



INFO-C

Information from the Consumer Policy Service of the European Commission - Special Edition

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GUARANTEES AND AFTER-SALES SERVICES, ACCESS TO JUSTICE AND SETTLEMENT OF DISPUTES - THE DEBATE IS WIDE OPEN

As foreseen in the Three-Year Action Plan (published in the first Special Edition of **INFO-C**), the Commission recently adopted two Green Papers: the first (COM(93) 509) concerns "Guarantees for Consumer Goods and After-sales Services"; the second (COM(93) 576) is devoted to "Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market".

A brief overview of these documents was published in **INFO-C** No 9/93.

A more detailed **summary** is contained in this second **Special Edition** with an eye to wider dissemination of the ideas put forward in each of the Green Papers. The Commission hopes that in this way the documents (each of which is over 100 pages long) will be more "accessible" even to non-specialists. The problems discussed potentially concern all European citizens - so the debate must be open to all.

An "integral" reading of one or other of the Green Papers is of course recommended for those who wish to submit a contribution in writing. The complete versions may be obtained from the Commission Offices in the Member States. The time limit is 30 April 1994 for the Green Paper on Guarantees and 31 May 1994 for the Green Paper on Access to Justice.

The Commission will give the utmost priority to suggestions emanating from representative organisations.

INFO-C

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ACCESS OF CONSUMERS TO JUSTICE AND THE SETTLEMENT OF CONSUMER DISPUTES IN THE SINGLE MARKET

EXERCISING ONE'S RIGHTS IN THE SINGLE MARKET : THE REASONS FOR THE GREEN PAPER

Late delivery of a product (or failure to deliver), bad performance of a service, products or services that do not match agreed specifications, difficulties connected with guarantees and after-sales services - all these are problems which any citizen is liable to face sooner or later.

In a market where millions of consumer contracts are concluded daily, a certain number of transactions will inevitably give rise to disputes.

As regards consumer claims, the cost of an "ordinary" procedure often exceeds the value at stake and so in the absence of simplified or alternative procedures the average consumer will abstain from invoking his legitimate rights.

It is in order to bridge this gap between law and reality that most Member States have introduced the notion of "small dispute" as grounds for the "simplification" of procedures applicable to disputes under a certain value - what is "small" for a firm will not normally be so for a private individual.

The credibility of the rule of law in the eyes of a country's citizens rests more on the fair settlement of "small disputes" (which concern each citizen) than on justice rendered in "big issues" which make the headlines.

Similarly, the credibility of a rule-of-law Community and confidence in the single market depend on the citizen's being able to achieve a fair settlement of claims concerning transfrontier transactions, and not only the theoretical possibility of conducting such a transaction.

This is why the Commission has adopted a "Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market" (COM(93) 576).

This Green Paper is a follow-up to the Communications already adopted by the Commission in 1984 and 1987 and the views expressed by the Council, the European Parliament and the Economic and Social Committee, and is part of the framework of the "Strategic programme on the internal market".

The first part of the Green Paper provides a historical overview and emphasises how several pilot projects supported by the Commission have contributed to a better understanding of the problem and to identifying solutions. The list of pilot projects is annexed in tabular form.

The second part discusses the existing situation in the Member States and is built around four themes:

- court procedures
- out-of-court procedures
- protection of collective interests
- pilot projects.

For each country the Green Paper surveys the remedies applicable to consumer disputes and the recognised role of consumer organisations and/or public authorities in protecting "the collective interests" of consumers.

COURT PROCEDURES

In a state governed by the rule of law all disputes must be settled by due process. Access to justice for all citizens and for all infringements of legitimate rights is a tenet enshrined in the constitutions or in the constitutional-type principles of all Member States of the European Union.

Because the cost and duration of an "ordinary" procedure can inhibit effective access to justice, "simplified" procedures have been introduced in all the Member States for disputes below a certain value.

These procedures, although they vary from one country to another, have three characteristics in common:

- 1) simplified procedures for bringing an action (such as a registered letter or a simple declaration to the court registrar instead of a writ served by a bailiff);
- 2) a lawyer's assistance is not required;
- 3) a prior attempt to effect conciliation on the part of the adjudicating court.

In several countries the judge's recognised role as "conciliator" is clear from his very title (juge de paix, giudice di pace, juzgado de paz).

The maximum value of disputes falling within the jurisdiction of justices of the peace is as follows:

Belgium: BFR 75 000

Greece: DR 60 000

Spain: PTA 80 000

Italy: LIT 5 000 000, from January 1994.

(in Italy, a lawyer's assistance is always mandatory if the value of the dispute exceeds LIT 1 000 000).

