen as desirable, as well as a development of "bonds" and insurance in order to open up the market and improve the protection of the buyer.

In SPAIN, contractor liability insurance is desired by the architects, whilst the whole area of liability could be reviewed and improved.

In BELGIUM, the disadvantages of the numerous national regulations could be diminished through harmonisation which, moreover, would have the merit of resolving certain shortcomings of the present system.

In DENMARK, the seven measures to promote quality in construction which have recently been adopted contain ideas, most of which could be taken on board at Community level.

In IRELAND and some parts of the UK, the uncertainties inherent in Common Law create a climate which tends to favour a clearer and more stable responsibility by builders and new guarantees in the non-residential sector.

In the NETHERLANDS, the Civil Code and Articles and Conditions have just been completely revised, which might well create difficulties if harmonisation at Community level is adopted.

Finally, in PORTUGAL the disadvantages of the present system, for guarantees as well as for builders' liability, and the lack of damage insurance militate in favour of harmonisation.

- 6) One of the factors influencing the thinking of those who, generally speaking, favour harmonisation is what one might call the "legislative muddle". Not only does the law allow of interpretation, but it is quite simply difficult to enforce.

This widespread dissatisfaction is in itself an argument for harmonisation and an opportunity to clarify a number of loose judicial concepts, such as the French "intermediate damage". See Table 1 of the Summary (wishes expressed).

F. Second question : Is there a realistic possibility of achieving a unified Community-wide system of responsibilities, guarantees and insurance ?

This possibility cannot be evaluated properly until governments are prepared to take a stance on reasonable proposals.

The comparison of different national systems allows one, however, to form an opinion as to what is possible and what is not.

Presented below is a coherent set of 12 elements which were set out in March 1989 in the provisional working document and which could constitute a harmonized Community system. The opinions gathered on this subject are presented in Chapter IV and the final suggestions in Chapter V.

1. It ought to be possible to agree on the definition and content of the main processes used in construction operations in the Community.

This clarification could be limited to public works contracts, but its extension to all public and private construction might also be considered.

On this subject see topics n° 0 (Language) and n° 1 (Processes).

1 In the final suggestions two further elements are added to the original proposal, namely E13 (qualification of firms) and E14 (sub-contracting).

It should be understood that the definition of the more common processes in no way excludes reference to other construction processes. On the contrary, reference to processes standardised at Community level would be a tangible sign of better mutual understanding between clients and participants.

Names or references could be given to the five most common processes.

No major difficulties are likely in this area as long as this harmonisation of language does not interfere in any way with the role assigned to the professionals.

The distribution of roles among the participants would remain a national matter provided that certain functions are always carried out.

2. The functions to be carried out in all areas of construction operations are in fact independent of the construction process chosen.
 - In all the countries of the Community the four main functions of the construction process are incumbent on :
 - the person ordering the construction,
 - the person designing the works,
 - the person erecting the works,
 - the person supervising operations.

The different functions are the covered in topics 5, 6, 7, 8 and 9.

It should be possible to reach agreement on these four functions, on condition that the German concept of "Entwurfsverfasser" or principal designer is applied Community-wide (topic n° 7).

Although real and important, it is not certain that this concept would be readily accepted in some countries. Only an in-depth study of this concept, which is akin to the French concept of the "maître d'oeuvre" (supervising architect or engineer), would provide the necessary basis from which to draw conclusions.

Whatever the case, the definition of functions is unlikely to interfere with free competition; indeed, there is every chance that it will have a beneficial effect on both the building and civil engineering sectors.

3. Whilst it may seem difficult to harmonise the role of the contractor at Community level, it nevertheless seems desirable to reach agreement on the role and obligations of the building owner (topic n° 6) Contrary to popular opinion, the building owner - not to be confused with the purchaser - does not only have rights.

It should be possible to integrate this idea into the Community system, failing which everything subsequently laid down with regard to the responsibility of the builder is liable to rest on shaky "foundations".

Public clients should set an example of competence and fair play.

Hence the proposal to include in the system - and this should be possible - a guide to good practice (topic n° 15), intended for public sector clients. This already exists in many countries. The guide should particularly stress the importance of paying builders on time (topic n° 14).

It should broach subjects of common interest so as to ease the "business" of construction, especially :

- submission of tender documents (topic n° 16);
- organisation of tenders (topic n° 18);
- permanent arbitration (topic n° 19);
- architectural competitions (topic n° 23);
- control of products and materials (topic n° 29);
- choice between direct contractors or sub-contractors (topic n° 30);
- choice between fixed or unit prices (topic n° 31).

To this guide would be added various documents of practical interest such as :

- general contractual clauses (topic n° 21)
- standard contracts (topic n° 24) for works.

It should be possible to go further and make mandatory the twenty or so general contractual clauses of the works contracts.

Model Community bonds (topic n° 13) could figure among the appendices to this guide.

In fact, in the absence of such insurance bonds, given either by bankers or by insurers, it is probable that the business of construction would remain sluggish.

The difficulty of instituting realistic and efficient arrangements for the qualification of contractors (topic n° 10) will lead clients to resort to contractual guarantees such as :

- "tender bonds" when calling for tenders;
- "performance bonds" and "payment bonds" during the works.

In fact, the system of the "payment bond" will be of help to small or medium-sized foreign companies when they are in a sub-contract situation with a major national company.

4. A more delicate subject is that of building control, raised in paragraph C.

It is no exaggeration to say this function is essential.

As long as it remains independent and uses appropriate means, control should be a positive factor for the establishment of a European construction market.

The function of "external" technical control of construction, which is a preventive action carried out right from the moment of conception of a project, can be instrumental in achieving the required level of quality for the works.

It is essential, in the interests of both the client and the builder, to ensure compliance, both at the design stage and at the stage of execution of the works, with the essential requirements :

- mechanical strength and stability,
- safety in case of fire,
- hygiene, health and environment,
- safety in use,
- protection against noise,
- energy saving and heat retention.

It should be relatively easy to reach agreement on the adoption at Community level of the idea of "external control" or "building control", involving :

- improved protection for the public, i.e. the users of the works, through the enforcement of regulations,
- a move towards the improvement and gradual harmonisation of technical regulations in terms of pathology,
- better circulation of products, processes and builders, as a result of information being exchanged between controllers,
- reduction of cost and frequency of disorders and, more generally, of the costs of poor quality.

It should be possible to define and clarify the principles and the content of Community construction control.

Here it would be desirable to define, as AUSTRIA has done, the respective duties of the controller, the designer and the builder with regard to each other.

As has already been indicated in paragraph C, all these ideas are connected with topic n°s 2 (quality and permissions), 3 (final certification) and 4 (role of the State).

It is suggested that control be financed by a fee levied at the time building permission is granted, or at least that every building owner should be required to call in an external inspector.

5. Another important element of the system on which it should be possible to reach agreement would be that of the duties and methods of remuneration for architects and engineers.

According to whether the designers have a simple advisory role or, on the contrary, take charge of the whole task of design and supervision of execution, their responsibility differs enormously. Their behaviour also depends on the method of remuneration, which should not have a fixed basis but should depend inter alia on the level of responsibility attached to the duties.

It is possible to envisage real regulations on this important subject, as there already are in GERMANY, and at the same time to draw up the documents necessary for harmonised wording of the corresponding design contracts.

There is no doubt that this element of the system would encourage the exercise of the architectural and engineering professions in Community construction.

It would probably also be a positive factor in exporting architecture and engineering services to the Third World countries. The actual drafting of such regulations should not be too difficult, due to the abundance and quality of documentation already collected in the different countries (topic n°s 11, 17 and 22).

Topic n° 23 (architectural competitions) could be dealt with in the framework of the guide for the use of public clients (topic n° 15).

To these Community regulations, a guide for the use of designers for the drafting of specifications (topic n° 17) could usefully be added.

Here again, it would not be necessary to lay down every detail but to harmonise the material presentation of specifications, as in GERMANY, so as to ease the "business of construction" in the European Community, if only for simple operations.

6. In a vast market where the risks of misunderstandings and conflict will remain numerous owing to the different languages, regulations, practices, etc, multi-disciplinary teams becoming involved at different stages of a "multinational" construction operation will feel the need for conciliation or even permanent arbitration machinery.

Instead of accumulating disputes over interpretation or even over the simple application of a contract with a foreign builder, the public or private client would surely find it useful to appoint, as in ITALY, an inspector (collaudatore) who would try to find solutions as and when disputes present themselves. This practice apparently also exists in the United States.

It would be useful to reflect in a general way on the idea of expert interpretation at Community level (topics n°s 19 and 43).

The examples of the NETHERLANDS, BRITAIN, DENMARK and others testify in favour of the development of conciliation and arbitration procedures, both in the framework of a contract and as part of the specific liability of the builder.

7. It should be possible to reach agreement on the essential idea of acceptance of the works built (topic n° 20).

The arrangements to be adopted should enable acceptance to be performed under satisfactory conditions, not only under a construction contract but also under a contract of sale (topic n° 12).

The Community system of acceptance would have the advantage of counteracting bad practices, both on the part of the building owner or buyer and on the part of the builder or vendor.

It should put paid to the idea of immunity of the vendor of a new or renovated building.

Its significance, procedures and form need to be laid down clearly and fully, thus creating Community-wide acceptance arrangements.

The technical controller would not have to certify acceptance since he would not be contractually involved.

On the other hand, it would be advisable to envisage signature by a third party as in ITALY.

It appears essential to fix the form of the documents for acceptance and for the lifting of reservations.

8. It is suggested - and it should be possible, even in BRITAIN - that the system of ten-year liability of builders (and vendors ...) be made more widespread, with certain conditions :

- that liability should be invoked in the event of a breach of any the six essential requirements of Directive 89/106/EEC of 21 December 1988,
- that essential requirements relating to civil engineering works are studied and approved,
- that the commencement of this liability is the date of Community acceptance,
- that the onus of proof is reversed at the end of the fifth year,
- that after the tenth year, common law on contracts or damage is less strict than during the ten-year period,
- that the idea of the builder being "strictly" liable during the first five years is defined in restrictive terms, as in QUEBEC,
- that sub-contractors are not subjected to more stringent regulations than the main contractor,
- that provision is made for a technical inspection of the works before the end of the fifth year,
- that a 'period of action' of three years could be added to the ten-year period.

This is only the outline of a possible solution (topic n° 32) which would need to be refined in the light of the advantages and disadvantages of the different European or American systems (topic n°s 33 and 34).

The suggestion made is therefore that specific responsibility for construction should be standardised and not merely harmonised.

In order to improve the chances of it working effectively and being applied throughout the Community, it is also suggested :

- that a model law be drawn up (topic n°s 39 to 42), to be incorporated into the Civil Code or any other legal system, so as to regulate not only the question of specific responsibility but all of the regulations governing construction contracts in the different countries (including acceptance, the possibility of making good defects or accepting them under certain conditions, etc);
- that a practical guide be drafted for arbitrators having to apply the common law, in order to put an end to possible misunderstandings of common legal concepts (topic n° 43).

In the event of major difficulty in this attempt at standardisation, another, albeit less suitable, idea might be to provide for the possibility of derogating from the national Civil Code (or customary law in the U.K.) to establish liability only on public works in excess of ECU 5 million, thereby applying the principle already in existence in GERMANY.

The technical controller's responsibility, as well as that of manufacturers of materials or components, should be analysed separately.

It would be desirable for the principal designer to be able to choose the builder (in conjunction with the client) and for the builder to be able to choose manufacturers (in agreement with the principal designer).

9. Another important component of the system under consideration is a minimum Community guarantee of five years of satisfactory completion and durability attached to all new or renovated building or civil engineering works - (topic n° 44).

Several types of standardised guarantees could be introduced depending on the type of project to be constructed : private dwelling, block of flats, road, work of art, etc.

The nature of the guarantee could be left to the discretion of the client, except in the housing sector (topic n°s 45 and 48). This could be the simple undertaking by a major builder on a road project, the joint bond of a group of builders, or, naturally, damage insurance which can be freed easily.

The duration of the guarantee itself could be extended by contract to 10, 15 or 20 years, which would in itself be a means of ensuring better quality.

This guarantee could be released by either a client, a buyer or a tenant in the housing field.

It is suggested that model construction, sale or leasing contracts incorporating this guarantee be added to the public sector provisions (topic n°s 26, 27 and 28) for housing, on the understanding that the guarantee should then be put up by an insurer designated in the contract with the contractor, the vendor or the financial backer.

Upon expiry of the guarantee period, whether it is 5, 10, 15 or 20 years, it would be understood that the proprietor himself must undertake supervision of the works and take responsibility if the "essential requirements" are no longer fulfilled.

A system of five-yearly inspection of works might be proposed, at least for housing projects.

10. It is suggested that priority be given to the study and implementation of a system of guarantees and insurance in the housing sector (topic n°s 45 and 48).

The British system, known as "BUILDMARK", proposed to the purchasers of housing by the National House-Building Council, is a particularly interesting example.

It would be extremely useful to institute a new system in the Community, which would be known and used on a wide scale and which would :

- ensure compliance with minimum standards of habitability and quality,
- guarantee that the construction would be completed in case of default by the builder,
- allow the rapid making good of damage arising after construction, providing it is not due to lack of maintenance or to misuse.

11. Whether it concerns a civil engineering or building project, the guarantee of 5 years or more of satisfactory completion and durability attached to the works should prompt building owners to adopt the Belgian system of control insurance or the French system of a single work-site insurance policy.

It is suggested that the subject matter, content and method of operation of these systems be defined (topic n° 49), with a view to standardisation.

12. Lastly, it might be possible to take advantage of recent decisions in BRUSSELS in favour of free movement of architects in order to try and institute a system of group insurance for professional risks on the basis of tasks and responsibilities which would themselves be harmonised as set out in 5. and 8. above.

It does seem possible, in short, to incorporate into a Community-wide system of responsibility, guarantees and insurance in construction, provisions and practices which could be listed as follows :

- 1° Definition of the five Community construction processes currently in use.
- 2° Definition of the four essential functions in every operation and especially that of the principal designer.
- 3° Definition of the role and duties of every building owner, a practical guide for the use of owners of public works, together with general Community contractual clauses, standard contracts and model bonds.
- 4° Definition of technical construction control and certification in respect of the six Community essential requirements.
- 5° Community regulation of the duties and methods of remuneration of architects and engineers, together with advice on the drafting of contracts and a guide for the drawing up of technical specifications.
- 6° Definition and institution of a permanent Community conciliation and arbitration system.
- 7° Definition and institution of Community acceptance of new or renovated works, in the framework of a construction contract or contract of sale.
- 8° Establishment of ten-year liability for builders, strict five-year liability for some, technical inspection before the end of the fifth year, model Civil Code, a practical guide for use by arbitrators.
- 9° Establishment of a five-year minimum Community guarantee of satisfactory completion and durability to accompany all new or renovated building or civil engineering works (guarantee G5); standardisation of longer guarantees (G10, G15, G20).
- 10° Priority given to the introduction of G5 guarantees and others attached to all housing built, sold or rented.
- 11° Harmonisation of the various types of control insurance simultaneously covering damage of the works and builders' liability for a ten-year period.
- 12° Development of group insurance for architects and engineers in construction, on the basis of the new harmonised system of duties and responsibilities.

G. What should the underlying philosophy of such a system be?

1. Priority should be given to the protection of purchasers and tenants.

Obviously, the relationship between a competent professional and an occasional purchaser, and between an institutional financial backer and a tenant is liable to be unbalanced.

It is important to remedy this situation by introducing clear and stable measures to protect the purchaser and the tenant.

In order to do this, standardised Community guarantees should be framed, starting with a minimum five-year Community guarantee, known as G5, the content of which would be widely circulated throughout the Community.

2. The second, though less important, priority should be the protection of the building owner.

The latter must be made to realise how great his role and responsibilities are. His first duty is to be competent and, if he is not, to call upon a trustworthy and, of course, competent person.

The mere fact of owning a building plot is not enough to give a building owner special rights. It is his responsibility in the first place to respect regulations, the environment, neighbours, etc.

Public clients must set an example of competence and fair play in their dealings with builders.

3. Nor must we overlook the protection of builders in a new market where healthy commercial practices will have to be established.

4. One of the principles to be borne in mind is the need to lessen the burden of regulation generally.

The Germans themselves have recognized, in an important report on construction damage, that it is necessary to simplify, shorten and make more legible their DIN standards in the construction industry. At Community level, therefore, only the absolute minimum needed to attain the first three objectives of "protection" stated above should be imposed.

