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GREEN PAPER ON GUARANTEES FOR CONSUMER GOODS AND AFTER-SALES SERVICES

(presented by the Commission)

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AND AFTER-SALES SERVICES

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GREEN PAPER ON GUARANTEES FOR CONSUMER GOODS AND AFTER-SALES SERVICES

I - INTRODUCTION

This Green Paper on guarantees and after-sales services was announced by the Commission on various occasions and, most recently, in the Commission's second three-year action plan on consumer policy (1993-1995) called "Placing the Single Market at the Service of European Consumers" (COM (93) 378 final of 28 July 1993). In this document the Commission states that appropriate guarantee and after-sales service conditions are important if consumers are to be encouraged to benefit from the opportunities offered by the Single Market. Cross-border shopping can only flourish if the consumer knows he will enjoy the same guarantee and after-sales service conditions no matter where the supplier is located.

In January and February this year the Commission organised two hearings, one with the Member States and the other with the business circles concerned. Work in progress was also presented to the Committee on Commerce and Distribution in April followed by a discussion of the issues. In parallel the Commission had bilateral contacts with all the social actors who have expressed interest in the matter. The draft Green Paper presented to the Commission includes, as far as possible, the suggestions which were put forward during these consultations and aspires to satisfy the expectations of the parties concerned.

The Green Paper is also intended as a response to formal requests from the various Community institutions. The Council, the European Parliament and the Economic and Social Committee recently invited the Commission to take measures in regard to guarantees and after-sales services.

The preparatory consultations show that this Green Paper is being awaited impatiently. Certain national authorities are working on the reform of their domestic law and are waiting for discussions at Community level before finalising these initiatives. This applies in particular to the British authorities, which in February 1992 published a public consultation document with a view to reforming national law. This document, because of its great general interest, is annexed to the Green Paper. Again, the business community wants a document that will survey the existing legal situation at national and Community level and possibly pave the way for a general discussion of how to simplify and improve the existing rules. Companies have taken a great interest in the idea of creating a European guarantee, which would be valid throughout the Single Market, and to which they would be free to subscribe. Finally, consumers anticipate a document which will articulate their specific concerns as regards the functioning of guarantees and after-sales services in the Single Market and which will encourage discussion on how to make things better. The Green Paper aspires to meet all these expectations.

This Green Paper had manifold objectives. It attempts to analyse the existing situation, to identify the problems facing consumers and business and to outline certain possible solutions at Community level.

On the one hand the Commission wishes to place appropriate information on the existing situation at the disposal of all the Community institutions and all the social actors involved, both at European and national level, and both at legal level and at the level of commercial practices and, on the other, to trigger an in-depth public debate on the measures to be adopted at Community level to solve the problems identified.

This approach is itself an example of how the Commission is applying the policy of transparency and the principle of subsidiarity, and is part of the Commission's current strategy of promoting the widest possible consultations even before preparing any new initiative. The publication of the Green Paper will also contribute to clarifying relations between existing Community law with implications for guarantee schemes and national legal systems. This exercise will enable us to evaluate the current situation in the light of the principle of subsidiarity, with a view to simplifying existing rules where possible.

The next chapter singles out the notions of legal guarantee, commercial guarantee and after-sales service, which are the basic concepts drawn on in all the later sections. "Legal guarantee" is defined as the traditional protection which derives directly from the law and is present in all the national legal orders and according to which the vendor (or some other person) is held liable vis-à-vis the buyer for defects in the products sold. The effects and conditions for invoking the guarantee are directly laid down in each national legal order. "Commercial guarantee" refers to the additional features which are offered, optionally, by the producer, vendor or any other person in the product distribution chain. The effects and conditions for invoking the guarantee are freely established by the person offering it. After-sales services are defined in the strict sense, i.e. those that are not part of a guarantee and which, consequently, are provided against payment.

In Chapter III we will briefly describe and analyse the legal framework in each Member State. A topic-centred approach was preferred to that of covering each national legal system in turn. The exposé, subject by subject, is supplemented by tables which summarise the main national provisions in force (annexed to this Green Paper). The Irish legislation on commercial guarantees and after-sales services, as well as the recommendations made by the Danish ombudsman in this regard, both of which initiatives break new ground in the Member States in these domains, are also annexed.

Chapter IV describes existing Community law in this area.

Chapter V attempts to summarise the main problems facing consumers and business in the context of the Single Market. Here we also discuss the problem of the national law applicable to legal guarantees in the case of transfrontier transactions and survey commercial practices regarding the guarantee offered by economic operators.

Chapter VI puts forward a number of ideas on possible actions at Community level, with a view to fostering the public debate which the Commission wishes to open with this Green Paper. At national level the United Kingdom authorities (Department of Trade and

Industry) have published a very interesting discussion paper with an eye to reforming domestic law. This document is annexed to the Green Paper.

In the context of this project and bearing in mind the subsidiarity principle, the Commission decided to concentrate on the questions raised by the sale of products, although it is aware that similar problems may arise in the domain of services[1]. But because services are so heterogenous they may be difficult to treat in a global manner.

Yet, services, when they concern consumer goods (installation, rental, repairs) are very closely linked to the topics treated in the context of this Green Paper. Moreover, it is quite common nowadays for suppliers of services to provide as well a commercial guarantee for the service offered. In this context the question is whether services should be discussed.

Moreover, in the context of the solutions proposed, the Green Paper restricts its ambit to the sale of "moveable consumer goods which are durable and new", these being the type of goods likely to pose problems for consumers in cross-border shopping. The question as to whether the scope of these measures should be further circumscribed by reference to the traditional concept of the consumer has been left open. Again, with the subsidiarity principle in mind, the Green Paper's analysis of problems relating to after-sales services in the strict sense concentrates exclusively on the type of after-sales services more likely to have implications for the smooth working of the Common Market - namely the question as to the availability of spare parts necessary for the operation, maintenance or repair of goods over their normal lifespan.

As regards what can be done, the Green Paper makes it clear that the Commission does not claim to present either pat solutions or even to come out in favour of one or the other at this stage. Our aim is merely to indicate a number of avenues which will be explored in the course of future work and to trigger a public discussion that may generate new insights and cast fresh light on the problems addressed. Hence the Green Paper simply presents a number of options which seem appropriate. Some of the working hypotheses presented are to be seen as alternatives, but they may also be supplementary or indeed reinforce one another. At any rate, the Commission does not rule out further proposals and expects that the public debate will open new horizons.

The Commission's choices as to possible solutions presented in the Green Paper are based on methodological considerations and say nothing about the quality of the individual solutions analysed. Naturally the Commission expects feedback on the analyses advanced, but it also hopes that the addressees will themselves study and flesh out the options that the Commission has "played down". At any rate the Green Paper presents a spectrum of suggestions ranging from measures to harmonise national laws to solutions based purely on voluntary self-regulation.

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[1] The Commission's proposals concerning the Directive on unfair terms included a provision on guarantees for services (see Article 6(4) of the amended proposal, reproduced below in Chapter IV.2).

Every year thousands of consumers encounter difficulties regarding claims relating to defective products. This type of claim is one of the main sources of friction between vendors and consumers and to a large extent fills the dossiers of complaints received by consumer associations. Illustrations of some typical cases are provided in an annex.

This year the Office of Fair Trading in the United Kingdom carried out a study on the problems encountered by consumers in invoking the commercial guarantees offered by vendors or producers of products. According to this study 24% of consumers who have tried to trigger one of these guarantees have experienced difficulties and not received due satisfaction.[2] The incidence of these problems varies with the products, with the following breakdown:

- Furniture, carpets	47%
- Cars	28%
- Video (including camcorders)	25%
- Radio, audio, hi-fi	22%
- Computers	22%
- Vacuum cleaners	22%
- White products in general	22%
- Watches	20%
- Washing machines, Dryers	14%

The problems at national level inevitably become more complex when consumers are involved in commercial transactions of a transnational nature. This is one of the reasons why the Community institutions have for many years repeatedly recognised the need to help the consumer to make effective use of the rights arising both from the legal guarantee and, where relevant, the commercial guarantee accorded in the course of trade. This is essential if the consumer is to become a full-fledged operator in the Community market(s).

Although one might up to this point consider the problem as being somewhat theoretical, it has become an urgent one at the latest since the beginning of 1993 with the "opening of the large Single Market".

In order for the internal market to work properly it is necessary for guarantees concerning products purchased by consumers in another country to be honoured without discrimination in the consumer's country of residence.

In this connection the results of a Eurobarometer survey carried out in 1991 are of considerable interest[3]. This survey 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. A study carried out by the Commission of the European Communities in 1990 on complaints of a transfrontier character dealt with by national institutions has also shown that a large percentage of

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2 By comparison with the study concluded in 1984 the level of dissatisfaction has risen. In 1984 the level of dissatisfaction was approximately 22%.

3 Eurobarometer, No 35, July 1991

these complaints concerned, at least in part, defective products or services (with a percentage ranging between 50% and 75% depending on the Member State) or specifically difficulties in invoking the commercial guarantee or securing after-sales service (between 10% and 75%). It goes without saying that consumers who have had trouble with cross border shopping will be reluctant to repeat the experience and will tend to be sceptical about the process of European integration and the true significance of the single market. Members of the European Parliament have already voiced these concerns, mainly in the form of written questions to the Commission[4].

To a growing extent the completion of the Single Market would seem to demand that the Community attend to the problems linked to guarantees for consumer goods and services and after-sales services. The large economic space without frontiers will not be completely realised unless, in conjunction with the free movement of products and services, the "free movement" of consumers can be secured as purchasers of goods and recipients of services.

Moreover the European Court of Justice has already clearly recognised that "free movement of goods concerns not only traders but also individuals. It requires.... that consumers residing in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population[5]."

This liberty is impeded by linguistic, cultural, psychological and legal barriers which prevent consumers from enjoying the benefits of the large market, by purchasing products or services beyond national frontiers.

Strengthening the confidence of consumers in the large market and encouraging consumers to take an active part in its functioning means that conditions must be created so that the consumers can rest assured as to their rights and know they can definitely rely on them throughout the single market.

Indeed, the problem already arose well before the completion of the internal market. Community actions in this domain were already announced in the first preliminary programme of the European Economic Community on a policy for the protection and information of consumers[6].

In this programme the Council averred that the consumer was entitled to a satisfactory after-sales service for consumer durables.

In recognition of this need, the priority action identified by the Council in 1985 had a dual objective: to fight unfair commercial practices, notably in the field of guarantee conditions, mainly for durable goods, and to harmonise the law on product liability so as to improve consumer protection[7].

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4 See Written Question No 1881/93 by Mr Elio di Rupo, O.J. No C 66 of 16 March 1992 p. 40

5 GB-INNO-BM judgment of 7 March 1990, case C-362/88, ECR 1990, p 667, point 8

6 Council Resolution of 14 April 1975, OJ C No 92 of 25.4.1975, p. 1

7 The latter will be limited to compensation for physical damages only (bodily and material) and will also exclude compensation for damages caused by the defective product itself

In 1981, the second EEC programme for a consumer protection and information policy[8] reaffirmed this dual need for protection of economic interests in respect of defective products on the one hand and the existence of a satisfactory after-sales service on the other. The Council specifically requested the Commission to study the possibilities of improving the quality of after-sales service provided by producers and suppliers of products and services, as well as by firms carrying out maintenance and repairs, notably as regards the guarantee period, transport costs, out-of-service costs, and the availability of replacement parts. The Council also requested the Commission to study the necessary means and to take "appropriate steps with a view to improving conditions of warranty on the part of the producer and/or supplier and after-sales service,either by legislation or, where appropriate, by agreements between the parties concerned for inter alia the improvement of contract terms".

At one time the Council considered that the priority sectors were the motor vehicle and electrical appliances sectors[9], in line with the request from the Consumers' Consultative Committee in its opinion on the draft programme of action[10]. It is also interesting to note that the European Parliament, in connection with the opinion it adopted on the Communication from the Commission concerning this programme, had already invited the Commission to prepare a Directive on after-sales services, after drawing attention to the great interest that this initiative had given rise to in a public hearing on the second Community programme.

In 1986 the Council Resolution of 23 June concerning the future orientation of EEC policy for the protection and promotion of consumer interests[11], which refers back to the Communication from the Commission on "A new impetus for consumer protection policy"[12], introduced a new element. In its communication the Commission had highlighted the difficulties consumers encounter when invoking guarantees on products purchased in other Member States, whereas previously the potentially transfrontier dimension of this question had not been clearly addressed. On this occasion the Commission declared that the guarantee, as a service linked to a product and relating to a consumer durable, had to be honoured in the consumer's country of residence, even if it had been purchased in another country. The Commission went on to say that it would study problems encountered by consumers as regards guarantees and after-sales services and that it intended to formulate appropriate proposals.

In 1989 the Council in its Resolution on future priorities for relaunching consumer protection policy[13] again invited the Commission to study the possibility of taking initiatives in the field of guarantees and after-sales services.

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8 Council Resolution of 19 May 1981, OJ C 133 of 3 June 1981

9 ibid point 35 a)

10 CCC/44/79 of 24 April 1979

11 OJ No C 167 of 5 July 1986

12 COM (85) 314 final

13 OJ No C 294 of 22 November 1989

The EEC's three-year consumer policy action plan, published by the Commission in 1990[14], which follows on the said resolution, put even greater stress than the 1986 text on the need for a Community approach to the question of guarantees with a view to the smooth functioning of the internal market. The plan pointed out that it was important to adopt measures allowing consumers to exercise their purchasing power throughout the Communities. It was necessary to identify, in the existing contract law of the Member States, elements which might dissuade consumers from purchasing abroad and, as far as possible, to eliminate them. The Commission said in this document that it would examine ways to simplify transfrontier contracts, guarantees and after-sales services for consumers.

Finally in 1992 the Council, in its Resolution on future priorities for the development of consumer protection policy[15], said that it was necessary to take supplementary measures to create consumers confidence in the mechanisms of the Single Market, notably as regards guarantees. The Council invited the Commission to assess the usefulness and desirability of approximating guarantee arrangements and improving after-sales services for goods and services in the internal market.

On several occasions the European Parliament also emphasised the need for Community action in the domain of guarantees and after-sales services. Just recently, in its Resolution of 11 March 1992[16] the Parliament called on the Commission to "review the laws of the various Member States on guarantee schemes and to propose schemes that will ensure a minimum European standard, but to retain contractual guarantees that go further than this as a special form of competition and not to regulate them in European laws."

Again, the Economic and Social Committee in its own-initiative Opinion of 26 September 1991[17] on Consumer Protection and Completion of the Internal Market, expressly drew attention to certain inconsistencies where the reality experienced by consumers does not correspond to the official discourse, notable in the domain of guarantees relating to transfrontier purchases. It called on the Commission to work towards the protection of consumers in respect of guarantees and after-sales service, in the wake of the opening-up of Community frontiers and the internationalisation of consumer contracts. Again, in its Additional Opinion on the Consumer and the Internal Market of 24 November 1992[18], the Economic and Social Committee held that "particular attention should be paid to the establishment of an EC system - which would be effective throughout the Community - to provide consumers with guarantees in respect of latent defects."

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14 COM (90) 98 final of 3 May 1990

15 OJ No C 186 of 23 July 1992

16 Resolution on consumer protection and public health requirements to be taken into account in the completion of the internal market (Albert report), OJ C 94 of 13 April 1992, p. 217

17 OJ No C 339 of 31 December 1991, p. 16

18 OJ No C 19 of 21 January 1993,

Steps in this direction were made with the adoption of the Directive on product liability[19] and the Directive on unfair terms[20]. With the transposition of the latter Directive by all the Member States, consumers are assured that possible unfair terms in one-sided standard contracts, for example in general conditions of sale, will be void throughout the Single Market. However, this negative measure must be supplemented by a positive measure concerning consumer rights in connection with the purchase of products or services. It is necessary to guarantee consumers that, independently of the country of purchase within the Single Market, it will always be possible to benefit from an effective after-sales service and to take measures against possible defects in the product purchased. As long as these guarantees are lacking, the European consumer will continue to be limited to national horizons, or even regional or local ones.