In **Germany**, an equivalent procedure is applied by the Amtsgericht (court of first instance) which adjudicates in disputes of up to DM 10 000; an even more informal procedure applies to disputes below a value of DM 1 200.

In **France**, the writ served by a bailiff may be replaced by a simplified procedure for disputes whose value does not exceed FF 13 000, and a lawyer's assistance is optional up to FF 30 000 (disputes falling within the jurisdiction of the courts of first instance).

In the **Netherlands**, a simplified procedure is applied by the Kantongerecht (court of first instance) which adjudicates in (a) disputes whose value does not exceed

HFL 5 000 and (b) disputes concerning rented accommodation or hire purchase agreements irrespective of their value.

In the **United Kingdom**, small claims schemes have been introduced in the three jurisdictions, viz.:

- before the English and Welsh county courts, for disputes of up to UKL 1 000
- before the Scottish sheriff courts for disputes of up to UKL 750
- before the county courts of Northern Ireland for disputes of up to UKL 1 000.

In **Portugal** a "processo sumarissimo" applies to disputes of up to ESC 250 000.

In **Ireland**, a specific simplified procedure applies to all actions brought by consumers against sellers in connection with the purchase of goods or services when the value of the dispute does not exceed IRL 500.

This procedure, which was piloted in four large Irish cities, has now been extended to all the 43 Irish district courts (from December 1993) and the ceiling for "small disputes" will be gradually raised.

OUT-OF-COURT PROCEDURES

In the case of disputes which cannot be dealt with by applying one of the abovementioned procedures, seeking redress through the courts is often a long drawn out and expensive procedure. Moreover, the average consumer often has serious inhibitions about appearing before a tribunal no matter how "simple" the procedure may be. This is why a multiplicity of out-of-court procedures have been established to settle consumer disputes. In this brief survey it is impossible to mention all the initiatives - in most cases they concern specific economic sectors (banks, insurance, travel agencies, etc.) and very often they have been developed at regional or local level (see the national chapters in part II).

As regards the "legal effect" of the out-of-court procedures, it is important to stress that they may give rise to three different situations:

- a) a simple "recommendation" which is not binding on the parties (this is the case for most of the "ombudsmen" or "mediators" created by certain professional sectors);
- b) an opinion that is binding on persons acting by way of trade (these having accepted a priori to respect the outcome - such as the "banks ombudsman" in most countries) but not on the consumer;
- c) a decision that is binding on both parties, who can no longer challenge the "substance" of the case before the tribunal - such "abdication" of redress through the courts is permitted only under the rules that apply to arbitration, which may vary from one country to another.

TRANSFRONTIER DISPUTES

The third part of the Green Paper is devoted to what are called "transfrontier disputes".

If a consumer is domiciled in a country other than the one in which the professional is (legally) established, a dispute between them will still be a "transfrontier" dispute, despite the abolition of the physical frontiers: each Member State of the European Union retains its own courts and these apply their own national procedures.

Consequently, the question at issue is to determine the court which has jurisdiction in the dispute.

To this end a Convention was signed by the Member States in 1968 (Brussels Convention), to which the EFTA countries (Sweden, Norway, Finland, Iceland, Switzerland, Austria and Liechtenstein - Lugano Convention) have recently acceded.

As regards consumer contracts, this Convention stipulates that:

- a consumer may bring proceedings against the other party to a contract either in the courts of the state in which that party is domiciled or in the courts of his own state;

- proceedings may be brought against a consumer only in the courts of the state in which the consumer is domiciled.

The abovementioned rules apply only provided:

- the consumer has taken the steps necessary for conclusion of the contract in his own country and this was preceded in that country by a specific invitation addressed to him or by advertising;
- in the case of a contract for the sale of goods on instalment credit terms or a contract for a loan repayable by instalments made to finance the sale of such goods.

To sum up, these rules are designed to protect what one might call "passive" consumers - consumers who have been solicited and conclude the contract in their own country (for example: mail order sales).

On the other hand, for "transfrontier" consumers (as well as for tourists) who have concluded a contract abroad, the court having jurisdiction will normally be a "foreign" court.

With a view to simplifying the settlement of "transfrontier" disputes, several conventions have been signed, including the Hague Convention of 15 November 1965 on the service abroad of judicial and extra-judicial documents and the Hague Convention of 10 March 1970 on the taking of evidence abroad in civil or commercial matters. However, these conventions are not in force in all Member States of the European Union.