5. Another necessity in the new Community area is to avoid misunderstandings. In order to do this it is necessary to try to standardise the meaning of a few essential concepts used in construction, although it would be a mistake to go too far and into too much detail in this area of language.

6. National realities must also be considered. Not so much habits, some of which might be bad and which might usefully be questioned by the Community, but established traditions provided they are genuinely deeply rooted and are not confused with the fixed attitudes of regulatory bodies and corporations.
7. A point to be borne especially in mind is that a particular rule or practice in a given country should match the real resources of the national production system.

There is no point whatever in creating control or insurance mechanisms "from scratch" unless there are already people and structures capable of assimilating and using them.

8. On the other hand, it seems essential to consider in this debate the original features of the construction sector :
- construction is an integral whole and not the addition of parts;
 - construction involves participants who do not know each other.

This is why a concern for clarity and mutual comprehension must underlie the definition of roles, duties, tasks and responsibilities of those who will have to work as a team.

9. Finally, there is a case for taking steps to clarify the responsibility of the proprietor and especially to avoid the courts being led to impose a heavier burden of control on the builder after the tenth year.

The proprietor must supervise, maintain, repair and use the works built without assuming, as is frequently the case, that he will have no costs for 5 or 10 years and that, in any case, "the insurance company will pay".

One possible measure would be to make it obligatory for the owner to visit the works every five years, as is the case in a very few areas of EUROPE.

10. Although this might seem to be stating the obvious, the new regulations should be so drafted that they can be actually enforced.

They should therefore be few in number, clearly written and accompanied by practical documents making them easy to use.

They should be stable and widely publicized by the media.

It is on the basis of these principles that a new social aspect of Community action could be introduced. The European citizen must feel that here the Community represents an opportunity for more clarity and efficiency in his or her dealings with the construction industry.

In the same way, professionals should feel that the discretionary element is being removed from in their dealings with clients.

Compliance with the essential requirements introduced by the Directive of 21 December 1988 on construction products is essential. They go further than the simple requirement of solidity and suitability for use. If one combines them with the requirement to respect the environment, they can be seen as a new cultural aspect of Community action.

The initial harmonising proposal which follows takes into account all of the considerations set out above.

H. 4th question - What could be the proposals and recommendations making up the harmonised system and what form could they take ?

Here again it is important to distinguish between what is desirable and what is possible, even if it is only a question of formalising measures which are considered reasonable.

It is suggested that the discussion should be concentrated initially on three Directives and three recommendations.

■ A first Directive on the main roles, dealing with a number of basic concepts arising from topics :

- 1 - construction process
- 3 - final certification of compliance with the essential requirements
- 5 - enumeration of principal roles
- 6 - role and duties of the client
- 7 - role of the principal designer
- 8 - role of the contractor
- 9 - external technical inspection;

plus, possibly, topics :

- 12 - purchase and sale of housing
- 14 - payment of buiders
- 2 - quality and building permission.

■ A second Directive on the tasks of the designers also seems essential in order to establish the responsibilities of architects and engineers.

This will summarize the conclusions emerging from discussion of topics

- 11 - tasks and remuneration of designers,
- 17 - drafting of technical specifications,
- 22 - drafting of design contracts.

Without a directive of this kind, it will be very difficult for a client to make a foreign architect or engineer understand what is expected of him.

Different methods of remuneration for the principal designer and other professionals could be envisaged according to :

- the difficulty of the work;
- the remit;
- the level of responsibilities.

A possible solution might be to adopt the French system of a 20 % increase in the contractual fee in return for an undertaking by the principal designer to adhere to a cost target. This system allows the organisation of competitions for architects. It presupposes that the principal designer establishes, in agreement with the building owner, a list of contractors to be invited to tender.

The basic tasks assigned to the designer when he is called upon to be principal designer should be standardised.

It would be the task ⁽¹⁾ of the principal designer to supervise the execution of the works.

The German regulations contain some very interesting provisions regarding architects' and engineers' fees, not only on the content of the basic task, which is subdivided into five parts, but also on specific duties such as daily supervision when delicate works are executed which are crucial to the running of the project.

As indicated in paragraph 5 of the preceding chapter, it would be useful to append to these "Community regulations" two documents of a practical nature :

- a guide for the drafting of design contracts concluded with architects or engineers, using the Danish regulations as a model;
- a guide for the presentation of technical specifications based on German regulations. If it were considered possible, one should go further in this direction and think in terms of preparing a practical guide for principal designers. This would be the only way to obtain an attractive and modern presentation of technical documents, plans, drawings and instructions for "Community" projects. This could ⁽²⁾ have advantages in terms of exporting to non-Community countries.

(1) The Belgian concept is preferable to the ambiguous French concept of "Direction of Works".

(2) On this subject, see the proposal for a third recommendation.

- A third Directive - the most important - would be devoted to liability, guarantees and insurance.

On the basis of the definitions and references contained in the two preceding directives, this Directive could incorporate, inter alia, the conclusions arising from the discussion and study of topics :

- 20 - Acceptance;
- 32 - Specific liability of the builder or vendor;
- 44 - Guarantees G5/G10/G15/G20;
- 45 - Guarantee for the house-buyer;
- 48 - Housing insurance;
- 49 - Control insurance;
- 50 - Subcontracting.

Various model documents would be appended to this Directive :

- model construction, sale and leasing contracts (topic n°s 26, 27 and 28);
- model Civil Code (topic n°s 39 and 42).

One of the tasks of this Directive would be to define the following standardised essential elements (if they are agreed) :

- certificate of acceptance;
- ten-year liability;
- minimum five-year guarantee;
- damage insurance linked to the construction, purchase or renting of a new or renovated building.
- A first recommendation would be the practical guide for the public clients.

The guide formula would allow everyone concerned a certain flexibility, but would nevertheless present side-by-side the practices in use in the different countries.

The guide could incorporate the material selected after study of topics :

- 15 - guide for building owners;
- 14 - payment of builders⁽¹⁾;
- 16 - presentation of tender documents;
- 18 - organisation of tenders;
- 19 - permanent arbitration;
- 23 - competitions for architects;
- 29 - control of materials and components;
- 30 - direct contractor or sub-contractors;
- 31 - fixed or unit prices.

 (1) Unless this topic is covered in the first Directive on principal roles, which would be preferable.

As stated in paragraph 3. of the previous chapter, documents in common use could be appended to this guide, such as :

- general contractual clauses (topic n° 21), which ought to be made mandatory throughout the Community,
- standard works contracts incorporating the different ideas introduced by the whole of the new system (topic n° 24),
- Community bonds at the invitation-to-tender stage and thereafter during the execution of the works (topic n° 13).

This guide could include practical information on drawing up the list of qualified contractors (topic n° 10) invited to tender, selection procedures, etc.

- A second recommendation would be the practical guide for arbitrators.

This guide could tackle the different forms of conciliation and arbitration which will tend to develop in the Community construction market.

It should contain two sets of recommendations :

- those resulting from the study of topic n° 19 on the subject matter and practicalities of the intervention of an independent arbitrator during execution of the works and on acceptance and then on release of the retention money;
- those resulting from the study of topic n° 43 on the regulations on litigation linked to bad maintenance of the works during the ten-year period, so as to facilitate the handling of a number of difficult legal concepts.

- The third recommendation would be a guide for principal designers.

Although this subject might be considered outside the scope of this study, such a recommendation could be an essential complement to the guide for public clients.

It would be a matter of setting down certain standards or national practices which can be used to make estimates of the cost of the works at the different stages of the design process.

It would also be a matter of moving towards a harmonised presentation of the technical part of invitations to tender :

- soil reports;
- plans and drawings;
- technical specifications.

This subject is only touched upon briefly, although it has been raised in certain countries.

Such a guide would enable principal designers to check the main constructional requirements themselves.

IV. OPINIONS OBTAINED

The first three chapters of this report were widely circulated, in the version dated 31 March 1989, before being presented in June in Brussels to those involved in the construction business:

- on 22 June to architects, civil engineers, etc.
- on 23 June to contractors and manufacturers of materials and components
- on 28 June to insurance companies and inspectors
- on 29 June to clients and administrations.

During these meetings, the minutes of which are attached in annex, comments, criticisms and suggestions were gathered from some 100 representatives of all the interested circles.

The written opinions submitted by many of the above, either during the meeting or subsequently, are all attached in Annex IV.

1. THE DESIGNERS' VIEWPOINT

By and large, architects and engineers are in favour of harmonization.

For many of them, the differences observed in the 12 Member States constitute a real and formidable obstacle to the creation and operation of the internal market.

Harmonization, which is not synonymous with standardization, must be confined to the key points of the construction process and must not lead to more bureaucracy.

It will be a long process, in the British view, but the first point to tackle is responsibilities.

What the architects and engineers think is highly valued: they are often the 'building technicians', as the Spanish call them. They are well placed to assess what is good and bad about the different practices.

In ten of the 12 Member States, designers are in favour of harmonization. Only the Germans are against. The Belgians make the proviso that it should not lead to a lessening of the architects' role. Some believe that without harmonization there will be no Community market. Most want flexibility based on broad principles (Danish view) or on mutual recognition (Spanish view). The Italians make no preconditions, and the French are also strongly in favour.

The liaison committee of architects for a united Europe has adopted a clear stance in favour of a ten-year non-joint liability provision with an upper limit, plus insurance.

In an excellent paper the Spanish architects argue that harmonization is feasible and desirable, provided that flexibility is maintained: the aim of such harmonization is not to reap the commercial benefits of the completion of the internal market, but:

"The establishment of a normative European system which, while respecting the cultural value of architecture, guarantees a mandatory minimum level of building quality and safety, which is a basic right of users and of society as a whole."

They suggest the licensing of compatible national arrangements for professional competence, qualification, solvency, inspection, minimum liability, conciliation procedures and arbitration.

There is very widespread support for the views expressed in the interim working document.

A breakdown of the reactions presented either orally on 22 June or subsequently in writing, gives the following picture of the architects' and engineers' views:

a) Points on which there is **very substantial agreement**:

- There is a genuine need for harmonization (1st question);
- It is possible and realistic to set up a Community system (2nd question);
- Of the 12 elements presented, priority should be given to n°s 1 (processes), 6 (conciliation), 8 (specific liability) and 11 (project insurance);
- The main aim is the protection of the consumer.

b) Points on which there is **majority agreement**:

- elements n°s 2 (functions), 3 (role of the developer), 5 (tasks of the designers), 9 (five-year guarantee), 10 (housing insurance) and 12 (professional insurance);
- the objectives of improving quality and simplifying regulations.

c) Other points

There are a number of reservations on the subject of external inspection (element n° 4), but the need for a system of qualification for contractors has been repeatedly stressed.

There are those who argue that a harmonized system will work to the advantage of real quality/price competition and the exporting of European engineering expertise, including major civil engineering projects.

Others see harmonization as an opportunity to clarify legal responsibilities defined in archaic laws.

The question of possible establishing a broad Community definition of the tasks of the architect has also been raised.

Lastly, there have been many calls to acknowledge national realities.

It is important to stress that the principle of formal ten-year non-joint liability is accepted by all except the Germans.

The British have taken a formal position on this aspect, combined with mandatory insurance on an individual project basis (BUILD).

2. VIEWPOINTS OF THE CONTRACTORS AND THE MANUFACTURERS

While the architects and engineers have taken the initiative to express their position at an early stage on the different questions asked, the building contractors and manufacturers have found it difficult to reach agreement.

Most of the national professional organizations, except for those in France and Italy, will finalize their position in a few months time. The FIEC has not yet expressed a view.

Organizations representing subcontractors have already voiced their opinions in favour, as have the cooperatives.

Generally speaking, the major contractors fear any form of harmonization which would irrevocably fix the roles of the professions and would put a brake on new developments. While not hostile to a clarification of terms or even to a clearer definition of responsibilities, they have not yet managed to lay the foundations of a common position.

The president of France's National Building Federation, asked to report to the FIEC on responsibilities and insurance, has not yet submitted his report even though he has already established the broad lines of the French position on the basis of the working document of 31 March 1989.

In Italy, the major contractors belonging to the IGI have already come down in favour of the guidelines proposed; but they nevertheless have some original ideas on the responsibilities of principal designers and on making bonds a general practice. For their part, the Italian building cooperatives are in favour of harmonization and have also put forward some interesting suggestions: a 'dual' guarantee, the selection of 'genuine' contractors and a 'premium' for European groupings.

Specialist contractors, who are often required to work as subcontractors, consider that the initial ideas of the March 1989 document do not go far enough in the area of subcontracting. They call in particular for a number of principles concerning client-main contractor-subcontractor relations to be enshrined in law. They consider that French law on subcontracting could serve as a model, but does not go far enough.

Unlike the designers, the contractors seem unwilling to accept the general implementation of ten-year liability; although the Italians and British appear to be in favour, the French contractors would be happy with a five-year liability provision.

As for the manufacturers of products, materials and components, it is difficult to get a uniform view from them.

Some are not hostile to a harmonization of post-construction liability: instead of a 'tenuous' contractual liability built into the sale contract, often for 30 years, they would prefer a clear ten-year liability starting either from the date of delivery of their product or from the date of acceptance of the works in which their product - identified in the contract of work - is incorporated.

3. THE VIEWPOINT OF THE INSURERS AND INSPECTORS

Insurers and, to a lesser extent, inspectors have already made their views known on most of the suggestions of 31 March 1989.

They are unanimous both with regard to the value of the suggestions and the usefulness and feasibility of harmonization, particularly when it comes to the specific liability of builders.

In their view the primary and, according to some, sole objective should be the protection of the consumer.

Some see harmonization as the only way forward in the development of construction insurance.

Though their arguments are contested by certain architects and engineers, public and private inspectors make a very strong case for defining a few general principles, but their opinions are divided when it comes to the detailed procedures for carrying out building inspections.

One of the difficulties encountered is the problem of avoiding duplication of effort by two inspectors, one employed by the State and the other by the insurance company.

Most insurance companies stress the need for reliable, common rules on responsibilities and minimum guarantees, but they do not all favour compulsory professional liability insurance for builders.

Insurers and inspectors are convinced that, in view of the seriousness and social and economic importance of construction damage in Europe, the demand for damage insurance will develop naturally, even in countries like Germany where there is as yet little public awareness of the problem.

Analysis of the reactions on 28 June or the opinions submitted subsequently in writing presents the following picture of the insurers' and inspectors' views:

a) Points on which there is **very substantial agreement**:

- There is a real or latent need for harmonization (1st question);
- It is possible and realistic to create a Community system (2nd question);
- Of the 12 elements presented, priority should be given to n°s 4 (external inspection), 7 (acceptance), 8 (specific liability), 9 (minimum guarantee) and 10 (housing insurance);
- The main objective is the protection of the consumer.

b) Points on which there is **majority agreement**:

- Elements n°s 3 (role of the developer), 5 (tasks of the designers) and 11 (project insurance).

c) **Other points**

The idea of making it compulsory for all builders to insure against professional liability is an important issue which cannot be avoided in future discussion. An interest has also been shown in harmonization of processes and functions, in order to achieve clarity.

Some people have already expressed themselves in favour of the three Directives suggested in March 1989.

Lastly, a number of interesting comments and suggestions put forward by either insurers, brokers or experts are set out in annex.

4. THE CLIENTS' AND ADMINISTRATIONS' VIEWPOINT

It is safe to say that, apart from in Germany, the majority of public or private clients of the construction industry strongly endorse both the steps taken and the initial suggestions put forward in March 1989.

Most administrations, for their part, are now adopting a cautious approach and some favour setting up a committee to evaluate the final suggestions. The Irish administration is against anything which would make construction more expensive.

The French and German administration representatives would like the suggestions made in this report to be put to a small evaluation committee made up of representatives of only those Member States that are interested.

In a letter included in the file, one of the Directors of the Netherlands Ministry of Housing has expressed, unofficially, an initial broadly favourable opinion on the preliminary suggestions in Chapter III.

The minutes, also attached in annex, of a meeting of the European Consultative Group held in London on 26 June record that the representative of the DOE considered the suggestions of March 1989 interesting but too ambitious.

Under these circumstances, it would appear useful to set up and convene a select evaluation committee, possibly the GRIM or an offshoot of the GRIM.

During the meeting of 29 June the major clients in the housing sector expressed near-unanimous interest in the 12 elements put forward, although there were some doubts about n^os 4 (external inspection), 6 (conciliation), 11 (project insurance) and 12 (professional insurance).