In the context of work following the proposal for a Council Directive on unfair terms in consumer contracts[21] the Commission had even envisaged an initial harmonisation measure concerning certain aspects of the legal and commercial guarantee for movable goods and the legal guarantee for services. However, the Council considered it more appropriate to treat these issues independently and in greater depth and refused to included these provisions in the Directive on unfair terms, inviting the Commission to examine the opportunities of harmonising the guarantee schemes in the Member States relating to contracts concluded with consumers and, on this basis, to submit to it, if relevant, a proposal for a Directive on the harmonisation of national legislation in this domain[22].

[19] Council Directive 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ No L 210 of 7 August 1985, p. 29

[20] Council Directive No 93/13 of 5 April 1993 on unfair terms in consumer contracts, OJ No L 295 of 21 April 1993, p. 29

[21] Initial proposal, OJ C 243 of 28 September 1990, p. 2; amended proposal OJ C No 73 of 24 March 1992 p. 7

[22] Statement in the Council minutes in connection with the adoption of the Directive on unfair terms of 5 April 1992

II -LEGAL GUARANTEE, COMMERCIAL GUARANTEE AND AFTER-SALES SERVICE

When people speak of "guarantees" for goods, two different legal aspects are involved: the legal guarantee and the commercial guarantee.

The legal guarantee is always present and derives directly from the law. The commercial guarantee is offered on a voluntary basis by the producer or vendor of the good or by any other person in the product distribution chain

The legal guarantee produces effects which are laid down by law and its implementation is subject to legally fixed conditions and procedures.

The commercial guarantee produces effects which are unilaterally determined by the guarantor and its implementation is subject to the conditions and procedures established by that person.

When they coexist the two types of guarantee are complementary and to a certain extent juxtaposed. Sometimes the conditions necessary for invoking the two guarantees coexist and sometimes the consumer can only rely on the legal guarantee or the commercial guarantee (for procedural reasons, such as guarantee periods or for substantive reasons, such as the notion of "defect"),

But the relations between the two types of guarantee are far from clear in the legal literature and case law and even less so in the public mind. As a rule the consumer is unaware of the existence of the legal guarantee and knows only the commercial guarantee. Thus, when there is no commercial guarantee or when it cannot be invoked, the consumer believes he has no rights. Moreover, in many cases the consumer believes that his rights are limited to the content of the commercial guarantee[23].

A.THE LEGAL GUARANTEE

Traditionally, the legal guarantee has meant the vendor's obligation to guarantee the good condition of the product as well as any product features which have been specifically agreed on. When this is not the case the purchaser may invoke remedies against the vendor.

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[23] Example: many commercial documents contain a clause of the type " the vendor's liability is expressly limited to the repair of defective parts, and under no circumstances can he be held liable for damages resulting from a defect in the product" However, in such a case the legal guarantee applicable under national law may well include the right to damages resulting from a product defect.

Ultimately this guarantee is nothing other than a legal effect arising from the contract of sale by virtue of the law. Here we must distinguish between defects covered by the legal guarantee and safety defects within the ambit of product liability. Although the two areas may to some degree overlap, when we speak here of the legal guarantee we are expressly excluding the product safety aspect.

Hence the legal guarantee in continental law derives from provisions relating to the contract of sale contained in the Civil Codes, and - in common law tradition - in statutory provisions concerning contracts of sale (Sales of Goods Act). These provisions were suited to traditional societies based on relations of confidence and trust between consumer and seller, and between the latter and his suppliers. The goods sold to the consumers were normally simple from the technical viewpoint. These national legal provisions are often no longer attuned to conditions in modern consumer societies where, at least in certain consumer sectors, neither the vendor nor the consumer look at or check each individual good (which, moreover, is often highly technical) and where relations with consumers have lost their personal character and generally take place in the anonymity of the hypermarket.

National laws differ considerably as regards the contractual aspects of the legal guarantee scheme. These divergences concern the defects covered, the persons liable, the appropriate procedures and guarantee periods, the legal effects of the guarantee etc.[24]. Hence, when the consumer shops abroad it is normally the law of the country of purchase that applies to the transaction[25].

To secure the **"free movement of consumers"** also means that they must become holders of a certain minimum set of rights, implemented by similar procedures, no matter where they shop. These rights should not be diminished or extinguished simply because they purchased products or services in a country other than the one in which they reside. A minimum number of common rules, creating fair conditions for transfrontier consumer purchases, might hence be desirable.

B. THE COMMERCIAL GUARANTEE

Initially confined mainly to electronic products, electronic household appliances and motor vehicles, commercial guarantees are now being extended to almost all branches of consumption.
This applies across a range of goods - from textile products to pepper mills. More and more goods come together with a commercial guarantee, normally offered by the manufacturer. The commercial guarantee always relates to a predetermined period, normally calculated from the date of sale: the product is guaranteed for six months, one

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24 The questions are analysed under III A

25 This is the approach of Article 4 of the Convention of Rome of 19 June 1980 (OJ No L 266 of 9 October 1980). The applicable law will not be that of the consumer's country of residence unless the journey abroad was arranged by the seller for the purpose of inducing the consumer to buy (Article 5.3). This question is analysed in detail under point IV.A

year, ten years, etc. This period is not a procedural condition - as is often the case in the context of the legal guarantee, but a genuine substantive condition. It corresponds to the promise of "good performance" of the product during a certain period.

If a defect crops up during this period, the consumer generally does not have to prove that it existed at the time of sale.

The commercial guarantee is of great practical importance for consumers. According to the abovementioned survey carried out by the United Kingdom's OFT in 1993, 74% of the respondents had purchased, during the past three years, at least one product accompanied by a guarantee and 20% of these consumers had invoked this guarantee.

Guarantees are steadily becoming a preferred method of competition between firms and one of the most widespread arguments used in advertising (consumers look on guarantees as a quality label). To some extent the offer of a guarantee is based on firms' need to establish closer personal links with the clients. They want to sell not only the product but also a specific service guaranteeing that the product is in good working order. In some way the offer of a commercial guarantee compensates for the trend in modern societies towards abstract and anonymous relations with consumers. Hence these guarantees play a fundamental economic and social role. However, there are few Member States which have a legal framework designed to accommodate the commercial guarantee offerred by the producer.

With a view to the smooth functioning of the large single market, such a framework however seems necessary. It should be designed to reinforce the **"competitive"** element contained in the guarantee, to ensure the effectiveness of the producer's guarantee throughout the common market and to contribute to correct and full information of consumers. This framework should not affect the voluntary nature of the commercial guarantee but ensure the transparency and functioning of the market.

C.AFTER-SALES SERVICES

Here we are concerned with after-sales services in the strict sense, i.e. those that are not linked to the application of a guarantee and which, as a result, are provided on payment of a fee. A good after-sales service covering maintenance and repair is esssential for the product's useful life and hence something consumers find highly attractive. In modern mass-production societies, the quality of after-sales services provided by firms is playing an increasingly important economic role. More and more, firms compete not only as regards the guarantee they offer for the products they manufacture or sell but also as regards the quality of the assistance they can provide to consumers; modern firms do not just sell products but also services linked to products.

In the context of this Green Paper and in line with the subsidiarity principle, the Commission has decided to focus on one aspect only of after-sales services which might potentially interfere with the working of the Common Market - the question as to the

availability of the spare parts required to ensure the operation, maintenance or repair of goods throughout their normal life. Certain Member States have adopted provisions in this regard, but in the context of the single market these proposals may turn out to be ineffective or even provoke distortions in competition. It would be desirable to find a solution at European level.

III LEGAL SITUATION IN THE MEMBER STATES

A. THE LEGAL GUARANTEE

This section provides a comparative overview of the way the different national legal systems address the problems raised by the legal guarantee for consumer goods and services and draws attention both to similarities and to differences.

Sometimes, however, it is difficult to draw a distinction between legal guarantees and commercial guarantees and on some occasions the legislators have, at least in certain respects, combined the two approaches. The aspects of the national legal systems in which the legal and commercial guarantees converge are set out in section B.

We proceed by analysing specific aspects of the legislation; firstly, we identify the different legal bases to the legal guarantee in force in the Member States, as well as any statutes or case law that lend binding force to the guarantee (1). Secondly, we compare the different constructions of the notion of defect - the cornerstone of the legal guarantee - and the characteristics which it must have to trigger the legal guarantee (2). Then we study the extent to which the guarantee is enforceable only against the vendor or other persons in the product distribution chain, by identifying the parties liable under the guarantee (3). In parallel, we examine whether only the purchaser or other users may also benefit from the legal guarantee (4). The different remedies available to the consumer (5) and the time limits imposed for such remedies (6) constitute other important elements in the comparative analysis of the legal guarantee schemes in the national legal systems. Finally, we examine the distribution of the burden of proof between the different parties (7).

1. THE LEGAL BASIS

All national legislations in the Member States contain provisions relating to the vendor's guarantee in the event of a defect in the product sold. The analysis revealed that in the Member States which, by virtue of their legal culture, have codified their civil law, the groundrules on guarantees are contained in codes, and notably in the section devoted to contracts of sale.
However, several countries have supplemented or amended the provisions of the Civil Code through specific legislation which sometimes concerns general issues of consumer protection and sometimes protection of consumers against unfair terms. Moreover, in the Member States which do not have a Civil Code, there exists specific legislation on sales, sometimes supplemented or even modified by specific provisions on sales to consumers, and by legislation relating to contracts concluded by consumers.

In this context it is interesting to examine the different legal systems taking the following questions into consideration:

- Does the law governing legal guarantees have a specific status when the sale has been concluded by a consumer?
- Are the legislative provisions pertaining to the legal guarantee voluntary - can they be waived in a contract - or are they mandatory, i.e. may they not be waived in a contract or if so only to the benefit of the consumer?

Before sketching the legal bases for the legal guarantee in national legislation two points must be made:

a) Here we are concerned only with the law on guarantees, to the exclusion of all other remedies available to the consumer in the event of a product defect or non-conformity of the product delivered. Hence, we do not analyse questions pertaining to the law on product liability (transposition of the Directive of 25 July 1985) or the obligation to deliver: these questions are conceptually distinct from the notion of guarantee, even if in practice these different remedies may present similarities and overlaps; they remain of interest because they may allow the consumer to escape from the restrictions inherent to the legal guarantee by invoking alternative remedies.

b) Section 1 in principle considers only statutory provisions and, where relevant, regulations, ignoring developments in case law or in the legal literature, which however may in certain Member States constitute the only effective legal grounds for consumer redress in the context of the law on guarantees.
Certainly, these developments have made it possible to interpret, supplement and adapt, in line with the growth of mass consumption, a body of law which was sometimes too rigid or embryonic. They have given a fillip to recent legal reforms and their contribution is made abundantly clear in the sections that scrutinise certain aspects of the law on guarantees.

The framework of legal guarantees in the different Member States is described below:

Germany: Articles 459ff of the Civil Code stipulate that the vendor must provide products which are free of defects which would diminish their value, their capacity to withstand normal use or the use explicitly or implicitly provided for in the contract. These provisions are supplemented by the Act relating to general contractual conditions of 1977 (AGB) governing the use of certain one-sided standard clauses concerning the applicability of the legal guarantee, or conditions for invoking it.

The provisions of the Civil Code and the AGB are designed to protect purchasers of goods. The protection accorded by the German Civil Code is not mandatory. However, under the terms of the AGB, general conditions of contract which limit the rights of purchasers are prohibited in certain respects: the vendor must give the purchaser the right to have the goods repaired whenever he limits or disclaims the purchaser's rights arising from the legal guarantee (and the right to repudiate the contract or to reduce the price whenever the repair fails). Neither can the vendor limit his liability in the event of negligence or fraud, nor annul the purchaser's right to seek compensation when the

product does not have the promised characteristics; he cannot shorten the period for seeking redress below the legal six-months limit.

Belgium: Articles 1641ff of the Civil Code provide that the vendor is bound by the guarantee in respect of latent defects which render the product sold unfit for the use for which it is intended, or which diminish this use to such an extent that the purchaser would not have bought it or would have paid less if he had been aware of the defects. The Civil Code has been supplemented by the Act of 14 July 1991 on commercial practices and on information for the protection of consumers (LPC), whose Article 32 provides that certain terms in contracts concluded with consumers restricting the rights of consumers are to be considered as unfair terms.
The provisions of the Civil Code apply to all sales and are not confined to consumer contracts, unlike the provisions of the LPC relating to unfair terms, which are.

The provisions of the Civil Code were not mandatory until the entry into effect of the LPC. Article 33 (2) of the LPC specifies that the unfair terms it enumerates are null and void. Article 32 (12) defines as unfair any terms designed to eliminate or diminish the legal guarantee against latent defects provided for in the Civil Code. Hence, the protection afforded to the consumer through the combination of the Civil Code and the LPC is mandatory.

Finally, a bill for the codification of consumer law also contains important provisions relating to the legal guarantee.

Denmark: the provisions relating to the legal guarantee in favour of consumers emanate from the 1906 Sale of Goods Act (SGA). In 1979 this general legislation was overhauled and supplemented by the Consumer Sales Amendment Act, and since then Danish law has had a specific legal regime applicable to consumer relations, which supplements and to a certain extent overrides general legislation. The Act specifies in detail the notion of defect. This legislation is supplemented by the 1975 Contracts Act, and notably Article 36 thereof, which governs unfair terms in contracts.

Many of the SGA provisions concerning the legal guarantee are mandatory, i.e. they cannot be waived except to the benefit of the consumer. Other provisions are merely supplementary.

Spain: Articles 1484ff of the Civil Code provide that the vendor is liable for any latent defects of the product sold which render it unfit for use or which diminish its value to such an extent that the purchaser would have paid a lower price if he had been aware of the defect. The legal guarantee established by the Civil Code may be waived by contract, except when the vendor is actually aware of the defect. The provisions of the Civil Code were supplemented in 1984 by the General Act for the protection of consumers and users of 19 July (GAPCU). However, it is not clear whether it concerns contractual liability or non-contractual liability of professionals. The GAPCU contains not only specific provisions relating to the guarantee but also provisions on protection against unfair terms, which are equally pertinent in the domain of the legal guarantee. It is also interesting to note that there have been several implementing regulations under the GAPCU in certain sectors, which also contain provisions concerning the guarantee. Thus, a royal Decree of 10 January 1986 concerns consumer protection in the domain of motor vehicle repairs;

a Royal Decree of 29 January 1990 concerns the protection of the consumer in respect of repairs to household appliances. Another Royal Decree of 8 March 1991 gives a definition of durable goods and a limited list of products considered as durables for the purposes of the GAPCU. Moreover, the national laws have to be supplemented by legislative initiatives taken by certain autonomous communities. These autonomous communities have the right to enact laws in the domain of consumer protection which, in certain cases, have precedence over national legislation. In this context they have adopted texts some of which directly concern the question of the legal guarantee. Examples include the Act of 18 November 1981 of the Basque Country, the Act of 28 December 1984 of the Autonomous Community of Galicia and the Catalan Act of 8 January 1990.

The provisions of the Civil Code apply to all purchasers. However, the regulatory instruments based on the GAPCU specifically concerns contracts concluded with consumers.

While the provisions of the Civil Code are supplementary, those contained in the GAPCU are mandatory, in that they cannot be waived to the detriment of the consumer.