At any rate settlement of a "transfrontier" dispute is more complicated than that of a similar dispute of a domestic nature - the complexity of the problems to be tackled (problems of substance: applicable law; problems of procedure: serving of court documents abroad, translation of documents, letters rogatory, applicability of bilateral or international convention) is such that a lawyer's assistance is always necessary, or at least recommended, even in the case of disputes which in accordance with the "lex fori" may be heard with by a justice of the peace.

INITIATIVES TO BE CONSIDERED

In the fourth part of the Green Paper the Commission advances a number of ideas for discussion, with a view to promoting a debate on the initiatives to be envisaged at Community level. These include:

- creation of a mechanism for monitoring transfrontier complaints with a view to itemising the problems encountered in practice;
- promotion of codes of conduct at Community level with a view to improving the functioning and transparency of the ombudsman (mediator) systems responsible for dealing with consumer disputes;

- improvement of the legal instruments designed to combat illegal transfrontier practices ("actions for an injunction").

The Commission attaches very great importance to the opinions and contributions which the other Community institutions as well as any interested party may wish to make: the Green Paper is to be considered as a point of departure for an in-depth reflection at all levels.

The deadline for consultation has been set at 31 May 1994.

GUARANTEES FOR CONSUMER GOODS AND AFTER-SALES SERVICES

INTRODUCTION

The Green Paper presented by the Commission is a response to formal requests from the different Community institutions and to the expectations of all the parties concerned. It focuses on problems posed by the sale of products, ignoring existing problems connected with the provision of services. Moreover, in mootng possible solutions, the Green Paper limits itself to discussing the sale of "movable consumer goods that are new and durable", these being the type of goods whose transfrontier purchase raises most problems for consumers.

A Eurobarometer survey conducted in 1991 clearly demonstrates that the difficulties encountered in exchanging or repairing products purchased in a different country are one of the main grounds for consumer fears (53%) when purchasing abroad.

THE BASIC NOTIONS

Legal guarantee: the traditional protection which exists in all national legal orders and derives directly from the law.

Commercial guarantee: supplementary advantages offered by the product manufacturer, vendor or any other person in the product distribution chain.

After-sales service: services provided against payment. The analysis concentrates exclusively on the aspect of after-sales services which seems most relevant to the good functioning of the Common Market, viz. the availability of spare parts.

ANALYSIS OF NATIONAL LEGISLATIONS

The comparative analysis of the different national legislations shows that there is a certain common ground but also great divergencies.

Legal guarantee: the legal situation in each Member State is quite complex. Several national legal orders have supplemented or amended traditional trading provisions by specific legislation on general issues of consumer protection or protection of consumers against unfair terms. The national systems have common features but they also differ in important respects. Examples of differences include:

- **the notion of defect:** while certain legislations require that the defect be hidden, others rule out invoking the legal guarantee only when the purchaser has examined the goods before purchase;

yet other Member States rule out invoking the guarantee only when the purchaser was genuinely aware of the defect at the time of purchase.

- **guarantee period:** six months (P, E, D, GR), one year (DK, I), six years (UK, IRL), indeterminate period (F, B, L, NL)

- **persons liable for the guarantee:** the vendor (all Member States).

In F, B and L: all vendors in the distribution chain, including the manufacturer, who bears joint and several liability together with the final vendor. In UK and IRL: the provider of credit in the case of hire purchase, who is jointly and severally liable together with the vendor.

Commercial guarantee: few Member States have exhaustive legislation concerning commercial guarantees. However, there have been a growing number of legislative initiatives in this domain with a view to ensuring the correct information of consumers on the guarantees offered and to avoiding misleading information, to ensuring that the consumer is informed about the existence of the legal guarantee and its mandatory nature, to providing the consumer with specific protection in respect of durable goods and to establishing certain basic legal rules regulating commercial guarantees and notably requiring that certain minimum information be provided in the guarantee documents. The Irish statute is particularly far-going and is published in the annex. Some Member States have even gone so far as to reverse the principle of contractual freedom in the domain of the commercial guarantee, requiring that the vendor give a written guarantee in connection with the

sale of certain goods - this is the case in Greece and Spain.

After-sales service: certain national legislators have enacted provisions with a view to ensuring adequate after-sales service for the repair and maintenance of products during their normal lifespan. National initiatives have already been taken in Portugal, Spain, France, Greece and above all in Ireland.

ANALYSIS OF COMMISSION LAW

There is no specific legislation in this domain. However, certain Community texts and policies have played an influential role.

Legal guarantee. The Green Paper analyses in turn Directive 85/374 (product liability), Directive 93/13 (unfair terms), Directive 84/450 (misleading advertising) and the Case Law of the European Court of Justice concerning the application of national laws relating to the legal guarantee.