It would probably be advisable - and this echoes a British request - for the major clients in the equipment sector (transport, energy, water, etc.) to be involved in future work on harmonization.

* * *

Mention must be made of the constructive attitude shown by all sectors in Italy to the move towards harmonization, which is only just beginning and which, in the case of industries with a high labour input, is seen as an essential complement to harmonization only for factory-made products.

REPLIES TO THE FIRST TWO QUESTIONS

1st question: Is harmonization of the 12 national systems desirable?

- YES was the reply from 14 designers' organizations in Denmark, Spain, France, Ireland, Italy and the UK, and from the CLAEU and the CEBI; NO from the German architects. Reservations were expressed by Belgian and Netherlands architects;
- YES was the reply from nine organizations of contractors from France, Italy and the UK; NO from German contractors. The Belgian contractors and those belonging to the FIEC have yet to reply;
- YES was the reply from 10 organizations representing insurers and inspectors from Germany, Belgium, France, Italy and the UK;
- YES was the reply from clients or administrations in France, Italy, the Netherlands and the UK, and from the UECL; NO from the German GCW. Most administrations are still reserving judgment.

2nd question: "Is a Community system feasible?"

- 14 organizations of designers from Belgian, Denmark, Spain, France, Ireland, Italy and the UK, and the CLAEU and CEBI answered YES, with the odd qualifying comment; the German architects said NO; two bodies expressed reservations;
- 8 organizations of contractors from France, Italy and the UK answered YES, with some qualifications; the German contractors and British specialist contractors answered NO;
- 10 insurers and inspectors from Germany, Belgium, Denmark, France, Italy and the UK answered YES;
- four clients answered YES; most of the administrations reserved judgment.

V - FINAL SUGGESTIONS

- I. Buildings and civil engineering works can and must be executed in such a way as to be controlled and reliable products and not the haphazard result of more or less well coordinated set of services.

If a common legal system is introduced to provide a framework for the protection of construction works, it must give precedence to consumer protection.

A system will only have a chance of achieving the desired results if it is legible, simple and incorporates the concept of motivation and even of incentives for the parties involved.

- J. In the final suggestions Chapters I, II and III are retained in corrected and amended form and a Chapter IV, which summarizes the opinions expressed, is added. Chapter V distinguishes between the production of works on the one hand and public design and works contracts on the other.

- K. In no case do the suggestions imply interference with the professions as they are or will be organised and treated in each Member State.

If processes and functions are mentioned, it is merely in the context of responsibilities and guarantees.

It is for each Member State to define the role of the designers¹ or of the contractors.²

- L. As they stand at present the national systems involve a risk or the threat of interference with the market.

One particularly formidable obstacle is the excessive diversity of the legal means for making professionals and contractors undertake liability when neither conditions nor the periods of time involved are clearly defined.

The tremendous differences observed in the degree of protection afforded to purchasers are seen as damaging to the housing sector and liable to create serious difficulties.

¹The case of professional 'monopolies'

²Cases in which the 'design and build' process is prohibited

- M. The suggestions put forward represent the personal views of the rapporteur in so far as he has endeavoured to:
- familiarize himself with the twelve systems in Europe
 - identify the positive and novel aspects of each system
 - elaborate on that basis a coherent set of proposals
 - take account of the reactions of the parties concerned
 - present these views in a 'grid' to simplify choices and set deadlines
 - outline, even at this stage, practical but provisional solutions.
- N. Each of the 14 outline solutions is the subject of an individual record containing most of the comments from the clients and participants consulted, followed by a list of some of the ideas which, in the rapporteur's view, might clarify the debate and fit into a coherent system.
- O. This set of suggestions, which may lead to the setting up of new more or less binding and reliable legal system, could be supplemented by the future functions of three bodies which are to be set up, namely:
- an expert valuation institute
 - a prevention agency
 - a modernization centre.

I. GENERAL IDEAS

It is in the interest of builders and purchasers to ensure that the works are considered and treated as final products, even if they are not produced in the same way as industrial goods.

The professional groups, under the pressure of market forces, are obsessed with the quest for higher quality.

Whether it be a question of the choice and selection of builders, the organization and management of the construction process or the assessment of the quality of the construction works, concerted efforts are being made in Europe and elsewhere to advance and innovate.

Any attempt at harmonization in the European Community is futile and meaningless if it does not take on board this desire for progress.

It would be a serious mistake to divorce technical quality from architectural quality. They are not mutually exclusive, but complementary.

Public opinion is increasingly conscious and hard-to-please on issues concerning the value of the environment, both their immediate environment and in the wider sense, and on the need for harmony between Nature and construction.

This seems to be the attitude which is going to influence the work in progress and which is apparent in many of the opinions collected during the summer of 1989.

After all, Article 18 of the Single Act, which contains the new Article 100a of the Treaty of Rome, has the following to say:

'The Commission, in its proposals concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection'.

It is important not to lose sight of this common position, especially when it is a matter of approximating the legislative provisions of the Member States governing the establishment and operation of the internal market in the construction sector.

If there is to be a common set of rules - and that is likely to take nearer to 10 years than five - the higher the quality of those rules, the easier it will be for them to be accepted and enforced.

It is essential that clients and producers should feel motivated to be part of a modern system, worthy of Europe and attractive even for the external market.

The ideal would be to agree on a grid, fix certain key points within that grid, while remaining flexible and avoiding red tape.

J. NEW PRESENTATION

The manner in which the final suggestions arrived at in the ongoing study are presented reflects a concern not to overburden the reader with detail.

- a) The original text of 31 March 1989 has not been changed, except for certain specific amendments made at the request of the parties consulted¹.
- b) The text which follows naturally takes account of the comments, criticisms and suggestions received from the parties involved in the construction industry at the four meetings held in June 1989.
- c) These final suggestions will be presented in such a way as to recall the various actions already set in train by the Commission as part of its efforts to complete the internal market².

K. NO INTERFERENCE WITH THE PROFESSIONS

It is surely not necessary to repeat that the suggestions made will not in any way harm the professions themselves?

Or perhaps it is, since the meetings in June 1989 showed that there were still misgivings on this point. This is true of certain architects.

Admittedly, Directive 85/384 of 10 June 1985, mentioned by the Belgian architects at the meeting, underlines the role of architects in society.

For all practical purposes, however, this Directive does not specifically deal with the issues of the selection, role, tasks, contract, remuneration and liability of the architect in Europe.

The architect's liability, whether it is contractual or not, will always depend not on a general text but on the task that has been assigned to him by the client.

These tasks may or may not include consultancy, design and supervision, except in certain countries where the role of the architect is laid down by law.

¹Annex II lists the main amendments to the March 1989 text.

²Action on construction products (Directive 89/106 of 21 December 1988) and on public works contracts (Directive 89/440 of 18 July 1989).

But, from another point of view, if the architect acts at one and the same time as advisor to the contractor, as principal designer and as director of works, he will have a wider responsibility than if he were only the principal designer.

There are also certain misgivings in the minds of other professionals such as quantity surveyors and technical architects.

To dispel those misgivings it must be said that the fact of clarifying and defining certain functions and activities necessary to any process does not mean that these responsibilities will be assigned to a specific professional group.

On the other hand - and this is an important addition - two new suggestions will be added to the 12 original suggestions:

13. Qualification and competence
14. Subcontracting

This has been done in order to meet the wishes and criticisms expressed and to take fuller account of the situation in practice.

Other fears have been voiced by certain contractors and by certain countries, such as Germany, who do not want a rigid or innovatory system.

L. BARRIERS AND OBSTACLES

- In Germany, 30-year liability for gross negligence, which leaves wide powers of discretion to the courts, far more so than in those countries where builders' liability is specific and for a ten-year period.
- In Belgium, compulsory insurance for architects and for access to public contracts, and the mandatory approval of contractors.
- None in Denmark.
- In Spain, official qualification of contractors for access to public contracts and for specialist contractors.
- In France, compulsory insurance for architects, contractors and other builders, and especially for component manufacturers.
- None in Greece
- None in Ireland
- In Italy, official qualification for contractors.

- None in Luxembourg
- None in the Netherlands
- In Portugal, registration of specialist technicians on the approved list of each local authority
- In the United Kingdom, the legal risk inherent in the power of the judiciary and in the vagaries of Common Law.

* * *

In those countries which have public inspection of construction (Germany, Denmark, Netherlands, United Kingdom), the differing degrees of strictness exercised by individual inspectors may affect foreign contractors particularly severely.

* * *

Another obstacle, if not a barrier, is the fact that the problems of numerous languages are compounded by the multiplicity of concepts and practices:

Germany: A clear basis for architecture and engineering contracts (HOAI) and for works contracts (VOB/B).

Belgium: A set of particularly complex rules governing contract documents.

Denmark: All is clear

Spain: A mass of regional differences, especially in Catalonia and the Basque country.

France: The confusing way in which the rules are presented, dual system of public and private contracts, compulsory insurance and its consequences

Greece: p.m.

Ireland: The uncertainties of Common Law

Italy: The form in which regional rules are published.

Luxembourg: RAS

Netherlands: All is clear

Portugal: All is clear

United Kingdom: The multiplicity of concepts not found elsewhere, absence of general written rules, numerous standard forms of contract, the notion of implicit clauses, etc.

* * *

If the author of this report might be permitted an overall opinion, it is as follows:

- Germany has the clearest and most practical set of rules for everything to do with the construction stage.
- Italy has the simplest and most reasonable set of legal provisions for determining responsibilities
- The Netherlands have an excellent concept of standardized contractual clauses.
- France and the United Kingdom have the best systems for guarantees and insurance.

If the desire for harmonization were to be translated into a decision, it might be useful to use the above observations as a basis.

M. PROVISIONAL NATURE OF THE PROPOSALS

Apart from the misgivings voiced by Germany, the overwhelming majority of participants and clients are in favour of harmonizing construction law.

It therefore seems sensible that the Commission should devise a Community system in this area.

The final suggestions presented below can be no more than the outline of a solution. They are arranged according to the 52 topics listed in Chapter II and take account of most of the comments made.

A good deal of criticism has already been voiced by certain individuals who regard the original suggestions of 31 March as over-ambitious, unrealistic or incoherent.

This criticism may be justified, but at this stage in a possible process of harmonization, criticism needs to be welcomed, even provoked, from all sides and therefore must be seen in that context. The critical process can be aided by:

- not defining the remit of investigation too rigidly in advance. That is why all 52 topics have been presented by the author, who felt that he had no authority to be selective and who wanted to establish the basis for a wide-ranging dialogue.
- giving everyone the opportunity to have a say on the basis of a document that must, by the very nature of things, be imperfect but which has the merit of avoiding the confusion which inevitably results from not having a point of reference;
- putting forward, if only to provide a focus for the debate, a set of 12 specific elements (increased in this version to 14), three Directives and three recommendations, forming a fabric within which priorities can be adopted more easily.

Clearly, this presentation is no more than a working basis. These proposals could be changed in many ways:

- by permanently dropping some of them or, on the contrary, filling certain gaps;
- by not making some of the measures mandatory;
- by opting for the contractual approach;
- by confining attention to public sector operations and/or those above a certain threshold;
- by setting priorities and fixing a timetable, while ensuring consistency;
- by giving precedence to incentives and motivation of the participants concerned.

In short, nothing is definitive. The following specific suggestions are therefore merely provisional and intended as a guide.

The political decision-makers will have to decide, not forgetting the European Parliament's resolution on the matter.

N. OUTLINES OF PRACTICAL SOLUTIONS

The 14 elements which could be incorporated in one way or another within a Community system (regulations, directives, recommendations, guidelines, models, standards,...) are embodied in the proposed solutions set out in Annex V.

There is also a language element E0 covering all 14.

No useful purpose would be served by repeating the comments made on points E1 to E12 in Chapter III/F.

The 14 elements put to the experts and professionals for their assessment are:

- E1. Construction processes
- E2. Main functions
- E3. Role of the employer
- E4. External inspection
- E5. Tasks of the designers
- E6. Permanent arbitration
- E7. Community acceptance
- E8. Specific liability
- E9. Five-year guarantee
- E10. Housing insurance
- E11. Project insurance
- E12. Professional insurance
- E13. Qualification of contractors
- E14. Subcontracting

Annex V also contains the grid presenting the 52 topics from Chapter II and Annex II.

Alternative (fairly flexible) proposals are presented within this framework with a view to incorporating the 14 points in a coherent system, according to the choices and priorities adopted.

This framework also distinguishes between the aspects of the proposals relating to products and those relating to public contracts.

* * *

It should be mentioned at this point that certain of those involved in the exchanges of views in June 1989 felt that the issue of possible Community regulations on construction should be specifically addressed.

0. NEW INSTITUTIONS

Apart from the measures proposed in this study, the Commission's attention should also be drawn to three further points:

- European expert reports
- construction damage
- the future of the industry

1. Expert assessments must be improved and defined with an eye to a common market in construction. Issues such as the competence, neutrality, and independence of experts in their role as conciliators, inspectors and rapporteurs, both during the works and after acceptance in the case of damage, need to be addressed. Certain people want to see a European Institute for Construction Assessment set up, which could:

- establish the professional code of ethics for experts
- lay down the rules for awarding licences
- draw up a practical guide
- devise machinery for conciliation and arbitration based on the Netherlands model
- etc.

¹This is recommendation No 2 of my proposals in Chapter III.

2. Construction damage is an economic disaster in Europe.

Every country is preoccupied by this unfortunate state of affairs: buildings, monuments, works of art are not properly maintained and are deteriorating.

Construction defects cannot be eliminated and damage is often a nightmare for house-buyers.

Owners have not adjusted to the habit of supervising, using, maintaining and repairing their properties with the same care they give to their cars.

Germany, France, the UK and, of course, other countries are aware of the problem and have taken or are taking steps.

A report presented recently to the German Bundestag on this subject is particularly interesting.

One possibility would be to give operational powers to a European Agency for Combating Construction Defects.

3. The European Community must begin to take a greater interest in the housing sector: that is the opinion of the British National House-Building Council.

The action to be taken would have no point unless it involved serious measures geared to the industrialization of the construction sector.

This sector is the only one not to have taken the steps necessary for its renewal. The challenges from the countries outside the Community must be faced.

This may lead to the idea of setting up a European Centre for the Modernization of the Construction Sector.

Its role would be to devise and launch large-scale, prestigious industrial initiatives combining architectural quality, technical reliability and profitability.