France: Articles 1641ff of the Civil Code specify the rights of the purchaser in the event of a latent defect in the good sold. This is supplemented by the provisions of Decree No 78-464 of 24 March 1978, in implementation of Act No 78-23 of 10 January 1978 concerning unfair terms, which defines as unfair any terms which restrict the consumers' rights in the event of the professional failing to fulfil one of his obligations. Moreover, in French law there is some confusion between the obligation to provide a guarantee against latent defects and the obligation that the goods delivered must conform with the goods sold (obligation to deliver). The fusing of the two obligations, which is supported by a large body of legal literature, tends to benefit the consumer because it widens and supplements the conditions under which the consumer can invoke remedies when he buys a defective product.

The provisions of the Civil Code apply all contracts of sale, but the mandatory nature of the protection afforded is confined to relations between a person selling goods by way of trade and a consumer, or between traders who do not have the same specialisation (see point IV.4.1).

Greece: the legal guarantee is also rooted in the Civil Code, specifically Articles 513ff. In 1991 Greece adopted general legislation on consumer protection, including a chapter devoted to after-sales services and introducing a specific obligation on the vendor of consumer durables to provide a written guarantee (Act No 1961/91). This guarantee supplements the legal guarantee and, given its mandatory nature, the scheme which applies to new consumer durables can only be understood by considering the two legal schemes in conjunction.

While the Civil Code applies to all sales, the provisions of Act No 1961/91 are designed to protect consumers alone.

The provisions in the Civil Code are supplementary. However, the protection afforded by the 1991 Act is mandatory, in that any term under which a consumer waives his rights

under this legislation is held to be void. This act also contains a ban on unfair terms in contracts and expressly outlaws terms that limit the vendor's liability of the vendor under the legal guarantee.

Ireland: the Sale of Goods and Supply of Services Act of 1980 (SGSSA) gives the purchaser the right to a guarantee based on the notion of the existence in the contract of sale of an "implied term" to the effect that the goods are of "merchantable quality".

The provisions of Irish law can be invoked by all purchasers, whether the purchase was made for private ends or not, with the exception of specific provisions relating to motor vehicle sales, which do not apply when the purchaser is a professional motor vehicle dealer.

The Irish law is mandatory when the buyer deals as a consumer. It is also prohibited (with penalties for non-compliance) to include in contracts or to affix in business establishments contractual terms which limit or exclude these consumer rights[26].

Italy: two provisions of the Civil Code relate to this domain: Article 1490 on the guarantee against latent defects and Article 1497 on the guarantee against of quality defects. Case law has created a third legal basis in respect of actions on a guarantee: aliud pro alio. Basically, we have the same type of fusion as has taken place in French case law between the mandatory guarantee against latent defects and the obligation of conformity of the good delivered with the good sold.

The provisions of the Civil Code apply irrespective of whether the purchase is made for private ends or not.

The provisions of the Civil Code are in principle supplementary, allowing the parties - and hence in practise the vendor - to waive them. Terms limiting the guarantee are thus allowed, but there are two exceptions: on the one hand a vendor in bad faith cannot disclaim the obligations arising from the guarantee and, on the other, case law has made the guarantee against quality defects mandatory.

Luxembourg: as in Belgium and in France, Articles 1641ff of the Civil Code are the traditional legal basis of the legal guarantee. These provisions have been supplemented by the Act of 25 August 1983 on legal protection of the consumer, which contains provisions relating to unfair terms. This act has itself been supplemented by the Act of 15 May 1987 which also amends the articles of the Civil Code relating to the legal guarantee, codifying the evolution of case law in this domain.

The provisions of the Civil Code protect all purchasers. However they are not mandatory except in dealings with consumers, pursuant to Article 2 of the 1983 Act and Article 1 (9) of the 1987 Act.

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[26] The typical example is the notice in a shop that runs "These articles cannot be returned or exchanged"

Netherlands: the legal guarantee is dealt with in two chapters in the new Civil Code, which took effect in January 1992: (a) the section relating to sales (Book 7, sections 1 to 48) and (b) the section relating to general contractual conditions (Book 6, sections 231 to 247).

In both of these sections the legal guarantee is mandatory.

Portugal: Articles 913ff of the Civil Code apply to product guarantees. Moreover, Decree-Law No 446/85 of 25 October 1985 on general contractual conditions introduced restrictions on the validity of certain terms limiting the guarantee.

The provisions of the Civil Code are addressed to all parties, whether acting in the course of business or privately. The specific provisions contained in the above mentioned Decree Law are also of general scope, though there are certain rules that apply only to dealings with consumers .

In Portuguese law certain guarantee provisions in the Civil Code are mandatory, whereas others are supplementary. The vendor may not waive the purchaser's rights to repudiate the contract or to reduce the price in the event of a defect. However, he may waive the obligation to replace or repair the product except in the case of bad faith (knowledge of the defect).

United Kingdom: the law relating to the legal guarantee is embodied mainly in the Sale of Goods Act of 1979. This Act confers on the purchaser the right to a guarantee based on the notion of the existence in the contract of sale of an implied term, according to which the products must be of merchantable quality. It is supplemented by the provisions of the Unfair Contract Terms Act of 1977, which contains rules on terms limiting the legal guarantee.

The provisions of English law may be invoked by all purchasers, whether the purchase was made for private ends or not. Moreover, the English law is mandatory under the Unfair Contract Terms Act. This mandatory character differs depending on whether the contract concerns dealings with consumers, in respect of which no waiving of rights is possible, or was concluded in the course of business, in which case the "test of reasonableness" is applied.

Moreover there is currently a growing movement for the reform of the law on guarantees in the United Kingdom, following a discussion paper published by the Department of Trade and Industry in 1992. Already in 1989 a report by the National Consumer Council had included several recommendations designed to improve protection of purchasers of motor vehicles and durables. Subsequently a bill was presented but did not reach the statute book.

A number of conclusions may be drawn from this comparative overview of the different national systems:

- all Member States with the exception of Italy have a kind of dual system, in which common law, normally based on the Civil Code, has tended - to a greater of lesser extent - to provide more effective protection to the purchaser. This has

taken various forms: provisions specific to the legal guarantee, provisions relating to the content of the contract and tending to regulate or even prohibit terms which hedge in the benefits provided by the legal guarantee. Hence the great majority of Member States have recognised the need to restrict contracts at will in the domain of the legal guarantee;

- most Member States have restricted the benefits of provisions adopted to supplement traditional law to the consumer alone, taking a more stringent approach to terms limiting the legal guarantee when they apply to consumer contracts;

2. THE NOTION OF DEFECT

The notion of defect constitutes the cornerstone of all legal guarantee systems. It is thus understandable that figuring out its content has given rise to significant developments in case law and even statute law in the Member States of the European Community.

Let us note at the outset that the legal systems tend very much to a case-by-case approach: the courts must determine in each case whether the defect of the good does indeed constitute a defect in terms of the legal guarantee. Hence:

Germany: the legal guarantee covers all defects of the product sold which (cumulative conditions)

- existed at the moment of sale
- diminish or destroy the value of the product, or render it unfit for the use set out in the contract, or, failing this, for normal use
- have a certain severity and:
- were not known to the purchaser at the time of sale.

On the basis of these conditions, as set out in the Civil Code, the German courts have developed subjective criteria (reference to the content of the contract, and notably the presentation of certain qualities by the vendor at the time of sale) and objective criteria (where the contract is silent, comparison with average products of the same type, reference to technical standards, reference to labelling requirements, advertising, etc.) but have not articulated general rules applicable to categories of products.
The philosophy of the German courts has hence been empirical, each case being judged on its merits: court rulings on defects in new and second-hand cars are a good example[27].

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27 According to this jurisprudence a motor car cannot be considered as new except when it leaves the factory. A car which had not been used but was an earlier model which had been stocked for several months was considered as having a defect. The opposite approach was adopted in the case of a sale of furniture exhibits

Belgium: the provisions of the Civil Code concerning the legal guarantee are silent about the notion of defect. The courts have defined a defect for the purposes of the legal guarantee as being (cumulative conditions):

- any defect existing at the time of sale;
- which renders the product unfit for the use which the purchaser entitled to expect or which diminishes this use to such an extent that the purchaser would not have purchased it or would have paid a lower price if he had been aware of the defect;
- which has a certain severity and
- which is latent.

Belgian case law has been fundamental in relaxing the conditions necessary for the establishing a defect for the purposes of the legal guarantee. Firstly, the courts have interpreted the notion of defect in an increasingly functional sense in line with the development of consumer law: "intrinsic" defects - deterioration of the product, bad design, manufacturing defects - are no longer the only grounds for invoking the guarantee; the presence of a "functional" defect, which affects a good which is perfect in itself, but which is not fit for the use for which it is intended, also entitles the purchaser to invoke the guarantee. Moreover, case law has often recognised a presumption that the defect precedes the sale, which reverses the burden of proof by placing it on the vendor; finally, the courts have held that assessment of the severity of the defect depends on the use for which the product is intended and have contributed to better protection of consumers by ruling that a defect is latent when a person of average ability and experience could not have detected it if he had examined it closely.

Denmark: Sections 76-77 of the SGA contain rules on the defect which allow the purchaser to invoke the guarantee. Hence, in accordance with Danish law, a product has a defect when, at the moment the risks are passed (transfer of property) from the vendor to the purchaser:

- the product does not conform to the description under which it was sold (contractual information);
- the vendor, at the moment of sale, provided incorrect or misleading information which may be considered as significant for the way the purchaser evaluates the product (precontractual information);
- the vendor, or any other person in the distribution chain, communicated information intended for the public or the purchaser concerning the description of the product either on the packaging, via advertising or any other means of communication, and the product does match this description (precontractual information);
- the vendor has withheld information from the purchaser concerning aspects of the product to which the purchaser attaches importance and which the vendor was aware of or should have been of;
- the product does not conform with the contractual terms or the purchaser's legitimate expectations.

Moreover the SGA sets out specific rules for the sale of products "in a state of which the purchaser is fully aware". Even in the case of such sales, the purchaser may invoke the legal guarantee when the information provided by the vendor has been incorrect or misleading, or when the product has a value significantly lower than the expectations of

the purchaser given the price and other circumstances. Although the standards used for assessing the defectiveness of such products are less protective than those in other types of sale, purchasers still enjoy a certain measure of protection against overly general disclaimers.

Thus Danish law is stringent mainly as regards the information provided to the purchaser. Conformity of the product with the purchaser's legitimate expectations is the main yardstick.

Spain: the Civil Code specifies that the product sold is defective whenever (cumulative conditions):

- the defect exists at the moment of sale
- the defect renders the product unfit for use, or the usefulness of the product is diminished to such an extent that if the purchaser had been aware of the defect he would not have bought the product or would have paid a lower price
- the defect is latent.

France: the provisions of the Civil Code relating to the legal guarantee have spawned a large corpus of case law. Hence a dissatisfied purchaser may invoke the legal guarantee whenever (cumulative conditions):

- the defect existed prior to sale (however, as in Belgium the courts have accepted a presumption of pre-existence of the defect and it is up to the vendor to prove that the defect occurred after the sale, notably by proving improper or abnormal use of the product by the purchaser);
- the good has a defect which renders it unfit for the normal use which the purchaser could reasonably assume given the price, the stipulated quality and the general contractual conditions;
- the defect is significant (minor defects are not considered) and
- the defect is latent (not only must the purchaser not be able to recognise it, but he would not legitimately have been able to detect it after an elementary check. Here the courts have adopted a more favourable attitude to purchasers when the purchase is for non-commercial ends).

Greece: the Civil Code protects the purchaser against product defects whenever (cumulative conditions):

- the defect existed prior to sale;
- the defect destroys or diminishes the value or utility of the product or the product does not have the agreed qualities;
- the defect is of a certain severity and
- the defect was unknown or could not have been known to the purchaser at the moment the contract was concluded.

Greek legal literature and case law have developed the notion of defect by defining it with reference to two elements: firstly, the product must have an intrinsic defect; secondly the defect must adversely affect the value of the product or conformity with use.

Moreover, Act 1961/91, described in greater detail in section B, defines the defect of a durable good as the characteristic which prevents its normal use. Again, the 1991 Act in no way requires that the defect must exist prior to sale but simply that it occur during the guarantee period.

Ireland: the SGSSA requires that the products sold must have "merchantable quality"[28]. A product is not of merchantable quality when it is unfit for the use for which it is normally intended or if it is not as durable as may reasonably be expected, taking into account the way it has been presented as well as other pertinent elements, such as the price.

Moreover the product must be unfit for the particular use which the purchaser has in mind and which has been brought to the vendor's attention. There is no requirement that the defect must be latent but when the purchaser has examined the good before purchase, defects are excluded which he could have discovered during this examination (as well as defects which the vendor has brought to his knowledge).

Irish law contains specific provisions relating to sale under description which somewhat widen the notion of defect. According to these provisions a good must above all correspond to the way it has been described, notably on the packaging, in advertising etc.

Irish law also contains rules on concerning motor vehicle sales: thus, a motor vehicle must, at the time of delivery, be free from any defect which would render it a danger to the public, including the driver and passengers. This is a kind of codification of the safety obligation which derives from the very notion of merchantable quality.

Italy: by virtue of the Civil Code, a defect is defined as (cumulative conditions):

- any defect in the product itself which prevents its normal use or diminishes its value to an appreciable extent;
- existing at the time the contract was concluded and
- which the purchaser was not or could not be aware of.

Moreover the Civil Code confers the right to invoke the guarantee (quality defect) against the vendor whenever the product does not have the (expressly or implicitly) promised qualities or qualities which are essential for the use for which it is intended, provided the defect is not a minor one.

The Italian courts have developed another construct: aliud pro alio. This is an application and extension of the principle of action against failure to perform a contract not only in cases in which the good delivered does not correspond to the good that was sold, but also cases in which the good delivered does not correspond to the expected use, and which had been drawn to the attention of the vendor, either in the contract itself or in the contract negotiations. Moreover the defect aliud pro alio includes cases in which the product is not adapted to its socio-economic function, even if in itself it has no intrinsic defect.

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[28] On the evolution of the notion of merchantable quality, see below, United Kingdom

Luxembourg: the provisions of the Civil Code are the same as in Belgium. Luxembourg case law is close to Belgian and French case law.

Netherlands: the provisions of the recently amended Civil Code consider a product as defective for the purpose of the legal guarantee, whenever at the moment of delivery:

- the product does not possess the qualities which the purchaser is entitled to expect by virtue of the contract or the qualities necessary for normal use, provided the purchaser was justified in assuming the presence of these qualities.

This final condition suggests that the purchaser has a certain obligation to inspect the product for defects particularly in the case of second-hand goods. However, the courts consider that what matters in interpreting this requirement is the purchaser's competence.

Moreover, in assessing the purchaser's legitimate expectations, all the circumstances must be taken into consideration, notably precontractual information. In the context of dealing with consumers, the information provided by other participants in the distribution chain may also be taken into consideration, but it may not be invoked against the vendor if the latter was not aware of claims made by other parties and could not be expected to know them, or again if he had expressly contradicted such claims.

It is important to note that the Netherlands Civil Code hence expressly enshrines the evolution of the obligation of the legal guarantee towards an obligation of conformity of the product with the purchaser's legitimate expectations.

Portugal: the Civil Code provides for four cases:

- the defect which diminishes the product's value;
- the defect which prevents realisation of the envisaged purpose or the normal use for which the product is intended;
- the absence of qualities assured by the vendor;
- the absence of qualities necessary for realising the envisaged purpose or normal use for which the product is intended.

The defect and the absence of qualities are defined in a functional perspective, primarily from a subjective or concrete approach, because the terms of the contract must be considered. It is only when the function for which the good is intended cannot be deduced from the contract that the an objective criterion comes into play: the normal functioning of goods of the same type.

Moreover, the defect must exist at the time the property was transferred. However, the defect does not have to be latent; a manifest defect only limits the purchaser's right under the legal guarantee if he has ascertained the defect and has nevertheless accepted the defective good.