Commercial guarantee and after-sales service. Competition law has clarified certain principles concerning the territorial scope of the commercial guarantee and after-sales service. The Green Paper analyses certain exemption regulations (notably motor vehicle distribution and franchising), as well as Commission decisions and Court of Justice judgments relating to concerted practices.

THE SINGLE MARKET

The disparities in national laws regarding the legal guarantee and the absence of a general framework applicable to commercial guarantees and after-sales services may lead to the maintenance of de facto barriers to cross-border trade, preventing consumers from benefitting directly from the opening of the markets and interfering with competition.

Legal guarantee. When a consumer goes abroad to buy a product, the law normally applicable to the transaction is that of the country of purchase. The conditions

under which the consumer may benefit from the protection accorded to him in his country of residence are, under the Rome Convention of 1980, extremely restrictive. Persons acting by way of trade are also obliged to take into account national laws concerning the legal guarantee in drafting the terms of their commercial guarantees and this is an obstacle to the development of a global marketing strategy.

Commercial guarantee. An analysis of a sample of commercial guarantees available on the market shows that consumer information on the scope and conditions for invoking guarantees is not always adequate. Moreover, as regards the functioning of guarantees in the context of transfrontier transactions, in commercial practice guarantee conditions vary from one country to another and the purchaser can only invoke the guarantee that applies in his own country. In other words a consumer who purchases a product outside his country of residence is completely unaware of the guarantee terms he will be able to invoke once he returns, and which, very probably, will not correspond to what is written on the guarantee document accompanying the product.

After-sales service. In a market without frontiers, where products are expected to move freely and where the notion of "importer" has disappeared, any national legislation which imposes strict obligations on producers as regards the provision of after-sales services for their products risks being ineffective or even causing distortions to competition or barriers to trade. In the context of transfrontier purchases the problem of access to appropriate after-sales services is complicated by the fact that the consumer can no longer turn to his vendor, and is not always in a position to evaluate, at the time of purchase, the terms under which these services will be supplied in his country of residence.

POSSIBLE SOLUTIONS

As regards what can be done, the Commission does not present definitive solutions to the problems studied. The Green Paper outlines certain strands designed to trigger a public discussion, with a spectrum of suggestions ranging from measures to harmonise national

legislation to solutions based purely on voluntary self-regulation.

Legal guarantee. - Two possible solutions are envisaged. The first is based on application of special rules of private international law under which the consumer is protected through application of his national law. The second solution is to approximate national legislation concerning the legal guarantee: the essential features of harmonisation would be the notion of defect, the effects and implementation of the guarantee, the persons liable for and the beneficiaries of the guarantee, and the guarantee periods. The solutions proposed for public discussion are designed to establish a balance between the interests of firms and those of consumers.

Commercial guarantee. - There are two classes of problems in the domain of the commercial guarantee: the first concerns commercial practices regarding guarantees (presentation of the guarantee, implementation, legal nature, links with the legal guarantee, advertising on guarantees, inadequate consumer information, etc.). The second concerns the functioning of the commercial guarantee in the context of the single market. Here the Paper considers the creation of a genuine "European guarantee" which could easily be invoked in all the Member States, irrespective of the country of purchase.

Three options are proposed: a "regulatory" and unitary option which aims at resolving the two types of problem by adopting a Community legal regime applicable to the commercial guarantee; a "voluntarist" option consisting of resolving the two types of problems through optional schemes; a "mixed" option which consists in resolving the first type of problem by adopting a Community legal regime, if necessary supplemented by voluntary rules on the basis of self-regulation, and the second by an entirely voluntary system - namely the creation of a "European guarantee" to which firms would be free to subscribe.

After-sales service. - With a view to resolving the spare-parts problem, the Green Paper proposes three solutions: a regulatory-type solution according to which spare parts would have to be available for a specified period; a voluntary-type solution in the form of codes of conduct or negotiations between the interested parties; a final strand based on an information-oriented approach,

i.e. the requirement that products be adequately labeled, for example, by indicating the periods during which the producers commit themselves to keeping an appropriate stock of spare parts.

CONCLUSION

The Green Paper is the point of departure for an in-depth public discussion of the subjects dealt with, the idea being to provide the Commission with the elements necessary for defining future measures in this domain. All interested parties are thus invited to provide the Com-

mission with any data of an economic, social and/or legal order which they consider pertinent, notably as regard the functioning of the commercial guarantee, relations with producers and distributors, and consumer complaints. They may also propose to the Commission any action they consider appropriate with an eye to improving the functioning of guarantees and after-sales services in the context of the single market and, more specifically, state their views on the solutions aired in the Green Paper. The time limit for consultation is 30 April 1994 and any person who presents a written submission may be invited to a hearing.