00051

Claude MATHURIN

STUDY OF RESPONSIBILITIES,
GUARANTEES AND INSURANCE IN
THE CONSTRUCTION INDUSTRY
WITH A VIEW TO HARMONISATION
AT COMMUNITY LEVEL

ANNEXES

30 September 1989

Claude MATHURIN

**STUDY OF RESPONSIBILITIES,
GUARANTEES AND INSURANCE IN
THE CONSTRUCTION INDUSTRY
WITH A VIEW TO HARMONISATION
AT COMMUNITY LEVEL**

**ANNEX I
PRELIMINARY REPORT**

- Resolution adopted by the European Parliament on 12 October 1988
- Particulars of the situation in England, Germany and France
- Annex 1 to Directive 89/106/CEE on construction products (essential requirements)

30 September 1989

RESOLUTION
(adopted on 12 October 1988)

on the need for Community action
in the construction industry

The European Parliament,

- having regard to the motion for a resolution by Mr. FITZGERALD on the need for Community action in the construction industry (Doc. 2-1066/84) ;
 - having regard to the motion for a resolution by Mrs. LIZIN and Mrs. VAN HEMELDONCK on the situation in the cement industry (Doc. B2-1157/84) ;
 - having regard to the motion for a resolution by Mr. ANDREWS on life cycle cost appraisal of building projects (Doc. B2-1229-87) ;
 - having regard to the report by the Committee on Economic and Monetary Affairs and Industrial Policy (Doc. A2-188/88) ;
- A. whereas the construction industry is vital to the European economy and its many activities are essential for the growth of the economy and for the environment and quality of life of the Community's citizens,
- B. whereas in recent years this sector has undergone a major crisis reflected by a 10 % drop in activity and an unemployment level of over 2 million and until now there has been no overall Community approach which would allow the construction industry to be revived,
- C. whereas greater consideration for the construction industry is essential, because a reduction of unemployment depends largely on a recovery in this sector and because the construction industry has to contend with changes of perception as regards markets and building technology itself,
- D. whereas, given the present demographic situation, the trend in demand for housing, with its growing emphasis on quality, and the increasing international competition, the construction industry must change if it is to develop and expand,
- E. having regard to the changes which this industry has undergone, as well as its special characteristics and its dependence on various forms of regulation, particularly as regards credit and public investments,
- F. whereas in the light of the internal market there needs to be a modernization of the industry, improvements in housing and town planning and encouragement for infrastructural projects of European interest,

- G. whereas the recent measures to liberalize capital movements in the Community open up new opportunities for securing wider sources of financing for construction,
- H. whereas, although demand for housing has fallen in terms of quantity, there is still a housing shortage in some regions in the Community, and the general housing situation is still far from satisfactory in any of the Member States, with the result that individual mobility is restricted by the lack of adequate housing and by financial problems,

A UNIFIED MARKET

1. considers that a Community strategy for the construction industry should be adopted which, while allowing for local peculiarities, would provide for a more unified market, and, with this mind, welcomes the recent proposal for a directive on construction products allowing for the free movement of the latter, and also welcomes the modified proposals on the procedure for awarding public works contracts, the aim of which is to improve competition in this sector and to ensure greater openness in the conduct of business,
2. considers that the Commission needs to take steps to ensure that documents relating to contracts and the monitoring of building operations are standardized and harmonization introduced as regards the liabilities of house builders and developers,
3. calls upon the Commission to look at the situation of the various materials supply industries - and in particular the cement industry - both from the standpoint of restructuring and of competition,
4. considers that the distortions arising from differing regulations (on insurance or the right of establishment of the various people, professions and services involved in construction, such as architects, for example) should be eliminated,
5. considers there is an urgent need to implement the package of measures designed to strengthen social cohesion which incorporates policies to promote the social protection, insurance cover and health of workers, particularly in the case of those employed in the construction sector where a large number of industrial accidents occur,

THE MODERNIZATION OF THE CONSTRUCTION INDUSTRY

6. believes that, since the factors which will decide the future of this industry are quality and competitiveness, there is a need to encourage modernization to :
 - . improve productivity in the industry through increasing use of information technology (computer-assisted conception, design and calculation, product databanks, improved project management),
 - . encourage research, both into construction products and the buildings themselves (the factory, the office and the house of the future), home automation being destined to play a major role in the future in the light of cost improvements in insurance, supply and maintenance and the possibilities for "teleworking" which the new equipment affords,

7. believes that, in order to cope successfully with the technological changes with which it is faced, the profession will have to undertake a major vocational training programme, for example with the aid of the public authorities, and will also have to present a new image as a modern industry able to motivate an increasingly highly-qualified staff,

A HOUSING AND TOWN PLANNING POLICY

8. recommends that each Member State should develop house building and renovation programmes (especially in regard to old housing in urban areas designated as having special historical, artistic or cultural interest), together with programmes for improving the urban environment (soundproofing and drainage),
9. Believes that there is a need to develop programmes of subsidized housing and a system of personal loans to enable people to acquire them, as well as to encourage flexibility in housing finance, to extend the use of formulae such as variable-interest loans and the transfer of loans to facilitate personal mobility and, in general terms, to open up the mortgage market as the Commission has suggested in a proposal which the Council should soon adopt,
10. calls on the Commission to recommend that the Member States provide greater legal and technical protection for consumers, and insists that they harmonize the standards governing the after-sales guarantee on housing,

NON-RESIDENTIAL BUILDINGS

11. stresses the importance of rehabilitating disused industrial sites in a number of the Community's declining industrial regions, and the urgent need in these regions for these industrial redevelopment measures, which must be carried out before any conversion is started and to which the Community instruments and the EIB should contribute under the integrated regional development programme,

AN INFRASTRUCTURE PROGRAMME OF EUROPEAN INTEREST

12. stresses the need to begin and carry out a comprehensive infrastructure programme of European interest in order to exploit fully the opportunities provided by the large internal market thanks to more convenient and faster communications, the elimination of natural obstacles within the Community and between the Community and third countries, and the carrying out of hydraulic projects, etc. These projects, which will boost the economy and employment and help to integrate the Community's outlying regions, will increase the competitiveness of European industry and undoubtedly give rise to a multiplier effect,

CONSTRUCTION PROGRAMMES FOR THE DEVELOPING WORLD

13. notes that the developing countries are more than ever in need of modern infrastructures and that the growing urbanization of these countries should also lead to a substantial demand for housing,

14. stresses that, despite their indebtedness, the shared interest between these countries and the Community (especially in the case of the ACP countries, but also in that of the Latin American countries) suggests that the latter should not cut its funding of public works through the EDF in particular, but rather set up an aid scheme for these countries with the collaboration of the multilateral aid organizations in which the major European construction groups could have a dominant share,
15. suggests that the Commission should therefore draw up general guidelines to increase the homogeneity of the construction industry, encourage its development and strengthen its ability to compete abroad,

* * *

16. instructs its President to forward this resolution to the Commission and Council and to the Governments of the Member States.

GERMANY

In GERMANY, the guarantee of the builder or vendor of a new building is for 5 years after acceptance, but that of the contractor can be reduced by contract to 2 years.

The onus of proof rests with the client.

Upon expiry of the 2 or 5-year guarantee, the 30-year regulations allow damages and interest to be obtained in the case of gross negligence or breach of contract or standard of care.

The recent report on construction damage submitted to the Bundestag by the Federal Minister shows an annual economic loss of more than DM 10 000 million per year.

Although a large proportion of this loss (DM 4 000 million) is due to pollution of the atmosphere, nearly DM 3 000 million is believed to be caused by construction defects and another DM 3 000 million by lack of maintenance of the existing housing stock.

In this report, the Federal Minister's proposals include :

- extending public control of housing,
- simplifying standards and regulations,
- reviewing the duration of the legal guarantee of 5 years,
- improving the drafting of contracts,
- tightening up supervision of existing works,
- clarifying the individual responsibilities of the participants,
- avoiding fixed prices for plans and works,
- making the private use of public regulations more widespread,
- studying conditions of subcontracting.

According to this report, the life of a building constructed today is in the order of 80 years.

As pointed out by the GGW, the Federal organisation of the proprietors of subsidised housing, it would therefore be possible to adopt the French ten-year guarantee in GERMANY.

Without going to those lengths, it is likely that the German construction industry, known for its high degree of quality and production to stringent standards, could easily cope with the consequences of a true 5-year guarantee.

This would end the unbalanced situation which puts all the pressure on the architect, who is responsible for 3 years longer than the contractor. This anomaly has been the subject of discussions at a meeting between the administration and the professions under the aegis of the DVA.

The conditions, thought by some to be bad, under which acceptance of works is carried out under VOB regulations is another issue for discussion in the DVA.

The trend in GERMANY is towards a lengthening of the guarantee period, although this view is naturally not shared by the contractors. On the other hand, there is no pressure in this country for construction insurance.

ENGLAND

English law lays a contractual responsibility on builders of 6 or 12 years after practical completion and a responsibility for negligence of 15 years after the date of performance of the negligent act.

The onus of proof rests with the client. The recent report by the committee chaired by Professor BISHOP, dealing with construction insurance, proposes a ten-year insurance for construction damages, known by the acronym "BUILD".

This insurance, which does not yet exist, would be applied to construction other than housing, as housing is already covered by the excellent ten-year guarantee of the National House-Building Council.

Taken out by the client, property developer or owner, it would be an insurance for latent defects limited to the structure (foundations included) and the impermeability of the weathershield envelope, with an optional extension for loss of rent.

It would be transferable to successive owners and to whole-building tenants (other tenants being indemnified). The premium would cover damage insurance, estimate of risk and inspection by an independent expert designated by the insurer. It would amount to between 1, 5 and 2 % of the total value of the works.

This ought to mean a reduction in the professional insurance premium (PI) of the architect.

In his report, Prof. BISHOP wonders how to stimulate the demand for "BUILD".

The most efficient method would obviously be legislation, but he does not recommend this. He observes that FRANCE has already instituted compulsory "works damage" insurance and that in the European Community, although to differing degrees, the law only imposes damage insurance on tenants covered by an "all repairs included" lease.

He considers that these subjects will be examined within the harmonisation of the systems of legal liability in the European Community. Commercial considerations could prompt financial backers and property developers to propose property products accompanied by BUILD, which would provide a guarantee similar to that of the NHBC for "housing" products.

This suggests that in ENGLAND, as a result of the imbalance between the good ten-year protection in the sector of new housing and the low take-up of damage insurance in other sectors, the adoption of harmonisation measures at Community level ought to be relatively easy.

An amendment to the "Latent Damage Act" should also be envisaged, but this is not likely to cause serious problems.

RESPONSIBILITIES AND GUARANTEES
IN FRANCE IN THE CASE OF CONSTRUCTION
DEFECTS AND DAMAGE

FOUR LEGAL PROCEDURES				
SPECIFIC LAW OF 4 JANUARY 1989				
	I TOTAL COMPLETION (conformity)	II 2-YEAR LIABILITY (equipment)	III 10-YEAR LIABILITY (sound constr. fitness for use)	IV LIABILITY UNDER COMMON LAW (person who has to discharge a duty)
1. Damage prior to acceptance	No (nothing in the law of 1978)			Yes
2. Damage and defects on acceptance	Yes (if defects subject to reservation)	No No reservation = acceptance Reservation = procedure I		No
3. Damage appearing after acceptance :	No damage insurance (possible serving of demand)	Damage insurance optional (building)	Damage insurance compulsory (building)	
1st year	Yes	Yes (or VI)	Yes (or VI)	Yes, if A. minor work B. no effect on soundness or fitness for use C. other conformity defects
2nd year	No	Yes (even if conformity defect)		
from 3rd to 10th year	No	No	Yes	
after 10th year	No	No	Non	Yes Case B above + fraud
4. Time limit for constatation + taking action	1 year	2 years	10 years	B=10 years ? Fraud=30 years?
5. Person liable	Each contractor who is a "guarantor"	All builders + suppliers of components but not subcontractors		Not the builders but the suppliers of materials

6. Nature of liability	Presumption of personal liability	Presumption of liability and possible joint liability	Proven fault joint liability
7. Beneficiaries of the guarantee or indemnity	Building owner	Building owner and successive owners	Person for whom the duty is discharged
8. Starting point of liability		Written acceptance or manifest tacit acceptance	Acceptance

(1) compiled by students of the Poitiers Law Faculty.

ANNEXE I

EXIGENCES ESSENTIELLES

Les produits de construction doivent permettre d'ériger des ouvrages qui, compte tenu des aspects économiques, soient (dans leur ensemble et dans leurs parties) aptes à l'usage et qui, à cet égard, remplissent les exigences essentielles indiquées ci-dessous lorsqu'elles existent. Sous réserve d'un entretien normal des ouvrages, ces exigences doivent être respectées pendant une durée de vie raisonnable du point de vue économique. En règle générale, elles supposent que les actions qui s'exercent sur l'ouvrage aient un caractère prévisible.

1. Résistance mécanique et stabilité

L'ouvrage doit être conçu et construit de manière que les charges susceptibles de s'exercer pendant sa construction et son utilisation n'entraînent aucun des événements suivants:

- a) effondrement de tout ou partie de l'ouvrage;
- b) déformations d'une ampleur inadmissible;
- c) endommagement d'autres parties de l'ouvrage ou d'installations ou d'équipements à demeure par suite de déformations importantes des éléments porteurs;
- d) dommages résultant d'événements accidentels disproportionnés par rapport à leur cause première.

2. Sécurité en cas d'incendie

L'ouvrage doit être conçu et construit de manière que, en cas d'incendie:

- la stabilité des éléments porteurs de l'ouvrage puisse être présumée pendant une durée déterminée,
- l'apparition et la propagation du feu et de la fumée à l'intérieur de l'ouvrage soient limitées,
- l'extension du feu à des ouvrages voisins soit limitée,
- les occupants puissent quitter l'ouvrage indemnes ou être secourus d'une autre manière.
- la sécurité des équipes de secours soit prise en considération.

3. Hygiène, santé et environnement

L'ouvrage doit être conçu et construit de manière à ne pas constituer une menace pour l'hygiène ou la santé des occupants ou des voisins du fait notamment:

- d'un dégagement de gaz toxiques,
- de la présence dans l'air de particules ou de gaz dangereux,
- de l'émission de radiations dangereuses,
- de la pollution ou de la contamination de l'eau ou du sol,
- de défauts d'évacuation des eaux, des fumées ou des déchets solides ou liquides,
- de la présence d'humidité dans des parties de l'ouvrage ou sur les surfaces intérieures de l'ouvrage.

4. Sécurité d'utilisation

L'ouvrage doit être conçu et construit de manière que son utilisation ou son fonctionnement ne présentent pas de risques inacceptables d'accidents tels que glissades, chutes, chocs, brûlures, électrocutions, blessures à la suite d'explosions.

5. Protection contre le bruit

L'ouvrage doit être conçu et construit de manière que le bruit perçu par les occupants ou par des personnes se trouvant à proximité soit maintenu à un niveau tel que leur santé ne soit pas menacée et qu'il leur permette de dormir, de se reposer et de travailler dans des conditions satisfaisantes.

6. Economie d'énergie et isolation thermique

L'ouvrage ainsi que ses installations de chauffage, de refroidissement et d'aération doivent être conçus et construits de manière que la consommation d'énergie requise pour l'utilisation de l'ouvrage reste modérée eu égard aux conditions climatiques locales, sans qu'il soit pour autant porté atteinte au confort thermique des occupants.

ANNEX I

ESSENTIAL REQUIREMENTS

The products must be suitable for construction works which (as a whole and in their separate parts) are fit for their intended use, account being taken of economy, and in this connection satisfy the following essential requirements where the works are subject to regulations containing such requirements. Such requirements must, subject to normal maintenance, be satisfied for an economically reasonable working life. The requirements generally concern actions which are foreseeable.

1. Mechanical resistance and stability

The construction works must be designed and built in such a way that the loadings that are liable to act on it during its construction and use will not lead to any of the following:

- (a) collapse of the whole or part of the work;
- (b) major deformations to an inadmissible degree;
- (c) damage to other parts of the works or to fittings or installed equipment as a result of major deformation of the load-bearing construction;
- (d) damage by an event to an extent disproportionate to the original cause.

2. Safety in case of fire

The construction works must be designed and built in such a way that in the event of an outbreak of fire:

- the load-bearing capacity of the construction can be assumed for a specific period of time,
- the generation and spread of fire and smoke within the works are limited,
- the spread of the fire to neighbouring construction works is limited,
- occupants can leave the works or be rescued by other means,
- the safety of rescue teams is taken into consideration.

3. Hygiene, health and the environment

The construction work must be designed and built in such a way that it will not be a threat to the hygiene or health of the occupants or neighbours, in particular as a result of any of the following:

- the giving-off of toxic gas,
- the presence of dangerous particles or gases in the air,
- the emission of dangerous radiation,
- pollution or poisoning of the water or soil,
- faulty elimination of waste water, smoke, solid or liquid wastes,
- the presence of damp in parts of the works or on surfaces within the works.

4. Safety in use

The construction work must be designed and built in such a way that it does not present unacceptable risks of accidents in service or in operation such as slipping, falling, collision, burns, electrocution, injury from explosion.

5. Protection against noise

The construction works must be designed and built in such a way that noise perceived by the occupants or people nearby is kept down to a level that will not threaten their health and will allow them to sleep, rest and work in satisfactory conditions.

6. Energy economy and heat retention

The construction works and its heating, cooling and ventilation installations must be designed and built in such a way that the amount of energy required in use shall be low, having regard to the climatic conditions of the location and the occupants.

ANHANG I

WESENTLICHE ANFORDERUNGEN

Mit den Bauprodukten müssen Bauwerke errichtet werden können, die (als Ganzes und in ihren Teilen) unter Berücksichtigung der Wirtschaftlichkeit gebrauchstauglich sind und hierbei die nachfolgend genannten wesentlichen Anforderungen erfüllen, sofern für die Bauwerke Regelungen gelten, die entsprechende Anforderungen enthalten. Diese Anforderungen müssen bei normaler Instandhaltung über einen wirtschaftlichen angemessenen Zeitraum erfüllt werden. Die Anforderungen setzen normalerweise vorhersehbare Einwirkungen voraus.