United Kingdom: a defective product can give rise to an action on a guarantee whenever the implicit term guaranteeing the merchantable quality of the goods has been infringed.

In accordance with this notion, the product must be fit for normal use or the use that can reasonably be expected of goods of this type, taking into account the description of the product and all other circumstances, notably the price. The absence of merchantable quality is not enjoinable when the vendor has informed the purchaser of the defects before conclusion of the contract or when the purchaser has examined the product prior to the contract and has not identified defects which he should have been able to identify. While it is certain that the notion of merchantable quality covers major defects, English case law remains divided as to the coverage of this notion in respect of "cosmetic" defects or "minor" defects.

The notion of "merchantable quality" has been widely criticised on terminological grounds, but also because of the restriction to conformity with use, to the exclusion of other product characteristics[29]. Another line of attack concerns the difficulty of applying a single legal notion to cover a whole range of transactions. Current proposals for reform urge that this notion be replaced by that of "satisfactory quality": this no longer refers to conformity with use as the only criterion, but would enable other elements to be taken into account, such as the appearance and finish, the existence of minor defects and the product's durability.

As in Ireland, the provisions of British law relating to sale under description have a close bearing on the question of legal guarantee and provide additional protection to the purchaser.

The following conclusions may be drawn from this analysis of the different definitions of the notion of defect in the legal systems of the Member States. :

- in most Member States the core definition is similar: the defect taken into consideration is one that diminishes the product's fitness for normal use or the use envisaged in the contract. The notion of functional defect thus takes priority over the more restrictive notion of intrinsic defect in the statutes or, failing this, in case law. The latter notion means that the product itself has a design or manufacturing defect; however, apart from these broad similarities there are many areas where the legal systems differ.

- Great attention is accorded to the agreement reached between the parties: the notion of defect often refers to the quality or the use agreed upon in the contract.
- Recent statutes emphasise the importance of the information available to the purchaser in determining whether there is a defect: there seems to be a move from the obligation concerning conformity with normal use towards an obligation to conformity with the information provided and the purchaser's legitimate expectations;
- even if recent statutes contain more elements allowing one to specify what aspects must be considered in determining whether a defect exists, very much depends on the judge's interpretation: the notions of fitness for normal use, latent defect, serious defect, misleading information, merchantable quality, etc. are notions which exist only by virtue of the significance and scope which judges give to

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[29] However, some of the case law seems to have moved away from this restrictive approach

them by applying them to particular cases. The law on guarantees remains an empirical one and well-established solutions are still few and far between;

- certain characteristics which must be present if the defect is to be taken into consideration are pretty similar in most of the Member States: for example, in most cases the defect must have existed prior to transfer of the property. However, courts in some Member States have significantly improved protection of the purchaser by facilitating proof, even by reversing the burden of proof[30], while in other Member States this development has not taken place.

- As regards other characteristics, such as the hidden nature of the defect or knowledge of the defect on the vendor's part, national laws are, by contrast, quite different. While in some legal systems the defect must be latent, in others the legal guarantee is inapplicable only when the purchaser has examined the good before purchase (and should have been able to discover the defect) and in yet others only when the purchaser was genuinely aware of the defect at the moment of purchase. Similarly, the way in which the knowledge or possibility of knowledge of the defect on the vendor's part affects the legal guarantee also differs considerably across Member States.

3. PERSONS LIABLE FOR THE GUARANTEE

As regards identification of the person in respect of whom the purchaser may invoke the guarantee in the event of a product defect, the contractual nature of actions on a guarantee comes to the fore, which means basically that the purchaser can seek redress only against his vendor.
However, the courts in certain Member States have, through a legal construct, extended the scope of actions to enforce guarantees against other participants in the distribution chain. The situation in each Member State is described below.

Germany: the purchaser may invoke the legal guarantee only against the vendor. However, the law allows the vendor by express agreement to transfer his rights vis-à-vis "his" vendor to the final purchaser.

Belgium: while the Civil Code mentions only to the vendor, case law has established the possibility of direct action against the preceding vendor and the manufacturer. The guarantee is considered to be an intrinsic characteristic of the product itself and to be transferred with it. The consumer may enjoin several vendors at the same time or only the most solvent vendor. However, direct action is subject to two restrictions:

- the defect must have been present at the time of sale by the professional against whom the action is brought, i.e. possibly by the manufacturer;
- the guarantee applicable is the one which can be invoked against the professional whom the purchaser is addressing. Here it should be noted that the specific provisions of the LPC which establish the unfair nature of terms limiting the legal guarantee apply only to the relations between the vendor and the consumer. Hence

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30 For details, see below, Section 7

a manufacturer or wholesaler may oppose against the consumer any terms limiting his legal guarantee and contained in the initial contract concluded between persons acting in the course of business. However, such terms may be evaluated on the basis of the general norm contained in the LPC (general definition of "unfair terms") which also applies to relations between persons acting in the course of business.

Denmark: the consumer's action on a guarantee provided for in the SGA may be brought only against the vendor. However, the purchaser may turn to the producer or another participant in the distribution chain in accordance with the general rules on liability whenever incorrect information has been given to the consumer (or no information at all) and the consumer has as a result suffered damages.

Spain: before the entry into effect of the GAPCU, the law clearly stipulated that the purchaser could only enjoin his vendor. However the GAPCU contains provisions whose precise meaning is obscure. In accordance with this Act (Article 27):

- the manufacturer, importer and vendor are liable for the origin, identity and fitness ("idoneidad") of the item sold, depending on its nature and end, and the applicable technical standards
- for bulk products, it is the final vendor who assumes liability;
- for prepackaged products it is the firm indicated on the labelling that is liable;
- when two or more persons are responsible for injury, the principle of joint and several liability applies.

Moreover Article 25 of the Act stipulates that, in general, the consumer has the right to compensation for damages resulting from the use of the products, except when these damages were the result of his own negligence.

Article 26 provides that producers or distributors are liable for acts of commission and omission which injure users, unless they have respected not only the regulatory requirements but also their duties concerning care and attention, taking into account the nature of the product.

On the other hand, Spanish legislation, as we have seen, requires that a commercial guarantee be given to the consumer by the producer or vendor. This guarantee thus has a quasi-legal nature, because it is mandatory. When the guarantee, as is often the case, is offered by the producer, it is he who is liable almost as though it were a legal guarantee.

France: as in Belgium, the courts consider that the guarantee is inherent to the product and that it may give rise to a direct action by the purchaser against the preceding vendor, the importer or manufacturer, provided the purchaser proves that the defect existed at the time it was sold by the professional he is enjoining. However, in contrast to Belgium, terms limiting the legal guarantee contained in the initial contract concluded between the professionals may not be opposed against consumers.

Greece: here too the law is based on a strict interpretation of the contractual relationship and allows the consumer to seek redress only against his vendor.

Ireland: the purchaser can invoke the legal guarantee only against his vendor, in line with the "privity of contract" doctrine. However, there is a very interesting exception to this principle in the field of hire purchase: under the SGSSA, purchasers on an instalment basis may bring an action not only against the vendor but also against the person who has financed the sale. The two parties are jointly and severally liable for defects in the product sold.

Italy: here too only the vendor may be held liable.

Luxembourg: the courts have supported direct action on the same lines as in Belgian and French case law. The 1987 Act implicitly codifies this practice and amends Article 1645 of the Civil Code, which provides that the manufacturer can always be held liable for refunding the price of the good and for payment of damages to the final consumer.

Netherlands: the new Civil Code does not contain provisions for direct action against the manufacturer, although several versions of draft amendments to the code had envisaged such a possibility.

Portugal: statutory and case law permit actions on a guarantee only against the vendor, to the exclusion of other participants in the distribution chain.

United Kingdom: the principle of privity of contract rules out direct action against the manufacturer. In principle, the purchaser may invoke the guarantee only against the vendor. However, like Irish law, English law has opened a breach in this contractual relationship: according to the SGA, hire purchasers may invoke the guarantee not only against the vendor but also against the person who financed the purchase. These two parties are jointly and severally liable for defects in the product sold. Moreover, the current proposals for reform envisage establishing the manufacturer's liability for quality defects in his products. According to a survey carried out by the OFT this year, 96% of the respondents would support this solution.

In summary:

- most of the Member States stipulate that the purchaser can seek redress only from his vendor. However, three countries have clearly broken with the principle of privity of contract: Belgium, France and Luxembourg. The breach is confirmed by statute in Luxembourg, whereas in the two other countries direct action is countenanced as a result of long-standing and undisputed case law.

- It is interesting to note also that English and Irish law have expanded the framework of the initial contract in the event of hire purchases or leases by endorsing action against the provider of funds. Finally, the DTI proposals confirm the trend towards manufacturer liability for the quality of their products. Likewise, the bill which preceded the new Netherlands statutes had proposed introducing the principle of producer liability.

- The GAPCU provisions are also noteworthy, although it is difficult to establish whether they actually allow direct action against the manufacturer on the basis of the legal guarantee.

4. BENEFICIARIES OF THE GUARANTEE

The question raised in this section concerns the beneficiary of an action on a guarantee. Two aspects must be addressed: firstly, may the subsequent purchaser of a product invoke the legal guarantee provided by the professional vendor and, secondly, has a non-purchaser user the right to invoke this guarantee?

Germany: neither the subsequent purchaser nor the non-purchaser user may in principle invoke the guarantee against the initial vendor.

Belgium: the courts have extended their construction of liability (see above, 3) to include the subsequent purchasers of a product: the legal guarantee is considered to be an intrinsic characteristic of the product itself. However, the courts do not go so far as to extend coverage to the non-purchaser user of a product.

Denmark: the theory of the succession of contracts has been drawn on to allow the subsequent purchaser to invoke the guarantee against the vendor. The solution is at odds with the one referred to under 3, because this theory should also allow the consumer to enjoin the manufacturer.

Spain: the rules of the Civil Code apply only to the parties to the initial contract. However the GAPCU, through the general obligation it imposes on other participants in the product's distribution cycle and its very wide definition of the notion of consumer would logically seem to allow the subsequent purchaser as well as the user to invoke the legal guarantee against the importer or manufacturer under the same conditions as the initial purchaser (if he is in a position to do so!).

France: French case law, as in Belgium, extends the benefit of the guarantee to the subsequent purchaser but excludes the non-purchaser user.

Greece: application of the traditional theory of the privity of contract means that the legal guarantee cannot be extended to parties other than the purchaser.

Ireland: again, in line with the privity of contract doctrine, only the initial purchaser can invoke the legal guarantee. However, an exception is made in the case of motor vehicles: all car users, including passengers who suffer damages because of breach of the guarantee may under certain conditions bring an action against the vendor on the basis of the contractual bond between him and the purchasers. However, this topic is somewhat remote from the strict notion of the legal guarantee dealt with in this Green Paper because it concerns safety defects.

Italy: only the purchaser may invoke the legal guarantee against his vendor.

Luxembourg: the courts have adopted the same approach as in France and Belgium.

Netherlands: the revised Civil Code breaks new ground by not restricting rights recognised under the legal guarantee to a single purchaser. Such a right may be transmitted to a person other than the purchaser when this right is so closely bound up with the product - for example repair - that only a person in possession of the good has

an interest in bringing an action. Moreover, any term limiting the benefit of the legal guarantee to the purchaser alone is considered as unfair under the new provisions governing general contractual conditions.

Portugal: the provisions relating to the legal guarantee can be invoked only by the purchaser.

United Kingdom: pursuant to privity of contract only the purchaser can invoke the legal guarantee. However the courts sometimes extend the meaning of this notion, notably for members of the family, by invoking the theory of mandate (the merchandise having been purchased under the mandate of other persons who could hence benefit from the legal guarantee).

Conclusions:

- most Member States which have not countenanced direct action against the manufacturer logically refuse to recognise actions brought by the subsequent purchaser or non-purchaser user, because the obligation has its roots in the contractual relationship. However, Denmark and the Netherlands are exceptions.

- Logically enough Member States which have endorsed such a direct action extend the theory of the guarantee inherent to the product to subsequent purchasers. This is a new breach in the "citadel" of contract privity. However, the courts have not been fully consistent in that they do not allow actions brought by the non-purchaser user.

- Only one legal system clearly confers the right of bring an action against the vendor both on the subsequent purchaser and on the non-purchaser user, viz. the new Netherlands Civil Code;

- in certain circumstances, case law in the United Kingdom seems to extend to members of the family the right to invoke the legal guarantee.

5. EFFECT OF THE GUARANTEE

Here we analyse the possibilities open to the consumer once a product has been recognised as defective for the purposes of the legal guarantee with a view to obtaining compensation for injury. It is also necessary to determine - whenever alternatives exist - who does the choosing.

A further distinction must be made between the two types of remedy available: the first concerns compensation for damages directly resulting from the sale of a defective product, while the second concerns compensation for incidental financial losses caused by the defect.

Germany: the purchaser may chose between:

- demanding repudiation of the contract and reimbursement of the price;

- keeping the product but at a reduced price;
- in the case of fungible products, replacement of the product by a non-defective product.

However the purchaser can only demand damages under the legal guarantee whenever

- the vendor has promised certain characteristics or qualities or
- he recognised the defect in the product and concealed it.

The law does not establish a right to have the product repaired. However, the parties may agree to limit the purchaser's remedy to that of repair. In this event the vendor must bear all costs involved. If the repair fails, the purchaser is still entitled to invoke remedies at common law; this right is irrevocable under the AGB.

Belgium: in the case of latent defects the Civil Code provides for:

- cancellation of the sale and reimbursement of the price, costs incurred in connection with the sale being met by the vendor
- keeping the merchandise but with a reduction in price.

The Civil Code leaves it up to the purchaser to decide between the two remedies. However, certain provisions rule that cancellation of the sale is justified only if the defect is particularly serious in the court's judgment.

In Belgian law the purchaser does not have a right, under the legal guarantee, either to repair or to replacement of the defective merchandise. Similarly, he may turn down a proposal by the vendor to this effect.

The purchaser is entitled to damages only to the extent that the vendor was aware of the defect. However, the courts have long established a presumption of knowledge of the defect on the part of persons selling in the course of business. Accordingly, the professional vendor is liable for damages. However, this presumption may be challenged and the vendor can disclaim liability by proving that he was truly unaware of the defect.

Denmark: the SGA contains detailed and complex rules concerning the remedies available to consumers. These rules are outlined below:

- the right to repudiate the contract, unless the defect is a minor one, is protected by a mandatory rule of the SGA. Whether the defect is minor or not is determined on the basis of the real significance of the defect in the purchaser's eyes, while taking into account whether the vendor could be aware of this significance;
- reduction in price, a consumer right which cannot be waived; however, this reduction must be commensurate with the loss of value of the product and cannot hence be accorded unless the defect affects this value. This remedy also allows compensation for damages in the event of minor defects;
- the purchaser may request replacement of the product by a non-defective one in the case of fungible goods; the SGA provisions relating to this remedy cannot be waived;

- the purchaser may demand repair of the product irrespective of the nature of the defect, unless the repair entails disproportionate costs for the vendor. Various criteria are applicable, notably the rule that the cost of repair may not exceed the value of the product itself. When repair has not been carried out within a reasonable period the purchaser has the right to cancel the sale or, where relevant, to demand replacement of the product. Again, these provisions cannot be waived.

In principle, the purchaser may choose whichever remedy he prefers.

The purchaser may also sue for damages in the event of losses caused by the defect, when the vendor has not been acting in good faith, has provided misleading information or has not informed the purchaser about the defects which he was aware of or should have been aware of. Moreover, as in Germany, the vendor must compensate the purchaser when he has promised certain qualities which the product does not possess or when the defect has been caused by the vendor's negligence after conclusion of the contract. The damages however do not cover personal injury or damages to goods other than the product itself (on damages covered by the legislation on product liability, see Directive 85/374/EEC).