1. Mechanische Festigkeit und Standsicherheit

Das Bauwerk muß derart entworfen und ausgeführt sein, daß die während der Errichtung und Nutzung möglichen Einwirkungen keines der nachstehenden Ereignisse zur Folge haben:

- a) Einsturz des gesamten Bauwerks oder eines Teils;
- b) größere Verformungen in unzulässigem Umfang;
- c) Beschädigungen anderer Bauteile oder Einrichtungen und Ausstattungen infolge zu großer Verformungen der tragenden Baukonstruktion;
- d) Beschädigungen durch ein Ereignis in einem zur ursprünglichen Ursache unverhältnismäßig großen Ausmaß.

2. Brandschutz

Das Bauwerk muß derart entworfen und ausgeführt sein, daß bei einem Brand

- die Tragfähigkeit des Bauwerks während eines bestimmten Zeitraums erhalten bleibt,
- die Entstehung und Ausbreitung von Feuer und Rauch innerhalb des Bauwerks begrenzt wird,
- die Ausbreitung von Feuer auf benachbarte Bauwerke begrenzt wird,
- die Bewohner das Gebäude unverletzt verlassen oder durch andere Maßnahmen gerettet werden können,
- die Sicherheit der Rettungsmannschaften berücksichtigt ist.

3. Hygiene, Gesundheit und Umweltschutz

Das Bauwerk muß derart entworfen und ausgeführt sein, daß die Hygiene und die Gesundheit der Bewohner und der Anwohner insbesondere durch folgende Einwirkungen nicht gefährdet werden:

- Freisetzung giftiger Gase,
- Vorhandensein gefährlicher Teilchen oder Gase in der Luft,
- Emission gefährlicher Strahlen,
- Wasser- oder Bodenverunreinigung oder -vergiftung,
- unsachgemäße Beseitigung von Abwasser, Rauch und festem oder flüssigem Abfall,
- Feuchtigkeitsansammlung in Bauteilen und auf Oberflächen von Bauteilen in Innenräumen.

4. Nutzungssicherheit

Das Bauwerk muß derart entworfen und ausgeführt sein, daß sich bei seiner Nutzung oder seinem Betrieb keine unannehmbaren Unfallgefahren ergeben, wie Verletzungen durch Rutsch-, Sturz- und Aufprallunfälle, Verbrennungen, Stromschläge, Explosionsverletzungen.

5. Schallschutz

Das Bauwerk muß derart entworfen und ausgeführt sein, daß der von den Bewohnern oder von in der Nähe befindlichen Personen wahrgenommene Schall auf einem Pegel gehalten wird, der nicht gesundheitsgefährdend ist und bei dem zufriedenstellende Nachruhe-, Freizeit- und Arbeitsbedingungen sichergestellt sind.

6. Energieeinsparung und Wärmeschutz

Das Bauwerk und seine Anlagen und Einrichtungen für Heizung, Kühlung und Lüftung müssen derart entworfen und ausgeführt sein, daß unter Berücksichtigung der klimatischen Gegebenheiten des Standortes der Energieverbrauch bei seiner Nutzung gering gehalten und ein ausreichender Wärmekomfort der Bewohner gewährleistet wird.

Claude MATHURIN

STUDY OF RESPONSIBILITIES,
GARANTEES AND INSURANCE IN
THE CONSTRUCTION INDUSTRY
WITH A VIEW TO HARMONISATION
AT COMMUNITY LEVEL

ANNEX III

INITIAL SUGGESTIONS

Main changes incorporated
in the text of 31 March 1989

30 September 1990

MAIN CHANGES
to Chapters I, II and III
of the working document of 31 March 1989 1)

Chapter I	
page 2, point 5	Added : .. developer, <u>in his capacity as employer</u>
page 2, point 5	Added : <u>with reasonable care</u>
page 2, point 7	Deleted : the British Latend Damage Act
page 5, point 13	Added : <u>or gross negligence</u>
page 6, point 17	Added : <u>footnote (1)</u>
page 7, point 18	Amended : <u>certain large engineering companies</u>
page 8, point 19	Amended : <u>30-year period of limitation for gross negligence</u>
page 8, point 19	Added : <u>especially since the European Parliament voted (...) construction market</u>
page 9, point 23	Amended : Although superficially attractive (...) same Member State.

Chapter II

Page 10 has been amended.

Chapter III

page 13, point C	Added : <u>through the Community</u>
page 13, point D	Added : <u>carefully selected</u>
page 13, point G	Added : <u>the inexperienced purchaser and also - thorough to a lesser extent - a number of operational annexes (...) for private construction works</u>
page 13, point H	Added : <u>it is absolutely essential</u>
page 14, point A	Added : <u>and recently Foundation 15</u>
page 15, point C	Added : <u>Provided that the question is confined to the key elements</u>
page 16, point E	Added : <u>the FIEC has been considering</u>
page 16, point E 2)	Amended : <u>permission is granted, or at least (...) call in an external inspector</u>
page 21, point F 4)	Added : <u>supervision of execution</u>
page 22, point F 5)	Amended : Such a guide would enable (...) essential requirements themselves.
page 32, point H	New last sentence

1 page numbers refer to the new version

Number of comments have been made about topics 1 to 52 as listed in Annex II.

Interesting though they may be, these comments have not been included for several reasons:

- first, the list of topics is no more than a very provisional form of presentation designed to stimulate discussion and not to propose solutions,
- secondly, there is not always consistency between the various comments and it is not the rapporteur's task to decide which comments are more relevant than others,
- lastly, because all the written comments have been kept and will be passed on to DG III, together with the final report, so that they can be taken into account in the later stages.

Claude MATHURIN

STUDY OF RESPONSABILITIES,
GARANTEES AND INSURANCE IN
THE CONSTRUCTION INDUSTRY
WITH A VIEW TO HARMONISATION
AT COMMUNITY LEVEL.

ANNEX IV
OPINIONS OBTAINED

- Reports from the four meetings held in June 1989
- Breakdown and summary of the opinions obtained
- written opinions submitted

30 september 1989

ALL OPINIONS

Q1	Desire for harmonisation	40 for	4 abst.	3 against
Q2	System possible	36 for	3 abst.	2 against
Q3	Why	Consumer/common basis		
Q4	How	Common rules/standards or examples		
	Quality of contract doc.	37 for	4 abst.	

ELEMENTS

E1	Processes	23 for	2 abst.	
E2	Functions	22 for	6 abst.	
E3	Role of client	22 for	2 abst.	
E4	External inspection	14 for	8 abst.	
E5	Tasks of designers	20 for	4 abst.	1 against
E6	Conciliation	17 for	2 abst.	1 against
E7	Acceptance	25 for		
E8	Specific liability	35 for	1 abst.	
E9	5-year guarantee	27 for	2 abst.	2 against
E10	Housing insurance	26 for	1 abst.	
E11	Project insurance	19 for	7 abst.	
E12	Professional insurance	21 for	2 abst.	
E13'	Qualification of constructors	7 for		
E14'	Subcontracting	6 for	1 abst.	

OBJECTIVES

B0	Improve quality	11 for		
B1	Protect the consumer	18 for	1 abst.	
B2	Protect the contractor	5 for	5 abst.	
B3	Protect the builders	10 for	1 abst.	
B4	A single set of rules (not 12)	14 for		
B5	Avoid misunderstandings	13 for		
B6	Take account of local realities	10 for		
B7	Production resources	4 for		
B8	Clarity and mutual understanding	9 for		
B9	Responsability of the owner	5 for		
B10	Realism	7 for		
B11	Social concerns	3 for		
B12	Cultural concerns	3 for		

FORM

D1	Act of construction	12 for	2 abst.
D2	Tasks of designers	13 for	
Annex	Design contracts	2 for	
Annex	Submission of specifications	2 for	
D3	Responsibilities/guarantees / insurance	13 for	
Annex	Model Civil Code	3 for	
R1	Guide for public clients	10 for	1 abst.
Annex	General admin. clauses (CCAG)	6 for	1 abst.
Annex	Standard forms of contract	3	
Annex	Bonds	5	1 abst.
R2	Guide for arbitrators	8	1 abst.
R3	Guide for principal designers	8	1 abst.

ARCHITECTS/ENGINEERS

Q1	Desire for harmonisation	14 for	2 abst.	1 against (D)
Q2	System possible	14 for	2 abst.	1 against (D)
Q3	Why	Consumer/encourage competition/clarify responsibilities		
Q4	How	Regulations/standards/grid		
	Quality of construct doc	15 for	2 against	

ELEMENTS

E1	Processes	10 for	2 later (GB)	
E2	Functions	8 for	- 4 reserv. on princ.design.- 2 later GB)	
E3	Role of client	7 for	2 later (GB)	
E4	External inspection	4 for	7 against (or through in- surance)	
E5	Tasks of designers	7 for	2 later	1 against
E6	Conciliation	9 for	2 later	
E7	Acceptance	8 for		
E8	Specific liability	13 for	2 includ. manufacturer	
E9	5-year guarantee	7 for	2 contract 1 against (ES)	
E10	Housing insurance	7 for	4 all buildings	
E11	Project insurance	11 for	2 against	
E12	Professional insurance	8 for	6 compulsory for all builders	
E13'	Qualification of contractors	4 feel	it is an omission	
E14'	Subcontracting	1 for		

OBJECTIVES

B0	Improve quality	7 for		
B1	Protect the consumer	10 for	2 abst.	
B2	Protect the contractor	2 for	2 abst.	
B3	Protect the builders	2 for		
B4	A single set of rules (not 12)	7 for	2 abst.	
B5	Avoid misunderstandings	6 for	- tremendous obstacle	
B6	Take account of local realities	6 for		
B7	Production resources	2 for		
B8	Clarity and mutual understanding	2 for		
B9	Responsibility of the owner	2 for		
B10	Realism	4 for		
B11	Social concerns	1 for		
B12	Cultural concerns	3 for		

FORM

D1	Act of construction	4 for
D2	Tasks of designers	4 for
Annex	Design contracts	
Annex	Submission of specifications	
D3	Responsibilities/guarantees / insurance	4 for
Annex	Model Civil Code	2 for
R1	Guide for public clients	3 for
Annex	General admin. clauses (CCAG)	3 for
Annex	Standard form of contracts	1 for
Annex	Bonds	2 for
R2	Guide for arbitrators	2 for
R3	Guide for principal designers	2 for

CONTRACTORS/ MANUFACTORS

Q1	Desire for harmonization	9 for	1 against	
Q2	System possible	8 for	1 limited	1 against
Q3	Why	Common basis/clarity		
Q4	How	Various possibilities		
	Quality of contract doc.	6 for		

ELEMENTS

E1	Processes	5 for		
E2	Functions	6 for		
E3	Role of client	5 for		
E4	External inspection	3 for	1 against	
E5	Tasks of designers	4 for		
E6	Conciliation	5 for		
E7	Acceptance	7 for		
E8	Specific liability	7 for	(6 for 5 years)	
E9	5-year guarantee	5 for	1 against (cviv. eng.)	
E10	Housing insurance	4 for		
E11	Project insurance	1 for	2 against	
E12	Professional insurance			
E13'	Qualification of contractors	1 for		
E14'	Subcontracting	4 for		

OBJECTIVES

B0	Improve quality	2 for		
B1	Protect the consumer			
B2	Protect the contractor	1 for		
B3	Protect the builders	6 for		
B4	A single set of rules (not 12)	5 for		
B5	Avoid misunderstandings	4 for		
B6	Take account of local realities	3 for		
B7	Production resources	2 for		
B8	Clarity and mutual understanding	5 for		
B9	Responsibility of the owner	2 for		
B10	Realism	3 for		
B11	Social concerns			
B12	Cultural concerns			

FORM

D1	Act of construction	2 for	2 against
D2	Tasks of designers	3 for	
Annex	Design contracts	1 for	
Annex	Submission of specifications	1 for	
D3	Responsibilities/guarantees /insurance	4 for	
Annex	Model Civil Code		
R1	Guide for public clients	3 for	1 against
Annex	General adm. clauses CCCAG)	1 for	1 against
Annex	Standards form of contracts		1 against
Annex	Bonds	2 for	1 against
R2	Guide for arbitrators	3 for	1 against
R3	Guide for principal designers	4 for	

INSURERS/INSPECTORS

Q1	Desire for harmonisation	10 for	
Q2	System possible	10 for	
Q3	Why	protect inexp. consumer/Basis for devlpt. internal market/Improve quality/ good manag. of public interest	
Q4	How	Common rules, flexible implementing procs.	
	Quality of contract doc.	10 for	

ELEMENTS

E1	Processes	4 for	
E2	Functions	4 for	
E3	Role of client	5 for	
E4	External inspection	6 for, qualified	
E5	Tasks of designers	5 for	
E6	Conciliation	2 for	1 against
E7	Acceptance	6 for	
E8	Specific liability	8 for, 1 qualified	
E9	5-year guarantee	7 for, 2 longer	
E10	Housing insurance	7 for	
E11	Project insurance	5 for	3 against
E12	Professional insurance	1 for	2 against
			4 compulsory for all builders
E13'	Qualification of contractors	2 for	
E14'	Subcontracting	1 for	

OBJECTIVES

B0	Improve quality	2 for	
B1	Protect the consumer	7 for	
B2	Protect the contractor	1 for	3 against
B3	Protect the builders	2 for	1 against
B4	A single set of rules (not 12)	2 for	
B5	Avoid misunderstandings	3 for	
B6	Take account of local realities	1 for	
B7	Production resources		
B8	Clarity and mutual understanding	2 for	
B9	Responsibility of the owner	1 for	
B10	Realism		
B11	Social concerns	2 for	
B 12	Cultural concerns		

FORM

D1	Act of construction	5 for
D2	Tasks of designers	4 for
Annex	Design contracts	1 for
Annex	Submission of specifications	1 for
D3	Responsibilities/guarantees / insurance	4 for
Annex	Model Civil Code	1 for
R1	Guide for public clients	2 for
Annex	General admin. clauses (CCAG)	2 for
Annex	Standard forms of contract	2 for
Annex	Bonds	1 for
R2	Guide for arbitrators	2 for
R3	Guide for principal designers	1 for

ADMINISTRATIONS/CLIENTS

Q1	Desire for harmonization	7 for	2 abst.	1 against
Q2	System possible	4 for		
Q3	Why	Protect consumer/avoid legal proceedings		
Q4	How	Common rules (gradually)		
	Quality of contract doc.	6 for		

ELEMENTS

E1	Processes	4 for		
E2	Functions	4 for	(1 public sector)	
E3	Role of client	5 for	(1 public sector)	
E4	External inspection	1 for		
E5	Tasks of designers	4 for	2 abst.	
E6	Conciliation	1 for		
E7	Acceptance	4 for		
E8	Specific liability	7 for		
E9	5-year guarantee	6 for		
E10	Housing insurance	4 for	1 abst.	
E12	Professional insurance	2 for		
E13'	Qualification of contractors			
E14'	Subcontracting			

OBJECTIVES

B0	Improve quality			
B1	Protect the consumer	1 for		
B2	Protect the contractor	1 for		
B3	Protect the builders			
B4	A single set of rules (not 12)			
B5	Avoid misunderstandings			
B6	Take account of local realities			
B7	Production resources			
B8	Clarity and mutual understanding			
B9	Responsibility of the owner			
B10	Realism			
B11	Social concerns			
B12	Cultural concerns			

FORM

D1	Act of construction	3 for
D2	Tasks of designers	2 for
Annex	Design contracts	
Annex	Submission of specifications	
D3	Responsibilities/guarantees /insurance	1 for
Annex	Model Civil Code	
R1	Guide for public clients	2 for
Annex	General admin. clauses (CCAG)	
Anex	Standard forms of contract	
Annex	Bonds	
R2	Guide for arbitrators	1 for
R3	Guide for principal designers	1 for

Claude MATHURIN

STUDY OF RESPONSIBILITIES
GARANTEES AND INSURANCE IN
THE CONSTRUCTION INDUSTRY
WITH A VIEW TO HARMONISATION
AT COMMUNITY LEVEL

ANNEX V

FINAL SUGGESTIONS

- Elements E0 to E14
- Spanish draft law
- Grid

30 September 1989

EO - LANGUAGE

1. Taking up the submission from the Scottish architects, annexed to topic n° 0, there would appear to be a case for making a serious attempt to harmonize concepts and language.

Naturally it will be important to avoid creating a dual system, with one language for public contracts and another for private contracts.

Under the Scottish proposal, concepts and terms would be grouped under three headings:

- 1 - General (12 terms)
- 2 - Legal (21 terms)
- 3 - Practice (12 terms)

In addition to these terms (no more than 50 or so), those relating to the construction industry will have to be included:

buildings
civil engineering
new works (production)
work on existing works (maintenance, repair, modernization, etc.)

2. There have been no objections to this suggestion of developing a common language limited to 50 or so major terms.

The following bodies have expressly said that they are in favour:

- the consultant architects of the French CICF
- the Belgian national architects confederation
- the Spanish architects council
- the British ACA (architects)
- the British FG (engineers)
- the European design offices of the CEBI
- the contractors of the French FNB
- the Italian contractors of CONACO
- the French craftsmen of the CAPEB
- European weatherproofing contractors (ACE)
- Belgium's Royale Belge insurance company
- French insurance brokers
- French experts.

3. The main thing is to insist very strongly on the quality of the work on harmonizing the language.

Certain attempts in the past have been disappointing, either because too many definitions had been tackled or because of inadequate translations.

If such a measure were decided on, it would be necessary to prepare it in close conjunction with the standing committee set up by the Construction Products Directive.

E1 - CONSTRUCTION PROCESSES

For	23
Abst	2
Against	-

1. The UK, mindful of the need for flexibility, has certain misgivings about this suggestion under topic no 1.

The Netherlands, on the other hand, believes that this should be the first point to be tackled.

Ignoring the issue will do nothing to improve matters. Identifying the new processes such as management contracting in Britain or the building team in the Netherlands will automatically encourage their development.

Even with the so-called traditional process, there are still many deficiencies, particularly where work is split up and awarded in a number of lots, with the result that no individual has clear overall responsibility for the execution.

In the UK (see the Atkinson Report) there are those who believe that the reason for the lack of clear definition of responsibilities is that there are far too many different processes.

2. Clarification of the language is absolutely essential.

Engineers and, to a lesser extent, architects are in favour. Almost all insurers are too.

Both private-sector and public-sector developers and employers, who are the clients of the construction industry, are unanimously in favour of adopting this suggestion no 1.

Many contractors, including civil engineers and subcontractors, have also expressed their interest in a clarification of concepts and language.

Specialist electrical engineering contractors in the UK, and also the major contracting firms belonging to the French FNTP, believe that harmonization in this area should not be confined to public contracts alone.

The Spanish architects share their concern, believing that definitions apply both to public and to private construction. They were behind the adoption of a far-reaching draft law on the award of contracts, functions and powers, which is attached, but would like the Spanish processes to be recognized at Community level.

The French specialists in the coordination of works are in favour of a standardization of processes. The French architects are against the design and build process, whereas engineering design firms and consultants see the clearer definition of processes and roles as a basis for the definition of responsibilities.(1)

(1) The purchaser of an individual house is not a building owner..

3. Suggestion No 1 is therefore upheld, although it must be stressed that the action of identifying, defining and standardizing the main processes does not preclude the use of other processes.

It is essential to acknowledge the overwhelming majority of opinion endorsing this suggestion.

This proposal can be considered as an extension of the steps already initiated in respect of products, whereby works are regarded as a finished product and not as an "unknown quantity".

It still remains to be decided whether it should be incorporated in Directive D1 on the act of construction or in recommendation R1 "guide to the supervision of works".

E2 - MAIN FUNCTIONS

00082

For	22
Abst	6
Against	-

1. This area is a classic case of misunderstandings and misconceptions.

If a particular profession in a given country has, by law or by custom, the exclusive exercise of a particular function, there will be no question of any attempt being made at Community level to change that law or practice.

On the other hand, it is important and perhaps even essential to define the main functions which are always carried out regardless of the construction process chosen.

It was felt, in the light of the various comments received from architects and contractors in particular, that this point needed to be clarified.

2. Apart from the function performed by the client (purchaser in the case of sale, employer in the case of construction), there are two further essential functions to be performed by
 - the person who designs the works
 - the person who carries out the worknoting that the designer is often instructed by the client to supervise the execution.

Whatever the case, the aim of the proposal is to ensure a more efficient sharing-out of responsibilities, a fact which does not appear to have been grasped by everyone.

The gist of the proposal is that, in any project, it is up to the client to appoint the principal designer. If the latter is also given responsibility for supervising the work, he is in a position to detect and look for errors in execution and his responsibility will be greater.

3. In practice, leaving aside the concept of principal designer, there is nothing new in elements 1 and 2, since their aim is simply to clarify the language.

In this connection it would be a good thing if, where they are and will remain different, the main administrative, operational and constructional processes were identified in each Member State, as is the case in Germany (see topic No 1).

Here again, it is not a matter of confining our attention only to public contracts. It is the production of works that is at issue and therefore this set of definitions should fit into the context of the Construction Products Directive: if point E2 is retained, it would be preferable to make it general in character both for public and for private constructions.

As already mentioned in Chapter III/F, topics 5, 6, 7, 8 and 9 should be examined beforehand.

4. In particular, it will have to be determined whether the French (and Belgian) concept of 'maitre d'oeuvre' (supervisor of works) can be retained, as many architects and engineers have requested: the maitre d'oeuvre is both the principal designer and the guarantor of the proper execution of the project.

This question is relevant not only in relation to language (E0) and the tasks of the designers (E5), but also in relation to responsibilities (E8) and guarantees (E9).

One surely has to concede that the responsibility of the maitre d'oeuvre is greater than that of the principal designer alone.

How is the 'maitre d'oeuvre' to be encouraged to fulfil certain undertakings?

5. Although particular attention has to be paid to the four main functions, we should not overlook or fail to give the necessary emphasis to certain important principles, especially:

- sub-contractors, designers or specialists, who plan and build works or components and who account for a large volume and a growing value within the construction sector;
- suppliers, particularly component suppliers.

There are those who believe that it would be a good solution at Community level to define the function of subcontractor or 'approved' supplier.

This sub-contracting issue was considered so important that it has been dealt with in a new suggestion, E14.

6. It has been suggested that the findings from this examination of element E2, which clearly applies equally to public and private construction, could be incorporated into Directive D1 on the act of construction.

It is interesting to note the very clear position adopted by the Netherlands in favour of a clarification, at Community level, of the terms and definitions relating to the construction processes and the functions of the various participants.

This favourable stance is shared by many public and private-sector developers, who are mindful of the need to maintain flexibility, but starting from a point of reference.

German and Belgian insurers are also interested in a clarification of the basic language, a feeling which is echoed by French, Italian and British contractors.

¹ A possible fallback solution would be to incorporate E2 into Recommendation R1 on the guide to works supervision.

E3 - ROLE OF THE CLIENT (MAITRE D'OUVRAGE)

For	22
Abst	2
Against	-

1. There were no votes against the inclusion of this element, even though there are those in the United Kingdom who feel that this is not a priority topic or that it should be covered only in the context of public contracts.

It would therefore seem to be essential to define somewhere in a Community document what the role of the client actually is and what are his rights and duties vis-a-vis the builder.

In the absence of such a definition, liability will be difficult to establish.

Certain specialist contractors take the view that the role and duties of the client should be set down in a Directive.

A clear distinction has to be made between purchaser and client, and between seller and builder.

2. Since the Community has already taken action on public contracts, it would be sensible to supplement the legal texts with an operational guide for public clients, but drafted in such a way as to make private-sector clients want to use it; this presupposes the adoption of a new concept and style in administrative publications.
3. One of the difficult issues to address will be the role of the client in respect of the site and regulations.

There will be undoubtedly be a debate on this subject since it has obvious implications for the division of responsibilities, which is to be dealt with under E8 on the specific liability of builders.

A comparison of European Civil Codes, the Danish code of duties and British case law suggests that confusion is likely to become even more widespread unless important basic concepts such as client, developer and buyer are clarified.

In fact, what appears to be needed is a thoroughgoing revision of the legal terminology in the laws which define and specify the rights and obligations of those who build, sell or buy works.

Excellent bases, which are both simple and realistic, already exist in countries which have successfully brought outmoded concepts up-to-date without falling into the trap of making them over-complicated or too rigid.

A sound and well-established Community basis is what is required.

4. It would be useful to present the results of these investigations both in Directive D1 as regards the principles, and as an annex to either Directive D1 or D3 in the form of a model Civil Code. As for the guide for clients, this could form Recommendation R1.

The rapporteur is well-placed to appreciate the problems that will eventually afflict those involved in construction when confronted with the instability and diversity of texts, the inconsistency of rules on acceptance, liability etc., unless this particular nettle is grasped.

It is important to stress that a number of major clients have expressed a favourable opinion on this subject and that almost all insurers and assessors would regard it as an improvement for the purposes of risk assessment.

Almost all those who receive the orders, namely contractors and designers, want the role of the client to be harmonized.

Only British designers, concerned not make the problems worse, regard this harmonization exercise as fraught with difficulty and would prefer to put off examining it to a later stage.

This position is not likely to make easier the introduction of any future stable arrangements on liability.

It is necessary to define, other than by isolated court rulings, what is meant for example by "interference", and the only sensible way to do this is at Community level by means of a legally binding text and not a recommendation.

Similarly, it is difficult - when one has experience of it - not to deplore the confusion that exists in France between client and purchaser.

That is why element E3 has been retained.

5. The definition of the role of the client could be supplemented by a definition of the role of the proprietor, if only as a means of providing a solid foundation for determining responsibilities and guarantees.

Just like the client, the proprietor does not only have rights.

The topics in Annex II which are connected with element E3 are nos 6, 12, 13, 14, 15, 16, 18, 21, 23, 29, 30 and 31.

¹except for the Germans

For	14
Abst or	
Against	8

1. Virtually every country has a construction inspection system of some sort, be it public or private, superficial or detailed, free or paying, carried out by local authorities, central government or private bureaux.

There can be no question of attempting to lay down detailed inspection procedures at Community level.

On the other hand, there does appear to be a case for defining certain principles in this field, making the widest possible use of the ideas and concepts already included in Directive 89/106/EEC on construction products, namely

- contributing to long-term safety, while satisfying the essential requirements throughout the construction process (buildings and civil engineering);
- ensuring compliance with the essential requirements throughout the processes for the construction of works and those for the manufacture and supply of construction products;
- accepting a measure of internal inspection, but recognizing that more elaborate controls are essential wherever a certain level of technical expertise is required and serious implications are involved.

2. The issues of principle which could be examined include the following:

- Which of the six essential requirements contained in Directive 89/106/EEC warrant particular attention and should automatically be subject to controls?
- Can the Member States be expected, in the light of their traditions and customs, to introduce the correct measure of control into their systems?
- What practical means could be used to ensure that the requisite controls are enforced?
- Should principles and, if need be, a number of procedures be laid down in respect of the qualifications and operating licence of inspectors, and if so, how is this to be done?
- What are the rights and duties of inspectors?
- What is the nature of their liability and what are its limits?
- How is a clear distinction to be drawn between supervision performed by the parties concerned and external control by an inspector?
- Can a link be established between building permission and external inspection?
- What can be done to prevent an external inspector delaying plans and works and acting ultra vires?
- What time-scale should be involved: prior to completion, on acceptance, or even five years after the expiry of a generalized five-year guarantee, if adopted (E9)?
- What form should certification of compliance with the six essential requirements take, possibly in relation to authorization to occupy or to put on the market?

3. If it were decided to accept the British designers' suggestion for a single insurance policy per project (E11), a major problem would be that of avoiding duplication of inspections.

Ultimately, whatever solution is adopted, the external inspection should be made as simple, clear and effective as possible; clients and parties involved in construction should perceive it as a benefit not as an additional formality.

Those who have voiced reservations or voted against E4 include architects and engineers:

- who question the value of external inspection
- who consider that it slows up operations
- who are concerned about red tape.

The Spanish architects are in favour of an external inspection system, of the type which is enforced in Spain by the systematic intervention of a technical architect.

Few contractors have reservations.

Insurers and experts tend by and large to favour a properly organized control procedure.

Clients and administrations are also in favour, on condition that the procedure is really effective and there is a clear commitment on the part of the inspector.

Except for certain cases, and in civil engineering, there is no denying the value of and need for external inspection, however good the processes for producing construction works, the machinery for the qualification of the participants and the capabilities of the clients may be.

4. Topic n° 3 establishes the principle of final certification: this subject, which is not necessarily related only to external inspection, will merit special attention, particularly in the housing sector.

It is of interest to investors, vendors and, of course, purchasers.

* * *

5. The resolution adopted by the European Parliament on 12 October 1988 on the need for Community action in the construction industry includes the following statement under the heading 'A unified market':

'The European Parliament considers that the Commission needs to take steps to ensure that documents relating to...the monitoring of building operations are standardized...'

This is a good reason for keeping element E4 which has already been presented in summary form in Chapter III/F and in the annex relating to topic no 9.

The results of the examination of E4 could be incorporated into Directive D1 on the act of construction.

6. In pursuance of the resolution of 12 October 1988 it would appear to be advisable to combine the concept of external inspection with:

- the building permit, and in particular the idea of a possible harmonized Community building permit of the kind proposed in Chapter III/F, for which a fee would be payable;
- the possible link between quality assurance and the building permit and with final certification, subjects raised in the annexes to topics n°s 2 and 3.

Topic n° 4 implicitly raises the question of the minimum level of State intervention required and the State's role in the administrative process.

Another issue which must be addressed concerns the qualification of contractors which, because many believe to be so important, is presented below as a separate element E13 and no longer as just one of the topics (n° 10).

ES - TASKS OF THE DESIGNERS

For	20
Abst	4
Against	1

1. The subject of Directive 85/384/EEC of 10 June 1985 is the mutual recognition of architects' diplomas.

It discusses the actual role of architects only in the explanatory memorandum.

It is one thing to say that European companies must take steps to ensure that highly-qualified professionals are suitably trained to perform the necessary tasks.

It is quite another to say that administrations and clients in the construction sector must actually assign a particular task to a qualified professional in the context of such an operation.

2. Consequently, even if there are architects (and engineers) in the community who are properly trained, competent, mobile and readily accepted everywhere, it will still be necessary to conclude contracts with them and specify exactly what is expected of them.

The Belgian architects have taken this point on board: they consider that the responsibility of designers should depend not only on the nature of what they do but also on how much they are paid.

The ACA in the UK is calling for a Community solution regulating the tasks of designers.

Basically, the co-existence of two systems, one for public sector construction and the other for private construction, does not seem healthy.

Regulating the actions of a qualified professional in the public construction sector alone is a solution which is not consistent with the aims of Directive 85/384.

Moreover, it was clear from the meeting of 29 June that both public and private-sector developers have the same attitude towards proposal no 5. The Luxembourg authorities have made it a priority.

The most recent version of the German order on the fees of architects and engineers (HOAI - 1 April 1988) is a practical and most useful document, which has to be used in both the public and the private sectors.

It is both a guide and a set of rules in which users can find advice for the drafting of contracts, references for the definition of tasks and guidelines for determining the level of fees.

In view of the quality of this order, which contains instructions and recommendations covering almost every aspect and speciality of buildings and civil engineering, it could surely be used as a starting point for directly drawing up Community rules, taking into account what already exists in Spain and Belgium in particular.

That, in fact, is the final suggestion presented here and a reaffirmation of the suggestion already put forward in Chapter III/F.

3. As already proposed, it would be necessary to add to or incorporate in these rules the requisite provisions for the drafting of planning contracts and, especially, general clauses.

Regulation does not necessarily mean inflexibility.

It is a concept which is widely used in this field, notably in Denmark, the Netherlands and Germany.

Topics 11 (tasks) and 22 (contracts) are linked with topic 23 (competitions).

In this connection it is worth mentioning the existence, in France, of a new law covering these three topics, but only in respect of public procurement.

4. A sensitive subject which has not yet been touched on is the question of a permit or licence to carry on this profession; that in turn is linked to the even more delicate issue of a possible professional monopoly of designers, who are recognized as competent either at the planning permission stage or at the construction process stage.

It would be interesting, to say the least, to take a serious look at the whole question of the principal designer (E3): is he an architect, an engineer, and in which field, etc.?

5. There is also another aspect to this element E5, namely motivating and even creating attractive conditions for principal designers.

The principal designer, be he architect or engineer, has a moral duty to attain the quality, cost and scheduling objectives set by the client or employer.

It would be better still if the method of remuneration were to create conditions more conducive to that end.

E6 - PERMANENT ARBITRATION

For	17
Abst	2
Against	1

1. There is good reason to be worried when confronted with the increased likelihood of conflict in a new market where the clients and participants will be speaking nine languages and will not yet have managed to work on a harmonized basis.