Spain: the Civil Code allows the purchaser to invoke any of the following remedies:

- repudiation of the contract and reimbursement of the price
- reduction of the price
- when the vendor is aware of the defect, he is also liable for other damages caused by the defect.

Under the GAPCU these provisions cannot be waived in consumer contracts. However the GAPCU also provides that in the context of the mandatory commercial guarantee for durable goods the consumer has a right to demand as a minimum that the product be repaired:

- the consumer is entitled to demand the complete repair of the original defects free of charge, as well as compensation for all damages and losses caused by these defects;
- when the repair has not been done to his best satisfaction, the consumer may have the product replaced or the price reimbursed.

France: as in Belgium, the Civil Code allows the purchaser to choose between:

- repudiation of the contract and reimbursement of the price and, where relevant, of expenses incurred in connection with the sale;
- reduction in price.

Even if the Civil Code does not provide that the purchaser has the right to replacement or repair, the parties may agree to this solution, although the vendor may not compel the consumer to do so. On the other hand, a repair which would incur costs incommensurate with the value of the product cannot be demanded by the purchaser.

Payment of damages, under the Civil Code, depends on the vendor's being aware of the product defect. The courts have contributed to better protection of purchasers by presuming awareness of the defect on the part of the person selling goods by way of trade and hence bad faith on his part. French case law is harsher on the professional vendor than Belgian case law, because this presumption is irrebuttable and consequently the vendor cannot repudiate liability even when the defect is normally undetectable.

Greece: the Civil Code and the Consumer Protection Act have given rise to the following situation:

- the purchaser may insist on repudiation of the contract and reimbursement of the price and any incidental expenses;
- the purchaser may demand a price reduction on the basis of the agreed price, the commercial value and the defects;
- in the case of fungible goods, the consumer may also demand replacement of the product by another, non-defective, one. This solution may also be proposed by the vendor and the purchaser cannot turn it down unless it is clearly not in his interest.

These provisions do not always specify which parties are entitled to choose between the various remedies. The vendor may propose repudiation of the contract or replacement of the product to the purchaser, who forfeits his right if he does not respond within a certain period. Moreover, even if the purchaser wants to back out of the contract, the courts may rule that only a reduction in price is justified;

- the Civil Code does not make allowance for repair of the product, but before the Consumer Protection Act the courts had always considered that the vendor was entitled to propose such a solution to the purchaser. This approach was implicitly confirmed by Act 91/1961 which, in enumerating the consumer's rights, commences with the case in which the vendor refuses or holds up the repair without reason and which provides in this event that the consumer may demand replacement of the product or repudiation of the contract, provided the product's defect prevents it from being used normally.

The purchaser may also demand compensation for other damages when the vendor was aware of the defect at the time of sale or the time of transfer of risks, and did not inform the purchaser, when the defect is due to the vendor's negligence or when the defect emerged after conclusion of the contract but before delivery and was the vendor's fault.

Ireland: the same approach has been adopted as in British law. Thus, a distinction is made between:

- the right to repudiate the contract. However, the purchaser loses his right to back out of the contract when he is held to have accepted the product in accordance with the provisions of the SGSSA concerning acceptance, which are similar to those in the United Kingdom (see below). This implies notably that the right to repudiate the contract can only be invoked within a brief period after delivery of the goods;

- when the purchaser has lost his right to repudiate the contract, or has decided not to invoke it, he may obtain compensation for damages which are directly linked to the defect. In reality this often means a reduction in price, because damages are calculated on the basis of the difference between the price of the product with the defect and the price of the product without the defect;
- however, when the purchaser is a consumer, he may request the vendor, within a brief period after discovering the defect, to have the good repaired or replaced. If the vendor refuses or does not manage to repair the merchandise within a reasonable period, the consumer then reacquires the right to repudiate the contract (or he may have the repair done at the vendor's expense).

The purchaser may also sue for incidental damages when he has incurred other losses.

Italy: under the Civil Code, the purchaser may choose between:

- repudiation of the contract, with reimbursement of the price, accompanied where relevant by reimbursement of the costs connected with the sale and
- reduction in price.

When the purchaser's action on a guarantee is based on a quality defect (Article 1497) he has only the right to repudiate the contract.

Moreover the vendor must pay damages to the purchaser when he cannot prove that he was unaware of the latent defect and that no fault can be imputed to him. As regards quality defects, the general rules concerning liability with fault are applicable.

Luxembourg: remedies are similar to those in Belgian law. Hence, the Civil Code provides for:

- repudiation of the contract and reimbursement of the price, including expenses incurred in connection with the sale;
- keeping the merchandise but with a price reduction.

Under the Civil Code it is up to the purchaser to chose the remedy. However, certain courts consider that the contract can only be repudiated if the product defect is particularly serious, as determined by the judge.

Under the legal guarantee the purchaser does not have a right either to repair or replacement of the defective product. Likewise, he may reject any such proposal from the vendor.

In 1987 Luxembourg codified case law relating to the payment of damages by the vendor. The amended Civil Code now provides that when the vendor is a manufacturer or a person selling by way of trade, he is liable for all damages incurred by the purchaser. Thus it is not enough to claim ignorance of the defect.

Netherlands: the new Civil Code offers the following remedies in the context of the legal guarantee:

- the vendor may demand repair of the product, unless such a repair is unreasonable; moreover if the vendor refuses, the consumer may instruct a third party to carry out the repair and demand reimbursement;
- the consumer may also demand replacement of the product unless the defect is too trivial to justify this measure (e.g. a very simple repair).

However, in sales to consumers, the vendor may choose between replacement and reimbursement: if the purchaser demands repair, the vendor may suggest replacement or reimbursement; if the purchaser demands replacement, the vendor may propose reimbursement.
Moreover, in accordance with the general rules governing the performance of contracts:

- when the defect is significant, the purchaser may demand reimbursement of the price and repudiation of the contract, accompanied where relevant by compensation for other damages. However, he must give the vendor the opportunity to eliminate the defect;
- the purchaser may in such circumstances also request a reduction in price.

Compensation may also be obtained on the basis of the general rules of contract law, when the purchaser suffers damages due to a product defect.

Portugal: the rules on guarantees against hidden defects are as follows:

- repair or, for fungible merchandise, replacement of the product (if necessary), unless the vendor was unaware of the defect through no fault of his own;
- repudiation of the contract or reduction in price, in accordance with the conditions applicable to error or deception, i.e. if the vendor was or should have been aware that the condition in respect of which he erred was an essential one in the purchaser's mind. As regards price reduction, it is not clear whether the vendor may refuse such a reduction by proving that he would not have sold at a lower price, this proof thus fully annulling the contract. However it is clear that the vendor may refuse to cancel the contract if he proves that the error was not of an essential nature, such a proof involving a price reduction (whenever the consumer would have in such case purchased the good at a lower price).
- where relevant, damages for injury incurred by the purchaser whenever the vendor has been at fault.

United Kingdom:

- the purchaser has the right to repudiate the contract. However, the purchaser forfeits this right when he is considered as having accepted the product in accordance with the provisions on acceptance in the SGA - i.e. when he has expressly declared his acceptance (e.g. by signing a receipt at the time of delivery), whenever he acts in a manner incompatible with the merchandise's being the vendor's property (this may include accepting an attempt to repair the merchandise), or when a certain time limit has expired after delivery of the merchandise. In practice this condition excludes repudiation of the contract for latent defects which do not crop up until some weeks or months after delivery.

- when the purchaser has forfeited his right to repudiate the contract or has decided not to invoke it, he may demand damages which are directly linked to the defect. In reality this often amounts to a reduction in price, because compensation will be calculated by taking into consideration the difference between the price of the product with the defect and the price of the product without the defect.

British law makes no arrangement for replacement or repair of products[31]. Damages may be awarded in addition to repudiation of the contract, when the purchaser has incurred other losses.

Conclusions:

- All Member States recognise the purchaser's right to demand repudiation of the contract or a reduction in price, although the conditions for exercising this right may vary;
- Recent legislation tends to be pragmatic, emphasising the purchaser's right to have the merchandise repaired. This right is enshrined in Denmark, Spain, Greece, Ireland, the Netherlands and also in Portugal. Note also that in the first four countries the purchaser has alternative remedies in the event of unsatisfactory or tardy repair. However in Portugal the right to repair does not apply if the vendor through no fault of his own was unaware of the defect;
- Replacement of the product by a non-defective product is explicitly provided for only in seven Member States - Germany, Denmark, Spain, Greece, Ireland, the Netherlands and Portugal.
- Only rarely may the purchaser choose between the different options. On the other hand in certain Member States the conditions for invoking the various remedies are so hedged in that in practice they exclude any real choice, while some courts have held that the purchaser may not abuse his right by demanding repudiation of the contract for defects which are not sufficiently serious.
- All the Member States confer on the purchaser the right to sue for damages, in principle in circumstances involving negligence or faulty behaviour on the vendor's part (misleading information, awareness of the defect). However, in Ireland and the United Kingdom, damages may always be claimed if the purchaser has suffered losses, even if there was no negligence on the vendor's part. It is interesting to note that in Germany and Denmark, express provision is made for damages when the product does not have the qualities promised by the vendor;
- Certain Member States have made it easier to claim damages by construing a presumption of awareness of the defect, and hence bad faith, on the part of persons selling by way of trade: this applies to Luxembourg statute law and to case law in Belgium, France and Italy.

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[31] In this respect, it is interesting to note that the United Kingdom has expressed reservations concerning Article 46 of the Vienna Convention on contracts for the international sale of goods of 1980 which concerns the right to compensation in kind.

6. GUARANTEE PERIODS AND TIME LIMITS FOR ACTION

When a purchaser wishes to invoke the guarantee against product defects, his main problem, independently of proving the defect (see below, section 7) is that of respecting the time limit for action. Although theoretically a distinction should be made between the guarantee period (substantive period) and time limit for action (procedural period), no national legislation clearly differentiates between the two. The national laws confine themselves to laying down the period within which the guarantee may be invoked. It is also essential to determine whether the period begins to run on conclusion of the contract, delivery of the product or discovery of the defect.

Germany: the Civil Code stipulates a very strict guarantee period:

- normally the purchaser has only six months at his disposal from the date of delivery to invoke the legal guarantee against the vendor.

Moreover, the guarantee period is not suspended by notification of the defect to the vendor. In order to retain his rights the German consumer must institute proceedings.

This system, similar to that of other Member States, fuses the guarantee period and the period for bringing an action: within six months, latent defects are grounds for remedy; after this period, no remedy is available, even if the defect was discovered during this period.

Whenever the vendor inspects or repairs the defect invoked during the legal guarantee period, the purchaser is however granted a supplementary period equivalent to the duration of the repair.

Belgium: the Civil Code says nothing about the guarantee period. In practice, since the purchaser must establish that the defect existed at the moment of sale, proof becomes progressively more difficult with the lapse of time.

Moreover, the Code stipulates that any action by the purchaser on the basis of the guarantee against latent defects must be brought within a brief period. The notion of brief period is defined on a case-by-case basis, depending on regional custom. In accordance with case law, the time limit for action starts with discovery of the defect and not with delivery of the product.

Denmark: the purchaser must notify the vendor of the defect within a reasonable period after discovery. However, the SGA limits the time limit for action to one year after delivery. This period may be extended when the vendor has expressly or implicitly guaranteed the product for a longer period.There does not have to be a full-fledged "commercial guarantee"; promises made by the vendor are enough. Moreover, the period of one year is not applicable if the vendor's conduct is contrary to the principles of "honest behaviour".

Spain: the purchaser must bring actions based on contractual liability and provided for in the Civil Code within six months of delivery. But the status which the GAPCU accords to the legal guarantee provided by the vendor and the other participants in the distribution

chain is not clear and so it is difficult to determine the time limit for action in the framework of this Act.

France: no guarantee period is ordained by law, but the purchaser must act within a brief period. In French law, as in German law, the courts have held that definition of this notion depends on the case in point. For the French courts, this period begins to run the moment the defect is discovered or from the day of the expert report revealing the existence of the defect.

Greece: the Civil Code has no provisions relating to the guarantee period, but as in Germany gives the purchaser six months from the date of delivery to bring an action in law against the vendor. The Civil Code itself specifies that any contractual term which reduces the period for bringing an action as set out in its provisions is invalid. Act 1961/91 requires that the vendor's mandatory written guarantee must be valid for a reasonable period.

Ireland: Common law is similar to British law; depending on the circumstances, the purchaser has up to six years from conclusion of the contract to invoke the legal guarantee. However, the specific right to repudiate the contract may only be invoked within a brief period after delivery of the product under the rules relating to acceptance.

Italy: no guarantee period is ordained, but the Civil Code stipulates that actions may be brought in respect of latent defects within a maximum of one year after delivery of the merchandise. Moreover, the purchaser, on pain of forfeiting his rights, must notify the vendor within eight days of discovery of any defect in respect of which he intends to invoke the guarantee against latent defects or quality defects.

Luxembourg: Since the 1987 Act, the procedure has been as follows:

- the purchaser, on pain of forfeiting his rights, must notify the vendor of the defect within a brief period starting from the moment he discovered or should have discovered the defect;
- the period for bringing an action is one year after notification, except in the case of fraud on the vendor's part. However, the clock stops during all negotiations between the vendor and the seller, and in the event of legal proceedings.
- A new period of one year starts running the moment the vendor notifies the purchaser, by registered letter, that he has broken off negotiations or when the purchaser is informed that legal proceedings have begun;
- after one year has elapsed, the purchaser may no longer invoke the defect other than in exceptional cases when he has withheld payment, and provided he has regularly notified the defect within a brief period, demanding instead a reduction in price or compensation for damages.

Netherlands: the new Civil Code specifies that the purchaser must, on pain of forfeiting of rights, inform the vendor within a reasonable period after the moment he discovered or should have discovered the defect. According to Netherlands law, this is a matter for empirical, case-by-case analysis. The time limit for legal proceedings is two years after notifying the vendor.

Portugal: the procedure is as follows

- the purchaser must, on pain of forfeiting his rights, inform the vendor within 30 days of discovering the defect or at the latest within six months of delivery of the product;
- legal proceedings must be instituted within six months of this declaration.

United Kingdom: under common law, actions based on contractual liability may be brought within six years of conclusion of the contract. However, this concerns only claims for damages, because in practice the action to repudiate the contract may be brought only within a brief period after delivery of the merchandise, under the rules relating to acceptance.
The reform proposals in the DTI discussion paper also tend towards establishing a "long term to reject".

The solutions chosen by the Member States are complex:

- it is difficult to establish a clear distinction in practice between the guarantee period and the period for bringing an action as stipulated in the legislation of the Member States;

- several Member States refer to one type of period only - Germany, Belgium, Spain, France, Greece, Ireland and the United Kingdom. This period is sometimes specified (six months, one year, six years) and sometimes left to the judge's discretion (short period). Sometimes the period starts to run on delivery on the merchandise or conclusion of the contract, sometimes on discovery of the defect.

- Other Member States provide for combined periods - Denmark, Italy, Luxembourg, the Netherlands. This combination does not correspond to the distinction between the guarantee period and the time limit for action and relates rather to a double provision concerning the time limit for action: firstly, the time limit for notifying the vendor and secondly the time limit for instituting legal proceedings.

- The length of certain periods or their vagueness must be set against the difficulties of proof incumbent on the purchaser. These difficulties grow with time, since the legal guarantee can only be invoked for defects existing at the time of sale or maybe delivery;

- However, there are also specific national provisions concerning deception or bad faith on the vendor's part, which may considerably lengthen the period during which the purchaser may bring an action.

As regards the guarantee period (substantive period) the situation in practice is as follows: Belgium, France, Luxembourg and the Netherlands do not specify any time limit; Ireland and the United Kingdom have a time limit of six months from the date of sale; Denmark and Italy have a time limit of one year from delivery; the limit is six months in the case of Germany, Spain, Greece and Portugal.