Disputes and litigation, conflicts and procedures must be avoided and simpler solutions found instead.

For a long time the Italians have had and successfully operated a system involving the use of a 'collaudatore' who settles disputes arising during the works between client and contractor, and who is a co-signatory of the written record of the acceptance of the works.

Within their construction insurance system the French are aware of the value of their single expert, who is appointed by the insurer and plays a key role in the investigation of damage and the pre-financing of early compensatory payments to the owner who has sustained the damage, which are then distributed among the insured builders according to the degree of their respective professional liability.

2. In order to make the lives of clients and those involved in construction bearable and to lessen the risk to purchasers, it would seem sensible and advisable to attempt to put in place and institutionalize, at Community level, permanent machinery which would allow the fullest possible development, both through legislation and practice, of conciliation and arbitration procedures

- during the execution of the works contract or the design contract,
- at the time of acceptance of the works or work,
- up to the time when the reservations are lifted,
- during the period covered by the minimum five-year guarantee (E9)
- and even, where possible, up to the expiry of the period of the builders' specific ten-year liability (E8).

This suggestion has met with a broadly favourable response from all circles concerned.

Its most forceful proponents are the Italian contractors.

Almost all architects and engineers are aware of the risks and are also favourably disposed towards this suggestion.

Insurers, clients and administrations have also expressed an interest, with only two or three exceptions.

3. In this connection, questions about the training, status and professional ethics of experts have repeatedly been raised.

An additional suggestion is put forward in Chapter 0 concerning the setting up of an institute in which the various issues could be debated and solutions found.

There is no point in hiding the criticism that has been directed at the system in countries such as France where there are separate insurance experts and judicial experts.

On the other hand, there might well be lessons to be learned from the experience of the Netherlands as a way of channelling the role of the expert (assessor) within an effective and specialised system geared to conciliation and arbitration.

4. This subject, which was touched on briefly under topic 19 and identified in Chapter III/F, is presented as element E6 in the final suggestions.

For practical purposes, the principle of general recourse to conciliation and arbitration could be embodied in Directive D1 on the act of construction.

Recommendation R2 on arbitration could deal, inter alia, with the practical procedures.

E7 - ACCEPTANCE

1. The acceptance of new works or of work on existing works is an apparently simple matter, but one which nevertheless preoccupies lawyers, clients, builders, product manufacturers, house-buyers, insurance companies, etc.

One thing is certain: despite the crucial importance of acceptance, it is all too often ill-conceived, poorly executed and without a proper formal basis.

The same goes for the corollary of acceptance, namely the lifting of reservations.

Clients, builders, buyers, insurers all complain.

2. In the face of this barrage of complaint, a number of ideas come to mind:
 - 1) This situation could be used in order to study acceptance from the point of view of Community-wide standardization
 - 2) A clear distinction could be made between acceptance as part of a building contract and acceptance as part of a contract of sale
 - 3) Acceptance could become a clear and indisputable basis for determining liability and the starting point for guarantees
 - 4) The legal significance of acceptance could be clarified and laid down in a mandatory form
 - 5) The concept of accepted defects and defects about which there are reservations could be defined more fully
 - 6) A realistic approach should be adopted to tacit acceptance
 - 7) The generalized practice in Italy of a co-signatory third person - above a certain threshold or for particular types of works - could be adopted
 - 8) Using the above practice could help to avoid the dilatory attitudes of various parties
 - 9) Certificates of acceptance and for the lifting of reservations could be standardized

3. There is unanimous approval of this proposal which was already mentioned under topic no 20 and as the seventh suggestion in Chapter III/F.

In conjunction with topics 12 (purchase and sale) and 25 (chain of responsibilities), it would be dealt with in Directive D3 on liability, so as to cover both the public and private sectors simultaneously.

This would be a key factor in the smooth running of the internal market in the construction sector.

E8 - SPECIFIC LIABILITY

For	35
Abst	1
Against	-

1. There is virtually unanimous acknowledgment of the need for a body of legislation specific to construction.

Likewise, almost everyone is in favour of harmonizing the liability of builders and vendors in the European Community.

These are preliminary questions to which a favourable response has already been received from a very large majority of clients and parties involved in construction.

2. What happens without a specific law?

The situation in Germany provides an example. There the following rules apply:

- 30-year builder's liability which can be invoked by any individual who considers himself an injured party and wishes to obtain compensation in the case of gross negligence;
- five-year liability of all builders which can be invoked by the client (or the purchaser of a new works) in the case of a defect not detected at the time of acceptance, and obligation to make good such defect;
- the above liability reduced to two years for the sole contractor in almost all public contracts and in many private works contracts.

Since many defects do not become apparent until after two or five years, and the total figure is considerable, the number of litigations and court cases under the 30-year liability provision is also considerable.

3. It is hard to believe that the Community construction market is able to function under rules of this kind.

With an excessively short guarantee period on the one hand and an excessively long liability provision on the other, clients and parties involved in construction have to put up with uncertain and intolerable legal practices.

The same situation obtains in the UK where the rules on negligence are too complicated and unreliable to ensure the proper functioning of an essential part of the economy.

4. A number of leading figures in the construction business have taken a clear stand in favour of a single specific piece of Community legislation, with a ten-year liability limitation except in the case of fraud.

A provision of this kind would allow the building industry to develop its activities on a reasonable, uniform and stable basis.

There are others, particularly among the contractors, who would prefer only a five-year limitation period, but what they have failed to appreciate that such a short period would inevitably involve many residual cases being brought before the courts and dealt with under the 30-year rule as in Germany.

5. One of the interesting arguments in favour of a number of different time limits is that which acknowledges that not all works necessarily have the same duration and that there are even temporary buildings. There is also work on existing works.

This factor has to be taken into account, not necessarily by complicating the relevant legislation, but by having recourse to contract and to the common sense of judges and arbitrators.

One solution would of course be to establish from the outset a clear distinction between two categories of works:

1. New works or completely renovated works with a duty to achieve a given result,
2. Work on existing works without a duty to achieve a specific result.

The original proposal in Chapter III/F to reverse the onus of proof after five years for only the first category of works goes along these lines. It has both its supporters and its opponents.

Other solutions could be considered, but the distinction suggested is basically inescapable since it reflects what actually happens in practice.

6. It is of paramount importance that the future Community system establishing the specific liability of builders should be not only simple and reliable, but also that no-one should be able to circumvent the system by any kind of legal loophole.

A solution will be found to the problem of manufacturers' liability.¹

A satisfactory link will have to be established between manufacturers' ten-year liability possibly arising out of the 1985 Directive on defective products and a ten-year builders' liability in respect of the six essential requirements laid down in the 1988 Community Directive on construction products.

7. The future system must be such that during the work all parties involved must be jointly liable, but after the work there should no longer be joint liability, a feature which is still found in numerous countries, but not in Italy.

¹This issue is related to the question of approved subcontractors and suppliers, discussed in E14.

The question of the period during which action can be taken must also be addressed; many believe that the three years suggested is too long and that one year would be sufficient.

Another issue that will need to be looked at is the possibility of establishing an order of priority within the six essential requirements, and also possibly shortening builders' liability for certain parts of works to two years - a proposal with which the rapporteur disagrees.

The UK contractors, particularly the specialist firms, seem to be in favour of ten-year liability as outlined in initial suggestion n° 8.

8. To sum up it would seem that, in the absence of a consensus, agreement might be possible on the following basis:
- a) A mandatory standard system of specific construction liability, incorporated in national legislation will be introduced in the Community.
 - b) This system will be laid down by law, and any contract clause that is less or more stringent than that law shall be void.
 - c) Those responsible shall be the vendors of new construction works (buildings or civil engineering works) and the builders themselves.
 - d) The builders are involved in the act of construction and are linked directly by contract to the building owner.
 - e) Contractually approved sub-contractors and suppliers shall be regarded as being equivalent to builders.
 - f) Specific liability shall lapse, except in the case of fraud, at the end of a ten-year period commencing on the date of acceptance of the new works or of the work on existing works.
 - g) The beneficiaries of the ten-year liability shall be the initial building owner, and the two successive owners.
 - h) Any failure to comply with one of the six essential requirements laid down in Annex 1 to the Directive of 21 December 1988 on construction products shall bring the 10-year liability into effect.²
 - i) Specific liability is no longer operative if the defect has been explicitly acknowledged in the acceptance certificate, but may apply in the case of a reservation not explicitly lifted in the relevant document ('certificat de levée des réserves').
 - j) The time limit for action is one year after the discovery of the defect or damage within the ten-year period.
 - k) The vendors, builders and approved persons cannot be held liable unless the fault is proven, the exceptions being the contractor and the principal designer, in respect of whom there is a presumption of liability during the first five years.

¹An alternative might be to reduce the duration of specific liability to five years in the case of work on existing works

²Provided that an order of priority is established among the six essential requirements and specific civil engineering requirements are laid down.

- l) The indemnities payable by those responsible are intended to cover the making good of the damage, but not to cover resultant financial losses.
 - m) The amount of the indemnity must not exceed a given ceiling, except in the case of fraud; this ceiling is related to the value of the object sold, plus fees, work and supplies.
 - n) This specific set of rules cannot be made more restrictive by the application of any competing legal provisions.
 - o) Common Law also provides for a ten-year contractual liability during the ten years following acceptance of the works or work, except in the case of fraud.
 - p) The specific rules are designed to rule out the possibility of joint liability actions by, for example, requiring the legal action to be taken out against the contractor alone.
9. The architects' and engineers' view is that the legal provisions on liability should exclude the possibility of a joint liability action, although they have not proposed a practicable alternative.

One possible solution might be based on the Italian system, under which the contractor alone is civilly liable; civil liability actions may be taken against the other builders only if they have already been found criminally liable.

Any set of rules on liability which does not include

- a simplification of procedures
- incentives for those involved to comply with them,

would be no improvement over the existing system.

Broadly speaking, that is the thinking behind the proposed solution which, as has already been made clear, is no more than an outline.

10. For practical purposes, we could consider incorporating specific rules of this kind into a Directive D3 on responsibilities, guarantees and insurance, in which the following would also have to be included:
- a model civil code embodying the principles set out in directives D1 (act of construction) and D3;
 - a recommendation R2, which would serve as a guide for arbitrators

The topics in Annex II to which element E8 relates are nos 23, 32 and 43.

E9 - MINIMUM GUARANTEE

For	27
Abst	2
Against	2

1. It is difficult to conceive of the construction market operating properly without harmonized rules on guarantees.

The word guarantee itself is not always fully understood.

In the context of construction contracts, for instance, there are often short guarantee periods - six months or a year - within which the builder makes good any defect or damage.

This restrictive concept is not sufficient.

Nor can a guarantee in the broad sense be equated with the legal concept of strict (or presumed) liability.

For many it denotes a commitment by the builder or manufacturer¹ to remedy quickly and automatically any defects in the works or the product, by either repairing or replacing the same.

Some argue that a guarantee is the tangible sign of liability.

2. Particular attention should be paid to the German concept of guarantee (Gewährleistung): in the German Civil Code, the five-year guarantee period applies automatically, even where it is not mentioned in the contract, to all construction works and all sales of new buildings.

Only work contracts can reduce the guarantee period to two years and, in some cases, to only one year.

The guarantor is required to make good (Nachbesserung) defects or damage occurring during the five years following acceptance.

However, it leaves open the possibility for the guarantor to demonstrate that the cost of remedying the defect is disproportionate and that it would be better to agree on a reduction (Minderung) of the price of the works.

It is not customary in Germany to use insurance methods to secure this guarantee. In the case of refusal, default or disappearance of the guarantor, the only means of redress is through conciliation, arbitration or legal action.

¹ More frequent use of the commercial guarantees given by the manufacturer could be adopted as one of the objectives under the heading of general contractual clauses.

- 3. It is suggested that the German idea of a generalized guarantee on 'everything that is not right' for a period of five years be adopted, together with the power to invoke that guarantee.

This guarantee must form an integral part of the works or work.

It seems neither advisable nor realistic at this stage to think in terms of complicating the guarantee by dividing it up into sub-periods and sub-works, etc.

The guarantee must be matched by rapidly available advance loan facilities for the repair of the defects and damage, without seeking to establish liability before that financing is made available.

Insurance seems to be the most credible method, but for social reasons it cannot be imposed, except in the housing sector,

There is a correlation between this suggestion of a minimum five-year Community guarantee (E9), on the one hand, and the suggestions presented earlier concerning the function of the principal designer (E2) and liability (E8) on the other.

- 4. The minimum guarantee attached to the works could be increased in the contract to 10, 15 or even 20 years, as is the case in Denmark, for instance.

It would be registered either under a project insurance arrangement or within a single work-site insurance policy taken out by the building owner (see E11) or under a contract for the sale of a building or house (see E10).

A further possibility would be to encourage the development, on the basis of a few harmonized principles, of specific guarantees for:

- housing
- business premises
- works of art
- etc.

- 5. An idea which should not be dismissed out of hand, for work on existing works, is that of a guarantee based not on insurance but on the collective responsibility of professional organizations, as in the case in Canada in the housing sector and in the UK for electricity works.

Italian contractors subscribe to the concept of a Community guarantee, provided that it is accompanied by a further guarantee that the builder will be paid by the building owner or that the vendor will be paid by the purchaser.

This dual guarantee system could be considered, taking into account the existing arrangement in Germany, known as the "Bauhandwerksicherungshypothek".

6. Although there were certain reservations on the suggestion of a technical inspection shortly before the expiry of the five-year guarantee period, this idea should not be totally ruled out until its respective merits and drawbacks have been re-evaluated.

Numerous objections have been put forward: the cost of inspection, tendency to report large numbers of defects, liability of the inspector, scope of the technical inspection (six essential requirements and/or quality), duplication, relationship with insurance, and so on.

The advantages have also been underlined: first stage in a series of beneficial visits under the responsibility of the owner, involvement of an objective and impartial expert, durability of the six essential requirements, quid pro quo for the reversal of the onus of proof at the end of the fifth year, etc.

Another attractive aspect of an inspection of this type - recently introduced in Denmark - would be the improvement in the technical conditions for assessing the state of a building, since these conditions are frequently superficial or limited at the time of acceptance and before the works are put into use.

Lastly, as a "tangible sign" of the enlarged market, this inspection - if properly conceived and executed - would be an objective element which would reassure both the client and builder worried about the risk of unfulfilled promises.

In short, it is suggested that this inspection be made an integral part of the guarantee, subject to working out the details of scope, implementing procedures, etc.

The place for provisions on a minimum guarantee and a possible inspection at five years would be in Directive D3.

E10 - HOUSING INSURANCE

For	26
Abst	-
Against	1

1. The risks run by purchasers and, in some cases, by building owners in the housing sector warrant special attention at Community level.

In those countries where systems already exist, namely France, the UK, Ireland, the Netherlands and Denmark, they could be improved by the application of a number of principles based on what has been done in other countries such as Sweden and the United States.

In countries where systems are seldom used or do not exist - Germany, Belgium, Italy and Spain - new systems could be introduced, and it would be sensible for the Commission to encourage the development of such systems on the basis of common principles.

2. The minimum provision that could or even should be contemplated at Community level in the housing sector would comprise public order provisions which could not be made less binding by the terms of the contract:

- insurance would be provided for every purchaser, but not necessarily every building owner, it being understood, however, that the purchaser of an individual house is not a building owner (employer);

- it would cover the whole construction period and in particular the risk of default, failure or disappearance of the builder or the vendor;

- rapid advance loan facilities would be provided to enable the necessary repairs to be effected in cases where defects or damage are detected during the minimum Community guarantee period of five years, suggested in E9.

3. Whereas responsibilities would be not only harmonized but, as suggested in E8, standardized for a period of ten years, housing insurance on the other hand could simply be required to comply with a number of basic principles, notably abiding by the five-year guarantee.

Recognition of the systems, however, should relate to the clauses in the insurance policies themselves, so as to address the question of the "balance of forces".

4. It would be sensible at this point to recap on some of the essential points of the preceding elements:

- E1. There must be a distinction between construction and sale
- E2. There is always a principal designer
- E3. The client has both rights and duties
- E4. There is a need for external inspection
- E5. The tasks of the principal designer must be clear.
- E6. Conflicts must be settled speedily
- E7. Acceptance of the works built or sold must be standardized
- E8. Principal designer and contractor are presumed liable for five years within their specific ten-year liability
- E9. Every new or refurbished works shall be covered by a minimum Community guarantee of satisfactory completion and durability

This is a coherent set of requirements which must not be altered by elements E10/E11/E12.