7. RULES CONCERNING THE BURDEN OF PROOF

The question of the burden of proof is an important one, since it is the litmus test for pinpointing real progress in consumer protection. In the following sections we survey legal trends concerning the burden of proof in the domain of the legal guarantee.

Germany: the burden of proof lies with the purchaser:

- in order to invoke a remedy he must prove that the defect existed at the time of sale;
- in order to invoke his right to repudiate the contract in the presence of contractual terms providing for repair, he must prove that the attempt to repair or replace the product was unsatisfactory.

Belgium: the purchaser must prove the existence of a defect adversely affecting the use of the product.
As regards the other conditions for invoking the legal guarantee (use known to the vendor, serious defect, latent defect, defect present at the moment of sale), the courts have shifted much of burden of the proof to the vendor.

Denmark: the purchaser must in principle prove:

- that the defect existed at the time of sale. However, in dealings with consumers the clear presence of a defect at the time of the complaint creates a rebuttable presumption that the defect existed prior to sale.

Spain: under Civil Code the purchaser must in principle prove any claims relating to the legal guarantee.

France: the courts have lightened the burden of proof incumbent on the purchaser. The purchaser must prove the existence of a latent defect which has affected normal use of the product.

Proof of existence of the defect at the time of sale is easier when the cause of the defect is unknown: in such cases it is presumed that the defect existed prior to sale. On the other hand, it does not matter whether the vendor was aware of the defect or not. The vendor cannot invoke legitimate ignorance in that French case law, as we have seen, posits an irrebuttable presumption of knowledge of the defect on the part of the person selling by way of trade.

Greece: the common law on proof applies - specifically, the purchaser must prove that the defect existed prior to sale and that it reduces the value of the product.

Ireland: it is up to the complainant to substantiate his claims. He must thus prove that the product was not of merchantable quality at the time of sale.

Italy: here also the purchaser must the prove the defect and show that the various characteristics entitling him to invoke the guarantee are in fact present. However, the vendor's knowledge of the defect is presumed.

Luxembourg: common law rules concerning proof have been considerably altered to benefit the purchaser/consumer and are similar to those in Belgian case law.

Netherlands: the common law on proof applies to purchasers who invoke the legal guarantee. Hence the purchaser must prove in particular that the product did not conform with the contract at the time of sale and that he duly notified the vendor within a reasonable period. However, recent case law seems to shift this burden of proof, depending on the circumstances, by requiring that the vendor prove product conformity at the time of sale.

Portugal: common law applies and hence the consumer must prove that the defect existed before the sale. However is up to the vendor to prove that the conditions necessary for applying the rules relating to error or deception are not present. Likewise it is up to the vendor to prove, where relevant, no-fault ignorance of the defect.

United Kingdom: it is up to the complainant to substantiate his claims. The courts have not designed rules of evidence which are more favourable for the consumer. Hence he must prove that the "implicit term" of "merchantable quality" has been infringed, i.e. that the good did not have merchantable quality at the moment of sale.

B. THE COMMERCIAL GUARANTEE

Germany: there is no specific legal provision relating to the commercial guarantee. However, the Supreme Court has enunciated certain important principles with an eye to consumer protection:

- when the guarantee is provided by the vendor, he must clearly inform the consumer that the commercial guarantee supplements the legal guarantee to which the purchaser is entitled;
- the existence of a commercial guarantee is interpreted as covering not only defects existing at the moment of sale but also product durability;
- when the guarantee is provided by the manufacturer, he is not bound, as is the vendor, by the AGB, and may in principle limit the remedies open to the consumer. However the Supreme Court considers that insofar as the manufacturer's guarantee may mislead the consumer as to the remedies he may invoke against the vendor and hence discourage him from relying on his rights, such limitation constitutes an infringement of the general rule contained in the AGB (general definition of "unfair term"), which creates a kind of transparency rule;
- a new trend in case law seems to have emerged in 1991, when the Supreme Court undertook to investigate the actual content of the guarantees provided by the manufacturer, on the basis of the AGB's general rule.

Belgium: a framework agreement concluded between the Minister for Economic Affairs and certain professional groups in the car trade contains specific standards relating to the commercial guarantee which the professionals undertake to include in their order forms.

However, there are no specific legal provisions regulating commercial guarantees.

Denmark: there are several regulatory or quasi-regulatory provisions which refer to the commercial guarantee. Hence:

- Section 80, subsection 1(4) of the SGA concerns the vendor's liability when the product does not have the guaranteed qualities and Section 83 concerns extension of the time limit for bringing an action in the case of a commercial guarantee providing for a longer time limit;
- Article 4 of the 1975 Marketing Practices Act contains an interpretation of the term "guarantee": use of this term or a similar expression is prohibited unless the beneficiary's legal position is rendered more favourable than that accorded at common law. This provision applies both to guarantees issued by vendors and manufacturers.
- in 1978 the consumers' ombudsman drew up recommendations on the use of the term "guarantee" and its content. These recommendations were amended in 1987. Although not binding, they are considered as points of reference for defining fair commercial practice. Since commercial practices contrary to good custom are prohibited, these recommendations have a "quasi-regulatory" status. They provide that:
  - a guarantee cannot limit the purchaser's rights in any circumstances (a trade-off between good and bad terms is prohibited);
  - the word guarantee may only be used for new products if the guarantee period is considerably longer than one year;
  - a shorter period is acceptable for second-hand products, provided it is clearly established that actions at common law may always be brought within a year;
  - the information which advertising must contain: duration, specific limits, etc.;
  - an identical guarantee must be provided for parts that are repaired or replaced under the commercial guarantee furnished by the professional;
  - the guarantee must be transferable to third parties (subsequent purchasers, donors, users);
  - the guarantee must be drawn up in Danish and must clearly state that the consumer's rights under the legal guarantee are not affected. Other mandatory information concerns the scope, identity of the guarantor, guarantee period, beginning of guarantee (i.e. at the moment of delivery), and the procedures for invoking the guarantee;
  - repair during the guarantee period is free of charge. However, limitations on the guarantee concerning spare parts, as well as travelling and labour costs, are valid after the legal guarantee period has elapsed.

The Danish law provides that in the case of the commercial guarantee, and by way of derogation from common law, the consumer must prove only the absence of the quality promised, it being up to the guarantor to prove that this defect was not present at the time of sale. By corollary, even if the commercial guarantee does not specify a guarantee period, it is generally interpreted as a guarantee of durability and good working order over the normal life of the product.

Spain: the GAPCU stipulates that a commercial guarantee must be provided in the case of durable goods, by the manufacturer or the vendor. The guarantee must be issued in writing and must specify the item guaranteed, the name of the guarantor, the beneficiary, the beneficiary's rights and the duration of the guarantee. The minimum guarantee period is mandated in certain sectors by specific legislation: three months or 2000 km for motor cars and three months for electrical household appliances.

During the guarantee period the beneficiary is entitled to the following services at least:

- repair of the products completely free of charge, as well as compensation for damages caused by defects;
- in the event of unsatisfactory repair, the beneficiary may choose between having the product replaced and reimbursement of the price.

France: in recent years two statutes have been adopted enhancing consumer protection in the domain of the commercial guarantee and supplementing the protection afforded by the Decree of 24 March 1978; this decree provides that the vendor who offers a contractual guarantee must clearly mention that the legal guarantee is also valid (the content of the legal guarantee does not have to be specified).

The two new initiatives are:

- the Decree of 22 December 1987, which mandates the NFX 5002 standard for guarantees for electrical household appliances and audio-video equipment;
- more ambitiously, the Act of 18 January 1992 strengthening consumer protection, which stipulates that for consumers the duration of the guarantee is extended for any period during which the good cannot be used for a period of seven days at least.

Greece: Article 33 of the Consumer Protection Act establishes a mandatory commercial guarantee (provided by the vendor). It stipulates:

- an obligation on the vendor to provide a commercial guarantee for new consumer durables;
- an obligation to include on the guarantee form the name and business address of the vendor and beneficiary of the guarantee, as well as indicating the product in question, the content of the guarantee and its duration, which must be reasonable.

If during this guarantee period a defect appears which prevents normal use of the product, the consumer may require that it be repaired. If the vendor refuses to repair the product or delays performance of the repair, the consumer may demand replacement of the product or repudiation of the contract of sale.

These provisions concern only the vendor's commercial guarantee, to the exclusion of the manufacturer's guarantee, which is covered by the common law on contracts.

Ireland: the SGA contains detailed provisions on commercial guarantees. These are defined as any document supplied in connection with the sale of products and indicating that the manufacturer or other supplier will service, repair or otherwise deal with the

goods following purchase. The guarantee provided by the vendor himself (the retailer's commercial guarantee) is not included in this definition. The content of the commercial guarantee must satisfy certain conditions. Hence the guarantee:

- must be clearly legible and refer only to specific goods or to one category of goods;
- clearly state the name and address of the guarantor;
- clearly state the duration of the guarantee from the date of purchase; however different periods may be stated for different components of any goods;
- state the procedure for presenting a claim; this procedure must not be more difficult than ordinary or normal commercial procedures;
- state clearly the precise extent of the guarantor's obligations, and what charges must be met by the buyer.

The protection afforded to the purchaser in the context of the commercial guarantee is mandatory; there are even penalties for infringement. Moreover the commercial guarantee cannot exclude or limit the rights of the buyer at common law or impose additional obligations. Any provision which purports to make the guarantor the sole authority to decide whether goods are defective is void. Moreover the vendor who delivers a guarantee issued by a third party (normally the manufacturer) is liable to the buyer as if he were the guarantor, unless he expressly indicates the contrary at the time of delivery. When the vendor gives a separate guarantee this is considered as indicating the contrary. As regards the guarantor's liability (normally the manufacturer or importer), Irish legislation clearly stipulates that the guarantor is liable to the purchaser as though he himself had sold the goods to the latter (contractual liability).
Any subsequent owner of the good during the guarantee period benefits from the guarantee and may present a claim to the guarantor.

Italy: the Civil Code itself provides for a guarantee of good functioning, applicable only to sales of movables and only if the vendor has voluntary guaranteed that the merchandise will work for a certain period, or if this guarantee is imposed by custom. However, the protection afforded by the Civil Code is not mandatory. The guarantee may be invoked by the purchaser under the following conditions:

- only "defects" which it was impossible to identify at the moment of purchase are covered;
- the guarantee period must be stipulated in the contract, otherwise the guarantee is void;
- the purchaser must prove only the bad functioning of the product as well as the existence of a guarantee of good functioning;
- by contrast, the vendor is not bound by the guarantee if he proves that the bad functioning depends on a cause which materialised after the contract or is the result of abnormal use by the purchaser;
- on pain of forfeiting his rights, the purchaser must notify the vendor of the defect within 30 days of discovering it; the time limit for bringing an action is 6 months from the date of discovery;
- the purchaser may choose between replacement of the good and its repair;
- the vendor, under the terms of the Civil Code itself, may not repudiate liability for damages.

Hence the specific rules on the commercial guarantee in Italy concern only the relations between vendor and purchaser. All other guarantees offered on the market are governed by common law.

Luxembourg: the law does not contain specific provisions as to the content of the commercial guarantee. However, the 1983 Consumer Protection Act specifies that:

- any advertising concerning product guarantees, even if made by a manufacturer or distributor farther up in the distribution chain, is an integral part of the contract of sale;
- when the guarantee is not in conformity with the advertising, the consumer may demand rejection of the contract or a reduction in price.

Netherlands: a distinction must be made between:

- the commercial guarantee offered by the vendor. This guarantee may not limit the consumer's rights under the legal guarantee;
- the commercial guarantee offered by the manufacturer: since the manufacturer is not bound by the legal guarantee, he may limit his obligations, save where the general provisions on unfair terms apply. Given that this legislation is of very recent date, it is difficult to foresee whether its application to the manufacturer's commercial guarantee will run into difficulties similar to those encountered in German law.

Moreover, the provisions in Netherlands law relating to misleading advertising expressly prohibit misleading advertising relating to the scope, content or duration of the guarantee.

The business community's code of good practice in advertising ("Nederlandse Reclame Code") contains specific provisions on advertising relating to commercial guarantees. The committee responsible for implementing the code (Reclame Code Commissie) published a recommendation in 1976 fleshing out the general rules. According to this recommendation:

- the guarantees offered must give the consumer more rights than those he already enjoys under the legal guarantee;

- any limitation in the guarantee offered must be specified in the advertising. Advertising which simply mentions the existence of a guarantee, without going into details, must be interpreted as a "total guarantee" without any restriction (i.e. applying to all components and properties of the product);

- use of the term "guarantee" means that concrete means must be provided to remedy possible defects in the product;

- the guarantee period must be specified in the advertising.

Portugal: the Civil Code regulates the guarantee of good functioning of the merchandise sold, defined as a conventional guarantee relating to the good's fitness, during a limited

period, for the use for which it has been designed. This guarantee exists when it is provided by the vendor or requested by the users. The following rules apply:

- the guarantee is valid for a limited period; except where otherwise stated, the guarantee expires six months after delivery, unless custom has established a longer period;
- the purchaser must notify the vendor of the defect, in principle within 30 days of discovering it (except where otherwise stipulated);
- the action on a guarantee must be brought within six months of notification of the defect by the purchaser;
- the purchaser must prove the bad functioning of the product during the guarantee period; the vendor cannot repudiate liability except by proving that the defect occurred after delivery or that it was caused by the purchaser or a third party;
- the guarantee of good functioning entitles the purchaser to repair or replacement of the good; however, if the vendor has on several occasions unsuccessfully attempted repair, the purchaser may require that it be replaced.

The guarantee of good functioning is considered as supplementary to the legal guarantee, except where the contract states otherwise (insofar as such terms are permitted under the Civil Code or the legislation on unfair terms).

United Kingdom: the commercial guarantee offered by the producer may in no way limit the consumer's entitlements under the legal guarantee. All documents providing a commercial guarantee must, with penalties for non-compliance, specify that the rights accruing to the consumer under the legal guarantee are in no way restricted, or a fortiori superseded by virtue of the commercial guarantee.

It should also be noted that in parallel with the evolution of the law on legal guarantees (cf. Section 1), there is growing pressure for reform concerning the issue of commercial guarantees based on the aforementioned discussion paper published by the DTI in 1992. Moreover, a 1986 report by the Office of Fair Trading and a discussion paper issued by the National Consumer Council in 1989 emphasised the specific need for protection of consumers in relation to commercial guarantees, particularly in the domain of durable goods and, notably, cars.

Hence commercial guarantees are the subject of several - as yet timid - legislative initiatives in the Member States. These texts are mainly designed to;

- ensure correct information of the consumer about the guarantees offered and prevent misleading information;
- ensure that the consumer knows about the existence of a legal guarantee and the mandatory nature thereof;
- afford the consumer specific protection in respect of durable goods;
- establish certain legal groundrules, framing and regulating the commercial guarantees and, notably, requiring that certain minimum information be provided in the guarantee documents.

C. AFTER-SALES SERVICES

The question of the consumer's right to the legal guarantee is closely linked to the availability of after-sales services (provisions of spare parts, maintenance, etc.). Such services may also be considered as a intrinsic to of the product - a product for which after-sales service is poor or non-existent cannot be used in line with the purchaser's legitimate expectations and may thus be considered defective under the terms of the legal guarantee.

Another question is whether the national legal systems recognise the consumer's right to require durability in regard to certain types of product: the fact that certain consumer durables may not function properly after a lapse of time which is less than their "durability expectation" may be considered as a defect.

Germany: there is no statutory obligation to provide after-sales service. However, in the motor vehicle sector, the courts - reasoning from the principle of good faith in the conclusion of contracts - have construed an obligation to provide spare parts. Moreover, the very short period at the consumer's disposal under the terms of the legal guarantee may under no circumstances overrule durability requirements.