Systems of housing insurance (E10), project insurance (E11) and professional insurance (E12) may vary, but where they exist they must always include at least the minimum guarantee E9, which itself is consistent with a technical inspection after five years, reversal of the onus of proof after five years, etc.

5. There are those who believe that the principle of prefinancing the repair of damage under the French system of insurance should not be reserved only to house-buyers, but should be applied across-the-board:

- by including housing, education and health
- by also applying to all buildings and even certain civil engineering works
- by not restricting its use to private sector clients, but extending it to include local authorities.

At the present stage of research, this subject is being tackled from the point of view of housing insurance.

Future discussion will inevitably deal with the merits of prefinancing insurance in sectors other than housing.

Directive D3 should embody the various provisions adopted.

E11 - PROJECT INSURANCE

For	19
Abst	-
Against	7

1. The generic heading "project insurance" covers a variety of forms:
 - Belgian inspection insurance
 - the French single work-site insurance policy (PUC)
 - British project insurance.

None of these forms is mandatory in any country.

Insurance schemes which protect purchasers in the housing sector are not like the above because they do not cover the professional liability of those involved in construction: see E10 - Housing insurance.

2. The major building owners often prefer to take out project insurance.

Where all the participants are aware of this, negotiations between building owner and insurance company can be conducted on a better footing.

The single project insurance policy has a number of advantages over several separate policies (damages for the client, liability for the contractors): it is cheaper, avoids loopholes, reduces red tape and makes court cases less common.

More engineers are in favour of it than architects.

Small contractors believe that it is more onerous to administer, since they often have only a small part in a large number of projects.

Others (including the French and Spanish architects) believe that a single policy spreads responsibility too thinly and that it covers only a part of architects' professional responsibilities.

Many insurance companies oppose it, although they have not spelt out the reasons for their opposition.

The main French contractors would prefer nothing to be rigidly fixed.

And yet, from the consultations and the opinions voiced, there would appear to be a clear preference for a single policy.

Perhaps there is a problem of the threshold or of the nature of the works...

3. The position of the six major designers in the UK is formally set out in a document appended at Annex IV.

It amounts to a request that the Community, on the basis of Prof. Bishop's report, should espouse the idea of a statutory generalized project insurance, together with certain limits and conditions.

This suggestion is very clear and unambiguous and involves:

- specific 10-year liability for builders
- this liability limited to damage (and not its effects)
- relationship between the levels of services and compensation
- abolition of joint liability proceedings
- external inspection by a third person connected with insurance
- definition of a chain of responsibilities in construction.

This is a position which could be taken up as a reference solution.

If it were to be adopted it would help to bring clarity to a vast new market.

It will be interesting to hear the arguments of those who are against this idea.

4. It has to be recognized that project insurance concerns building owners and is part of the construction process, whereas housing insurance is relevant to purchasers and ties in with the process of the sale of works already built or to be built.

Moreover, project insurance concerns both buildings and civil engineering projects.

For the sale of offices, for example, there is no equivalent elsewhere to what the NHBC or F15 currently offer to house-buyers in the UK.

Project insurance in the form suggested must be consistent with the minimum guarantee (element E9) and could give rise, for reference purposes, to optional standard clauses allowing an "a la carte" selection for a particular type of additional cover, since the "ten-year" option has been extensively studied and discussed.

¹This idea therefore goes further than Prof. Bishop's proposal: see paras 2.5, 2.6 and 2.7 of the joint response to which the six organizations are co-signatories.

E12 - PROFESSIONAL INSURANCE

For	21
Abst	-
Against	2

1. The solution currently used in France, namely statutory professional insurance for all building contractors and even for vendors and certain manufacturers, though unusual, has a number of merits.

There is a view in France that the scheme would be better still if it included sub-contractors and excluded manufacturers.

It is not the author's purpose here to advocate the French system, but merely to state that in those countries where only architects and engineers have professional insurance cover, an unfortunate imbalance is created, initially at the stage of the division of responsibilities, and then in compensation settlements.

Courts and arbitrators are sometime inclined to overcharge those who are solvent because they are insured, while others have disappeared, gone bankrupt, and so on.

It is the recognition of this state of affairs which has prompted the Spanish architects to advocate the principle of generalized compulsory professional insurance.

2. An insurance of this type, limited to specific liability as proposed above in E8, would undoubtedly provide a radical solution to numerous insoluble problems.

It should be given an airing before being rejected out of hand, even though this was not originally proposed by the rapporteur: suggestion no 12 in Chapter III/F merely underlined the benefit of and the new opportunity for providing architects and engineers with one or more means of easy access, in a single market open to designers from the 12 Member States, to a new formula of professional liability insurance based on a standard specific liability for builders as suggested in E8 above.

Whereas this suggestion has been well received, notably in the Netherlands, it has given rise to objections - at least as to its form - in certain other countries such as the United Kingdom.

3. One point must be stressed: the lack of professional indemnity insurance or difficulty in finding an insurance company could act as a barrier to the free movement of designers.

Consequently, the principle underlying the suggestion is upheld for European designers as a social grouping, some of whom are completely without protection in their countries of origin.

The subject of professional liability insurance for builders, designers, contractors, etc. engenders so much controversy and difference of opinion that the idea of the Community taking it in hand might be seen by many as a sensible one.

German insurance companies are in favour of liability insurance for all builders, but are against collective (group) insurance on the grounds that it distorts competition.

The Belgian architects would like professional liability insurance to be made compulsory for all those involved.

Some Danish insurance companies believe that the issue is a straight choice between across-the-board PLI or nothing.

Virtually all parties consulted are of the opinion that the building owner must also be covered by PLI.

Very few contractors have expressed opinions, and even these vary enormously.

At any event, the original suggestion is maintained.

1. A number of people are surprised that more emphasis was not placed on this aspect in the original suggestions.

This was not an oversight: qualification of contractors is the title of topic 10 (and appendix 10), but it was deemed to lie outside the scope of the study.

There is now a body of opinion which maintains that in architecture, engineering, insurance, housing and even administration, the strict approach adopted towards certain professions is inconsistent with the lax approach towards others.

Put another way, why should the requirements in respect of competence be so hard for architects and so lenient towards contractors?

To accommodate this concern, element E13 has been added in the final suggestions; this will be embodied either in the Directive on the act of construction or, failing that, in the guide for employers.

2. This is a good point at which to recall the three approaches to the difficult issue of the qualification of firms:
 - that favoured by Germany, Austria and Denmark who have introduced regulations (the implementation of which is devolved to the chambers of commerce) laying down the terms of access to certain professions which entail risks for third parties;
 - the approach adopted by Spain, Belgium and Italy who have set up a system of official qualification or approval which is essential for firms who wish to gain access to public contracts;
 - the French approach, which can be described as a 'post hoc' qualification issued by a body such as Qualifelec (electricity) or the OPQCB (building).

The Austrian system, which is based on a long tradition, has much to commend it. It entails the State delegating wide-ranging powers to chambers of commerce, who are better placed to assess the competence of firms. Any contractor allowed into the system is required to know and comply with the relevant very detailed standards, without there being a need to specify them in each works contract. Moreover, access to the professions is reserved for those who are deemed both capable and worthy of such access, which inevitably raises political or philosophical issues.

3. The professional body for the qualification and classification of building firms (OPQCB) in France has recently become a non-profit-making organization independent of the professional organizations.

The various technical sections have been updated with the agreement of firms and tradesmen.

Quality control in each individual firm is assessed at various levels, encouraging firms to attain the level of genuine quality assurance.

The clients themselves are involved in the setting up and operation of this restructured body.

It seems simpler initially to envisage the Community-wide adoption of the French principles, which subscribe neither to corporate nor to State control.

E14 - SUBCONTRACTING

1. In the construction industry subcontracting is so widespread and raises so many sensitive issues that it was felt essential to deal with it in more detail in the suggestions than was indicated in the description of topic 50.

The major Italian firms argue that only 'bona fide' contractors should be invited to tender; this raises the problem of general contractors, which is directly linked with the problem of subcontracting.

Subcontractors and specialist contractors account for more than half of the volume of construction and the problems which arise and will arise for them in Europe have to be identified and dealt with.

To a large extent, under contract law or criminal law, the situation of the manufacturers of components and assemblies vis-a-vis the contractor or client is similar to that of the subcontractors.

2. Within the international association of Electrical Engineering Firms, where it chairs a working party on "1992", the British association has already touched on a series of issues which concern all specialized firms, not just electrical contractors.

It has observed that designers, like contractors, tend to offload too many tasks and responsibilities on to subcontractors.

In a long document dated 31 July, appended as Annex IV, it sets out the many desiderata and concerns of the specialist firms.

The paper refers to the 52 topics set out in Annex II and to the 12 suggestions in Chapter III/F. The association would like to see harmonization (1st question) and wants to be involved in the definition of objectives (3rd question) and, in more general terms, in the setting up of a Community system (2nd question).

3. Most of the foregoing suggestions E1 to E13 have some bearing on subcontracting and this aspect will have to be incorporated in Community provisions on the act of construction (E1, E2), the role of the employer (E3), external inspection (E4), duties of engineers and architects (E5), arbitration (E6), acceptance (E7), specific responsibilities (E8), minimum guarantee (E9), project insurance (E11), qualification of contractors (E13) and possibly also professional insurance (E14).

The specialists contractors question the effectiveness of using only optional standard forms of contract or even of general contractual clauses. They feel that the French law of 1975 on subcontracting is a valuable instrument, but consider that it does not go far enough, and are calling insistently for a set of measures embodied in directives and of recommendations set out in the form of guides.

4. Examples:

- E1. Construction processes, a subject which will include the question of the devolution of responsibility for works to a single contractor or to several specialist contractors, and the coordination of both design and works, whilst ensuring flexibility.
- E2. The main functions, where it will be necessary to define certain principles governing the role and, possibly, the approval of subcontractors and suppliers in every construction process.
- E3. The rights and duties of the client; here it will be necessary to emphasize the considerable influence the employer's decisions can have on subcontractors.
- E7. Acceptance, in relation to whether or not approved subcontractors and suppliers will be co-signatories of the certificates of completion and the lifting of reservations.
- E8. Liability, which will come into play from acceptance for the "approved" participants as part of a possible specific system of builders' liability.
- E9. The minimum guarantee which every subcontractor or approved supplier will have to provide to the general contractor, and a possible collateral warranty given to the employer or the purchaser.
- E11. Project insurance: here the position of approved or simply 'domestic' subcontractors and suppliers will have to be clarified, in particular to make it easier to administer the numerous policies which the specialist firms will have to take out.
- E12. Professional insurance, where the question of compulsory insurance only for the approved participants or firms may or may not be raised.
- E13. Qualification of contractors, which concerns both general contractors and specialist contractors, and which may require the introduction of harmonization based on the mutual recognition of national approved systems, adhering to certain agreed principles.

5. The specialist firms want their case to be heard independently of the general or main contractors, who are well organized both at Community level and in each Member State.

The various issues to be discussed could be placed in the context of:

- Directive D1 on the act of construction, which could include certain definitions,
- Directive D3 on responsibilities, guarantees and insurance,
- Recommendation R1, otherwise known as the guide for public clients
- a possible 'model Civil Code' to be appended to Directive D1,
- operational annexes to be appended to Recommendation R1.

The issue of direct payment of approved participants will be dealt with in particular in Directive D1, while guide R1 will tackle in particular devolution of tasks and subcontracts, a sensitive matter which has to be examined because of the impact it will have on the life of small and medium-sized firms in the Community.

One major principle has to be clearly stated: the situation where a contractor who is awarded a single contract imposes on specialist contractors duties that are more onerous than his own must be avoided.

SUMMARY PRESENTATION OF
THE FINAL SUGGESTIONS

GRID

D1 : Directive on the "act of construction"
D2 : Directive on the "tasks of designers"
D3 : Directive on "builders' liability"
R1 : Guide for "employers"
R2 : Guide for "experts and arbitrators"
R3 : Guide for "principal designers"
A : Appendix
X : Proposal
O : Alternative proposal
PR : Action on "products"
PC : Action on "public contracts"
E : Element of the general system

NB : Other possibilities for consideration :
- combining D1 and D2 into a single Directive
- replacing D2 with Community regulations

°	THEMES	D1	D2	D3	R1	R2	R3	PR	MP	E	CE QUI EST EN JEU
0	Le langage	X	X	X	X	X	X	X	X	E1	Les concepts de base
1	Processus	O			X			O	X	E1	Les grandes options
A 2	Qualité et permis	X						X		E2	Le filtrage des erreurs
3	Certification finale	X						X		E4	Le respect des exigences
4	Rôle de l'Etat	X						X		E4	Le permis de construire
AB 5	Les acteurs	X			O			X	O	E2	La répartition des rôles
6	Maître d'ouvrage (Bauherr)	X			O			X	O	E2/E3	Le rôle du promoteur
AB 7	Auteur du projet	X			O			X	O	E2/E5	Le rôle du concepteur
8	Entrepreneur (Baumeister)	X			O			X	O	E2	Le rôle de l'entrepreneur
9	Contrôle de la construction	X						X		E4	Le filtrage des erreurs
AC 10	Qualification des entreprises	X			O			X	O	E'13	La qualité des travaux
11	Missions des concepteurs		X		O			X	O	E5	Le fonctionnement du marché
AC 12	Achat et vente	X		X	O			X	O	E3/E10	La protection du consommateur
13	Cautions et bords				A				X	E3	La solidité des constructeurs.
14	Paiement des constructeurs	X			O			X	O	E3	La garantie de paiement
C 15	Guide maîtres d'ouvrage				X				X	E3	Le fonctionnement du marché
16	Présentation des DAO				x				X	E3	Le fonctionnement du marché
C 17	Spécifications						X	X	O	E5	La suppression des pièges
18	Organisation des AO				X				X	E3	Le fonctionnement du marché
19	Arbitrage permanent				O	X		X	O	E6	La solution des litiges
CD 20	Réception			X				X	O	E7	La suppression des pièges
21	CG Travaux				A				X	E3	La suppression des pièges
CD 22	CG Etudes		X		O			X	O	E5	La souplesse nécessaire
23	Concours d'architecture				X				X	E3	Le fair play
24	Marchés types travaux				A				X		L'efficacité
CD 25	Chaîne des responsabilités			X	O			X	O	E8	La cohérence

N°	THEMES	D1	D2	D3	R1	R2	R3	PR	MP	E	CE QUI EST EN JEU
D 26	Modèle contrat de construction			A				O	X	E10	La suppression des pièges
D 27	Modèle contrat de vente			A				O	X	E10	La suppression des pièges
CD 28	Modèle contrat de location			A				O	X	E10	La suppression des pièges
D 29	Contrôle des matériaux				X				X	E3	Les responsabilités
CD 30	Lots séparés ou EG				X				X	E3	La coordination des travaux
D 31	Forfait ou PU				X				X	E3	La qualité des ouvrages
D 32	Régimes de responsabilité			X				X		E8	Le fonctionnement du marché
D 33	Système français			X				X		E8	La protection du consommateur
34	Système canadien			X				X		E8	L'industrie de la construction
D 35	Charge de la preuve			X				X		E8	Le fair play
36	Exonérations de responsabilité			X				X		E8	Le fair play
37	Dérogations au code civil			X				X		E8	Le réalisme
D 38	Constructeurs responsables			X				X		E3	Le réalisme
39	Modèle de "code civil"			A				X		E3	L'efficacité
D 40	Intensité des obligations			A				X		E3	La qualité des ouvrages
41	Durée de la RC			A				X		E8	La durabilité des ouvrages
42	Contenu de la RC			A				X		E8	La protection des citoyens
D 43	Interprétation des codes civils					X		X		E3	L'efficacité
E 44	Garantie G5/G10/G15			X				X		E9	La qualité des ouvrages
CE 45	Garantie de l'acheteur			X				X		E10	La protection de l'acheteur
46	Caution technique mutuelle			A				X		E10	L'industrie de la construction
47	Assurance des concepteurs			A				X		E12	L'indépendance des professions
48	Assurance logement			X				X		E10	L'efficacité des garanties
49	Assurance contrôle			X	O			X		E11	L'efficacité
E 50	Sous-traitance			X	O			X	O	E'14	L'avenir des PME
51	Assurance "tous risques"			A					X		L'efficacité
F 52	Assurance RC entrepreneur			A					X		L'efficacité