Belgium: there is no legal obligation on the vendor to provide after-sales service or guarantee the product's durability. However, since there is no time limit for the guarantee, the consumer may argue that the absence of durability constitutes a defect from the point of view of conformity with expectations.

Denmark: In practice the legal guarantee may be invoked if it turns out that at the time the contract was concluded there was no after-sales service for the durable in question. If the impossibility of providing after-sales service emerges after conclusion of the contract, the consumer must invoke the general rules of contract law to demand repudiation of the sale. Moreover, even if there is no legal durability requirement, in practice the courts recognise that absence of durability may constitute a defect (however, the one-year period for bringing an action on a guarantee acts as a damper in this regard).

Spain: the GAPCU provides that the consumer has the right to adequate after-sales services for durable goods. Moreover, the law provides that for each type of product, the availability of spare parts must be guaranteed for a specific period. However, these provisions are framework rules which have to be fleshed out by regulations. Hence for example there is a Royal Decree on household appliances, which stipulates that spare parts must be available for a seven-year period, or for five years if the price of the appliance is less than 10 000 pesetas.

Spanish law contains provisions relating to information of the consumer as to the price of spare parts and protects the purchaser against over pricing of spare parts, labour costs and travel expenses in connection with repairs.

France: there are no statutory provisions mandating vendors to provide after-sales service. However, pursuant to Decree No 87-1045 of 22 December 1987 vendors of electrical household appliances and electronic goods must present after-sales service contracts in accordance with a standard model specifying the servicing conditions. Similarly, there is no express durability requirement. However, since the period for bringing an action is not specified, the consumer can argue that lack of durability constitutes a product defect.

The Act of 18 January 1992 also requires the vendor to provide information as to the existence of spare parts and the duration of availability of these parts. However, this information requirement does not mean that the professional must actually provide such parts himself.

Greece: the 1991 Act mandates vendors of durable goods to provide after-sales service for a reasonable period, depending on the customary lifespan of the product. Similarly, availability of spare parts or accessories must be assured. The Act specifies that the Minister may define periods for categories or types of products.

Ireland: the SGSSA mandates after-sales service and availability of spare parts for a reasonable period, which may be determined by the Ministry of Industry after consultations with the parties concerned. Moreover, any promise made by the vendor concerning the availability of spare parts or after-sales service is binding on him. Indeed, the very notion of merchantable quality includes, as we have seen, reference to the product's durability: a good is considered defective when it is not as durable as one might expect taking into account the description made of the product, its price and any other relevant information.

Italy: no statutory provision is made for after-sales services and there is no durability requirement. However, when such qualities are promised by the vendor, their absence entitles the consumer to present a claim.

Luxembourg: the system is the same as in Belgium and France. There are no statutory provisions concerning after-sales services or durability requirements, but the broad interpretation of the notion of defect in combination with the absence of a legal guarantee period enables the consumer to invoke the right to after-sales service and/or a durability requirement in certain circumstances.

Moreover, the Act of 25 August 1983 strengthens consumer protection by imposing certain information requirements in regard to the provision of after-sales services.

Netherlands: although there is no specific provision governing after-sales service and product durability in the new Civil Code, the obligation of product conformity provides some leverage, for example regarding the availability of spare parts. Other aspects, such as maintenance, are not however covered by the obligation of conformity.

Portugal: the Consumer Protection Act makes it incumbent on suppliers of durable consumer goods to provide satisfactory after-sales service, comprising the supply of spare parts over the average lifespan of these products.

United Kingdom: the statutory provisions do not deal with the question of after-sales service or product durability. However, after-sales service is dealt with in rules laid down in codes of conduct established by the industries concerned, while product durability has been considered by the courts as inherent to the notion of merchantable quality: a product is not of merchantable quality unless it is reasonably durable. The definition of the reasonableness is open to interpretation on a case by case basis. Replacement of the notion of "merchantable quality" by that of "satisfactory quality" as proposed in the OFT's discussion paper is designed to cover more clearly the durability requirement.

IV -SITUATION AT THE LEVEL OF COMMUNITY LAW

While there is no Community instrument specifically devoted to the product guarantees and after-sales services, one should not overlook the contribution of other Community instruments to the development of a Community system relating to guarantees.

A.THE LEGAL GUARANTEE

1. DIRECTIVE 85/374/EEC CONCERNING LIABILITY FOR DEFECTIVE PRODUCTS[32]

This Directive is closely linked to the law on guarantees, because questions relating to product liability often overlap with the question of guarantees. Hence this Directive may also apply to circumstances in which the conditions for invoking the law on guarantees are also present. However, the criteria for applying the Directive differ conceptually from those that trigger application of the law on guarantees.

Firstly, in accordance with Directive 85/374/EEC, "a product is defective when it does not provide the safety which a person is entitled to expect...". The notion of defective product contained in this Directive must be distinguished from that of defective product contained in national laws relating to guarantees against latent defects, which concern the notion of conformity with the use for which the product was intended and not an assessment of the product's safety. Secondly, Directive 83/374/EEC establishes a scheme of non-contractual liability, as opposed to liability arising from the legal guarantee, which is a contractual. Thirdly, apart from damages caused by death or bodily injury, Directive 85/374/EEC concerns only damages caused to other consumer goods (above a limit of 500 ECU), to the exclusion of compensation or repair of damages to the defective product itself. Hence, any right to compensation for the deterioration or destruction of the defective good itself is outside the ambit of the Directive.

When the proposal for a directive concerning product liability was first presented[33], the Commission considered at length the question of the legal guarantee relating to goods. It is interesting to quote here an extract from the explanatory memorandum that accompanied this proposal: "Liability in respect of the quality of a newly-purchased article, its fitness for particular purposes, including its freedom from defects in the sense that it will not be damaged or destroyed in its entirety as a result of defects in part of it, is normally governed in the laws of all the Member States by the law relating to the sale of goods. This field is not affected by the directive. If for reasons connected with the

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32 OJ No L 210 of 7 August 1985.

33 COM(76) 372 final of 23 July 1976. OJ No C 241 of 14 October 1976, p. 9.

protection of consumers the need arises to improve the legal position of the purchaser of a defective article vis-à-vis its seller or to improve his rights of action against the producer, this can be achieved under the legal systems of the Member States in which the need shows itself. In so far as it is necessary for the functioning of the common market, it could be achieved by approximating the law relating to standard form contracts." [34]

In response to these sentiments the Economic and Social Committee in its opinion on the Commission's proposal expressly requested that the Commission rapidly present a proposal for a Directive on guarantees and after-sales services.[35]

However, Directive 85/374/EEC does contain a provision that is directly relevant to the law on guarantees: Article 13 specifies that the Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when the Directive was notified. This is an important provision, because it raises doubt as to whether the product liability system in any way replaces the guarantee systems existing in the various Member States. In reality, the injured person could in certain circumstances choose between application of the Directive and the law on guarantees, which might in some cases be more favourable.

2. THE COUNCIL DIRECTIVE ON UNFAIR TERMS IN CONSUMER CONTRACTS[36]

Although this Directive does not directly entitle consumers to invoke guarantees, once transposed into national law, it may have a major impact on the development of a Community system of guarantee law; in effect, contractual terms designed to hedge in the guarantee provided to the consumer are often unfair. Moreover, this Directive contains an annex which lists examples of the types of terms which may be declared as being unfair. One of these (Article 1.b of the Annex) is any term which has the object or effect of "inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations ...". This provision also includes contractual terms which limit the legal guarantee to which consumers are entitled under the national provisions in force. Moreover, this resulted explicitly from the text of the amended proposal of the Commission.

However, the Directive as adopted by the Council contains fewer express references to the law of guarantees than were made in the Commission's two proposals, which contained the seed of a specifically Community approach to the law on guarantees.

In effect, the blacklist annexed to the initial proposal[37] contained a clause (c) which defined as unfair any contractual terms which have the object or effect of limiting consumer rights as provided for in the clause under consideration, and which were very

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34 Explanatory memorandum to the proposal for a directive, point 20, Bulletin of the European Communities, Supplement 11/76.

35 OJ No C 114 of 7 May 1979, point 2.8.1.

36 Council Directive No 13/93 of 5 April, 1993, OJ No L 95 of 21 April 1993, p. 29.

37 COM(90) 322 final of 3 September 1990, OJ No C 243, 28 September 1990, p. 2.

detailed: conformity requirement, guarantee in respect of latent defects, right to reimbursement, replacement, repair or price reduction, right to compensation.

The amended proposal for a Directive[38] shifted guarantee matters from the annex to Article 6. The notion of guarantee was also divorced from that of unfair term, since Article 6 mandated the Member States to take positive action to guarantee certain rights relating to the consumer. The original text of Article 6 was as follows:

"1. The Member States shall take the necessary measures in order to ensure that the consumer is guaranteed, as purchaser under a contract for the sale of goods, the right to receive goods which are in conformity with the contract and are fit for the purpose for which they were sold, and to complain, within an appropriately extensive period, about any intrinsic defects which the goods may contain.

2. For the purpose of exercising these rights, the Member States shall take the necessary measures in order to ensure that the consumer is guaranteed the choice of the following available options:

- the reimbursement of the whole of the purchase price,
- the replacement of the goods,
- the repair of the goods at the seller's expense,
- a reduction in the price if the consumer retains the goods,

and the right to compensation for damage sustained by him which arises out of the contract.

3. In cases where the seller transmits to the consumer the guarantee of the manufacturer of the goods, the Member States shall take the necessary measures in order to ensure that the consumer is guaranteed the right to benefit from the manufacturer's guarantee for a period of 12 months or for the normal life of the goods, where this is less than 12 months, and to enforce payments, either by the seller or by the manufacturer, of the costs incurred by the consumer in obtaining implementation of that guarantee.

4. The Member States shall take the necessary measures in order to ensure that the consumer is guaranteed, as purchaser under a contract for the supply of services, the right:

- to be supplied with those services at the agreed time and with all due efficiency,
- to have the supplier's warranty that the supplier has the requisite skill and expertise to supply the services in the manner specified in the foregoing indent[39]."

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38 COM(92) final of 4 March 1992, OJ No C 73 of 24 March 1992.

39 Moreover, the provision contained in 1.b of the annex still defined as unfair any terms which had the object or effect of "excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance of any of the contractual obligations, and in particular the rights described in Article 6 of this Directive".

This Article was discussed at the Council Working Party and a compromise proposal between the positions of the different delegations was even presented by the Presidency of the Council. However, discussions at this level showed that the Commission's approach was at once too limited and too ambitious. It was too limited because it foresaw only minimum harmonisation yet too ambitious because it pursued this objective in the framework of a Directive which was designed for a different purpose. Hence, as mentioned in Chapter I, the Council asked the Commission to treat these questions in a more specific and in-depth manner.

3. DIRECTIVE 84/450/EEC ON MISLEADING ADVERTISING[40]

This Directive may also have an impact on the law of guarantees. Advertising messages on guarantee conditions must not fall foul of the very general ban on advertising likely to deceive. The importance of the Directive on misleading advertising should not be overlooked since, as consumers have learned, information on guarantee conditions disseminated by advertising is often very incomplete and oversimplified. Moreover, the broad definition of advertising adopted by this Directive[41] should normally cover the guarantee documents themselves.

However, this Directive confines itself to stipulating the legal mechanisms which must be employed to prevent misleading advertising, without conferring other rights on private individuals, notably as regards compensation for damages resulting from the misleading nature of the advertising. Neither does this Directive establish the principle that the advertiser is bound by his advertising, as though it were a contract. Hence, it does not give a handle to the individual consumer who finds he cannot obtain the benefits of guarantee-related services lauded in the advertising.

4. THE CASE LAW OF THE COURT OF JUSTICE

On two occasions the European Court of Justice has ruled on national legislation relating to the legal guarantee. Both concern France. The first looks at the irrebuttable presumption of bad faith on the part of the person selling goods by way of trade, and the second the principle of the manufacturer's liability for a guarantee vis-à-vis the subsequent purchaser.

4..1 Alsthom v Sulzer[42]

French case law has established a presumption that manufacturers or persons selling goods by way of trade are aware of the defects of the good sold. According to this case

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40 OJ No L 250 of 19.9.1984, p. 17.

41 According to Article 2(1) advertising is defined as "the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations".

42 Judgment of 24 January 1991, case C-339/89, ECR 1991, p. 120.

law, clauses limiting liability are considered null and void unless they are incorporated in a contract between two undertakings operating in the same specialised field.

The question the Court had to answer concerned the fact that this case law is stricter than the rules in force in the other Member States and that this might pose a problem in regard to Community law, notably Articles 85(1) and 34 of the EEC Treaty.
The French Cour de Cassation had submitted a request for a preliminary ruling in the context of a dispute concerning the supply of ships fitted with defective engines by a French shipbuilding firm (Alsthom) and a Netherlands shipping company (HAT). The case is an exemplary one because the engines had been ordered by Alsthom from Sulzer, a French mechanical construction firm which, in turn, had passed the order on to a German subcontractor. This subcontractor, in respect of whom Sulzer eventually invoked the guarantee, opposed the purchaser's claim on the basis of a number of terms limiting his liability and admissible under German law; on the other hand, Alsthom could not rely on clauses of this kind vis-à-vis HAT. Hence the French firms were in a less favourable position than their foreign contractors.

The Court of Justice did not deny that French case law could lead to distortions of competition, but held that it was not in contravention of Community law.

The Court held that this case law had been developed with a view to protecting purchasers and did not encourage the conclusion of agreements contrary to Article 85 of the Treaty. As regards Article 84, which prohibits quantitative restrictions on exports and measures having an equivalent effect, the Court held that French case law applied without distinction to all commercial relations governed by French law and did not have as its specific object or effect the restriction of exports thereby by favouring domestic production or the domestic market. The Court also noted that the parties of international contracts of sale are generally free to determine the law applicable to their contractual relations can thus avoid being subject to French law.

Admittedly, this decision concerns a commercial dispute. However, from the consumer protection angle, it is important to note a priori that national provisions containing guarantee conditions which are more favourable to consumers cannot be considered as contrary to Community law. On the other hand this case highlights the disparity in national laws and how they affect firms' competitive positions.

4..2 Jakob Handtke v TMCS[43]

The Court of Justice was asked for a preliminary ruling on the interpretation of Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The question was what jurisdiction applied to the actions brought by the purchaser of a product against its manufacturer. Article 5(1) of the Convention provides that in contractual matters the defendant domiciled on the territory of a Member State may be called, in another Member State, before the Court of the place where the event giving rise to the damage occurred.

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[43] Judgment of 17 June 1992, case C-26/91, ECR 1992, p. 3967.

According to French case law, the manufacturer is jointly and separately liable together with the contractor for the legal guarantee of products vis-à-vis the final purchaser. This liability is contractual.

In the case in point concerning the sale of industrial equipment, the French purchaser brought an action for damages before the French courts both against the French vendor and the German manufacturer.

The Court interpreted the notion of "contractual matter" in an autonomous manner by referring mainly to the system and objectives of the Convention and held that the rule on special jurisdiction in Article 5(1) of the Convention did not apply to a dispute between a subsequent purchaser of an item and the manufacturer because such could not be foreseen by the latter and was therefore incompatible with the principle of legal certainty. The Court also held that the manufacturer has no contractual relationship with the subsequent purchaser and assumed no contractual obligation towards that purchaser of whose identity and domicile he could legitimately be unaware. The Court ruled that in most of the Member States that had signed the Convention the manufacturer's liability towards a subsequent purchaser for defects in the product sold was considered to be non-contractual. Consequently, the Court refused to extend application of Article 5(1) of the Convention to the relationship between the producer and the purchaser.

According to the Court the rules of special jurisdiction in the Convention, and in particular Article 5(1), must be interpreted restrictively because they deviate from the general principle in accordance with which a defendant may be required to appear in court only in his Member State of residence.

In its observations before the Court the Commission had taken a different position, by requesting the Court to interpret the direct action of the subsequent purchaser against the manufacturer as a contractual action insofar as this qualification might have the consequence of giving the same court jurisdiction as the one hearing the action brought by the vendor against the manufacturer.

The Court did not probe the relationship between Article 5(1) and Article 5(3) of the Brussels Convention, which provides, in actions relating to delict or quasi-delict, that the defendant may be required to appear before the courts of the place in which the harmful event occurred. Both the Advocate-General, the Commission and the German government drew the Court's attention to this latter point, but the Court did not reply to the question as to whether the direct action in respect of latent defects also came under the rules of jurisdiction set out in Article 5(3). It may be supposed that the answer would be yes because the notion of delictual liability is a residual one which includes all forms of non-contractual liability. However, the preliminary ruling did not discuss this point.

It is clear that the Court's assessment of the nature of the manufacturer's liability towards the subsequent purchaser of the product is confined to the application of the Brussels Convention and in no way impinges on the validity of the notification in French substantive law. However, this judgment is a good example of the problems posed by the diversity of national laws.[44]

[44] This does not however mean that the competent court should be that of the purchaser's domicile.

5. ASSESSMENT

The legislative arsenal of Community consumer policy is weak and incomplete. Certainly the initiatives we have described contribute somewhat to developing a Community framework for product guarantees, since in certain sectors they are helping to establish minimum protection for the consumer, and since they are designed to abolish certain contractual conditions which restrict the guarantee to which the consumer is entitled under the law. However, up to now no Community instrument relating to consumer policy has moved to the next stage, which is to regulate, via harmonisation, the actual substance of the law on guarantees, as provided for in national legislation. Moreover, it should be noted that despite the gaps existing in the domain of pre-contractual and contractual information of consumers with regard to guarantees, the Community initiatives which stipulate that the producer/vendor must provide certain information do not stipulate the inclusion of information on guarantee conditions.[45]

B. THE COMMERCIAL GUARANTEE

1. THE COUNCIL DIRECTIVE ON UNFAIR TERMS IN CONSUMER CONTRACTS

Article 6(3) of the Commission's amended proposal concerned the commercial guarantee and stipulated a minimum period for the manufacturer's guarantee. This was a first attempt to lay down legal rules at Community level concerning the commercial guarantee. As we have seen this proposal was not included in the final text of the Directive.

However, this does not mean that the Directive can no longer affect the conditions governing commercial guarantees. The guarantee, whether offered by the distributor or the manufacturer, cannot be seen as a present: it is part of a commercial strategy designed to boost sales and hence is included in the final price. The guarantee conditions may hence provoke "an imbalance between the rights and duties of the parties resulting from the contract, to the consumer's disadvantage". This would be the case if there were conditions which run counter to the very principle of a guarantee (unreasonable conditions for invoking or excluding the guarantee, for example) or which might be such as to mislead the consumer as to his rights.

Application of the legislation on unfair terms in the domain of commercial guarantees is however somewhat inconsistent and will often depend on what the national judges (or other competent authorities) think about:

In this connection see the conclusions of Advocate-General Jacob, point 31.

45 See the proposal for a Directive on contracts negotiated at a distance (distance selling), COM(92) 11 of 21 May 1992, OJ No C 156 of 23 June 1992, p. 14. This proposal stipulates that certain information must be provided before conclusion of the contract, or at the moment the contract is signed, but ignores the question of guarantees.

- the very question as to whether the guarantee should be considered as a free good, which cannot consequently be vetted as to the "conditions" under which it is granted;
- the distinction between guarantee conditions which may be considered as unfair and those which attempt to describe the guarantee, i.e. to define the "present" offered to the consumer[46];
- the existence of a genuine contract (and hence contractual terms) between the producer and the final consumer, in the case of guarantees offered by producers.

Moreover, it is well known that German case law is only now beginning timidly to affirm that the conditions of commercial guarantees offered by the manufacturer may fall under the AGB (the Act on general contractual conditions).

2. COMPETITION LAW

To date Community policy on producer guarantees has been based on the application of Article 85 of the Treaty of Rome prohibiting concerted practices which restrict competition[47].

In 1977, in its Seventh Report on competition policy, the Commission first defined its policy in this domain, stressing that the guarantee offered in the context of after-sales service by the manufacturers of durable consumer goods must be valid throughout the Community, irrespective of the Member State in which they were purchased.[48] In numerous dossiers on notified agreements, and in regulations on exemptions by category, the Commission has interpreted the conditions of fair share of the resulting benefit provided for in Article 85(3) of the EEC Treaty as imposing such a conclusion[49]. The Commission considers - and its point of view has been abundantly confirmed by the Court of Justice - that the terms by which a manufacturer commits himself vis-à-vis his distributors to refuse guarantees to clients of parallel importers are in principle contrary to Article 85(1) of the Treaty of Rome and that the undertakings in question may be subject to fines. The Commission has also on occasions warned producers that their distribution agreements may be declared incompatible with competition rules whenever

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46 Article 4(1) of the Directive provides that assessment of this unfairness shall not relate to the definition of the main subject-matter.

47 The building blocks of this policy include Commission Decision of 23/10/78 (Zanussi), OJ No L 322 of 16/11/78, p. 36, and Commission Decision of 10/12/84 (Ideal Standard), OJ No L 20 of 24/1/85, p. 38; Hasselblad Judgment of 21/2/84, Case 86/92, ECR 1984, p. 883, ETA (Swatch) Judgment of 10/12/85, Case 31/85, ECR 85, p. 3933, and Commission Regulations Nos 123/85 of 12/12/84 (OJ No L 17 of 18/1/85, p. 16, (distribution of motor vehicles) and 4087/88 of 30/11/88 (OJ No L 359 of 28/12/88, p. 46 - (franchising agreements).

48 7th report, No 17-20, and Communication from the Commission concerning a request for a negative clearance (Zanussi guarantee conditions), OJ No C 313 of 29 December 1977, p. 14

49 For a list of the sectors treated, see the 16th Report on competition policy, 1986, point 56. In this report the Commission expressly reconfirmed the principle of the validity of the producer's guarantee throughout the Community

the guarantees offered to consumers are not valid throughout the Community for products purchased in any Member State.[50]

The fundamental principle in competition affairs is that the producer cannot restrict the guarantee only to goods purchased in the framework of a given distribution network. Moreover, when the producer distributes these products through a selective distribution system, he must make it obligatory on the members of the network to honour the guarantee independently of the place of purchase of the product.

As to the guarantee conditions applicable to parallel imports, the Commission has always upheld the principle according to which the guarantee is implemented by the distributor established in the territory of the Member State in which the appliance is used and in accordance with local conditions. This principle was confirmed in the Sony ruling of 1987[51].

The Court of Justice has confirmed the doctrine upheld by the Commission practice in two landmark judgments: the Hasselblad ruling of 1984[52] and the Swatch ruling a year later[53].

In its first judgment the Court had to rule on the relationship between the commercial guarantee provided by the producer and additional guarantees offered by the distributors themselves. In this regard the Court specified that to the extent that the clients of parallel distributors may benefit from the manufacture's normal guarantee, terms or practices by virtue of which certain specific advantages are reserved to clients of approved distributors by these distributors themselves, such as extension of the duration of guarantee or even greater speed of service, must be considered as valid. However, the Court declared that it is essential that the products imported in parallel should fully benefit from the manufacturer's normal guarantee.

In the context of the application of competition policy to the producer's commercial guarantee, the Swatch case is crucial. Swatch watches were marketed through intermediary "agents" who were exclusive distributors, to whom a certain "territory" was allotted. The distribution agreement required the agents to buy a minimum number of watches. These watches were guaranteed by the producer for 12 months from the date of purchase by the consumer, but subject to a maximum of 18 months after their delivery to the distributors[54]. The packaging of every watch contained a certificate of guarantee from the producer against all defects for 12 months from the date of purchase. In the event of a defect the watch was replaced, since repairs were impossible on account of the method of manufacture.

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50 Bulletin EC 11-1986, point 2.1.77

51 17th Report on competition policy, No 67.

52 Judgment of 21 February 1984, Hasselblad/Commission, Case 86/82, ECR 1984, p. 883.

53 Judgment of 10 December 1985, Eta Fabriques/SA DK Investments, Case 81/85, ECR 1985, p. 3933.

54 The Advocate-general also expressed his surprise at this clause because given the rules of privity of contract, one could not see how the producer could "refuse to honour the express undertaking to the user which accompanies the article sold by relying on a condition concerning the storage period which is valid only against the agent".

The case came to the Court of the Justice in the context of a request for a preliminary ruling submitted by the Brussels Tribunal de Commerce (Commercial Court) in a procedure involving the producer (ETA) versus several parallel distributors.

ETA wanted to prevent these distributors from furnishing the Swatch watches together with the guarantee certificate because, they argued, the guarantee resulted from an agreement between ETA and the exclusive distributors and was of a contractual nature and therefore related only to watches sold through its network of distributors. The refusal to honour the guarantee was also justified by its concern to ensure compliance with the maximum storage period imposed on distributors. The Court of Justice did not accept ETA's reasoning and held that "a clause contained in an exclusive distribution agreement, whereby the manufacturer undertakes with his exclusive distributor to grant a guarantee on its products after sale to the consumer, and by virtue of which he withholds the guarantee from the customers of parallel distributors, is incompatible with Article 85(1) of the EC Treaty in so far as the restriction on competition which is likely to result therefore affects trade between Member States".

Very recently, in a judgment[55] on a request for a preliminary ruling on the notion of misleading advertising in Directive 84/450/EEC, the Court fully confirmed its jurisprudence, going even further. One of the questions put to the Court by the national court concerned the allegedly misleading nature of a mention contained in the advertising of an independent motor vehicle dealer concerning the manufacturer's guarantee[56]. According to the Court such a mention could not be considered as misleading advertising since it corresponded to reality. To justify the solution the Court referred back to the Swatch ruling and declared that a "guarantee scheme in which the supplier of goods reserves the guarantee only to the clients of his exclusive concessionary places this client and retail sellers in a privileged position vis-à-vis importers and parallel distributors and must, consequently, be considered as having as its object or effect the restriction of competition for the purposes of Article 85(1) of the Treaty". It is worth noting that the Court has ignored the specific characteristics of the goods in question and the procedures for performing the guarantee. In effect, the Swatch judgment concerned mass-produced low-priced goods, which, according to the Court itself, "do not belong to a category of products in respect of which it is necessary to accept certain restrictions which are an inherent feature of a selective distribution system and are motivated by a desire to maintain a network of specialised dealers able to provide specific services for technically sophisticated, high-quality products."[57]
However, in its more recent judgment the issue at stake was guarantees for motor cars, goods of high technical complexity, which are marketed on the basis of a selective and exclusive distribution system, and which are also exempted under Regulation No 123/85. This Regulation contains specific provisions relating to guarantees. However the Court did not make more specific reference to the provisions contained in this Regulation[58]

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55 Judgment of 16 January 1992, Criminal procedings against X, known as the Bergerac case. Case C-373/90, ECR 1992, p. 131 .

56 Advertisements had been published in the press with a mention "buy your new car cheaper", followed by the mention "manufacturer's one year guarantee."

57 Grounds, 16

58 Hence adopting much the same approach as the Commission, which in its conclusions had argued

2.1. Regulations No 1983/83 and 1984/83 on categories of exclusive distribution agreements and exclusive purchasing agreements respectively[59]

These regulations on exemptions by category contain a simple reference to the guarantee, which does not affect the promotion of consumer interests. They simply state that the distributor's obligations in regard to providing service to his clients and the guarantee imposed upon him by his contractor do not prevent exemption by category.

2.2. Regulation No 123/85 on certain categories of motor vehicle distribution and servicing agreements[60].

This Regulation[61] concerns exemption by category for exclusive and selective distribution agreements in the motor vehicle industry. Such agreements have been endorsed by the Commission, notably because in the domain of distribution and servicing they make more economic sense than keeping the activities apart.

However, pursuant to the ban on concerted practices enshrined in Article 85 of the EC Treaty, these agreements may not lead to an elimination of competition or to a partitioning of the national markets[62]. Therefore the Regulation affords the consumer a minimum level of protection by permitting him, after having purchased abroad, to have the guarantee honoured by his local distributor. Article 5(1)(1) of the Regulation stipulates as a condition of exemption that all undertakings in the distribution network must honour the guarantee and perform free servicing and vehicle recall work irrespective of the place of purchase of the vehicle in the Common Market.

This is an indirect recognition of the consumer's right to shop where he likes in the Community and notably to have servicing under guarantee performed by the network's local representative. Moreover the Communication from the Commission concerning this Regulation stipulates that the final user must not be unfairly prevented from purchasing a motor vehicle wherever he wants in the Common Market. The Communication mentions, by way of example, the distributor's refusal to honour guarantees on vehicles which they have not sold and which have been imported from other Member States. In the past the Commission had received numerous complaints from consumers, in particular the BEUC, regarding the enormous obstacles encountered in connection with the private importation of vehicles, notably in the form of threats that the guarantee would not be honoured[63].

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that an imported vehicle had to enjoy the guarantee accorded by the manufacturer in the country of importation, without more detailed reference to the more stringent conditions set out in Regulation 123/85

59 OJ No L 173 of 22 June 1983, pp 1 and 5

60 OJ No C 17 of 18 January 1985

61 Like Regulations 1983/83 and 1984/83, Regulation 123/85 also contains a provision according to which the distributor's commitment to honour the guarantee, provide the minimum free servicing and vehicle recall work does not prevent the exemption from being granted.

62 Note in this connection the importance attached to the functions of intermediaries; cf. the Commission Communication on clarification of the activity of motor car intermediaries, OJ No C 329 of 18 December 1981.

63 See on this issue a complaint from the BEUC in the Ford Guarantee Deutschland Case, 13th

However, the consumer's freedom is hemmed in since the obligations of the local concessionary are limited in two respects: firstly, they are limited to the obligations he himself has assumed in signing the distribution agreement, and secondly to the contractual obligations imposed on the distributor who has sold the vehicle or which the manufacturer has assumed.
Hence the consumer will have the least favourable scheme applied to him.

This obligation is sanctioned by Article 10, which provides that the Commission may withdraw the benefit notably where it finds that the manufacturer or an undertaking within the distribution system continuously or systematically, and by means not exempted by the Regulation, makes it difficult for final consumers to obtain servicing for motor vehicles they have purchased within the common market.

Immediately after the entry into effect of Regulation 123/85, numerous consumers were refused guarantee performance in the case of parallel imports. However, in response to demands from consumers and intermediaries, the Commission has systematically requested the firms concerned to put an end to these practices. In most cases it has been possible to regulate these complaints through such an exchange of correspondence[64].

Currently it seems that refusals to honour guarantees are more typical of isolated distributors than of collusive behaviour on the part of the members of a distribution network. However, while they pose no real threat to Community competition law, they are still a major inconvenience to consumers who are victims of such individual activities.

2.3. Commission Regulation No 4087/88 on categories of franchise agreements[65]

As above, the Regulation on exemptions for categories of franchise agreements favours private imports by consumers. This possibility is enshrined in Article 5(3) which provides that the exemption can only be accorded provided the franchisees are forbidden to make supply of the goods or services to end users depend on their country of residence.

By corollary, the Commission wants to make it easier for consumers to conduct parallel imports by enabling them to have guarantee work performed in their country of residence. Moreover, it is important that the franchise network should acquire the standard brand image it tends to create.
Indeed the consumer is rarely aware of the fact that he is dealing with an independent dealer and often thinks that his partner is only a representative of the manufacturer/franchiser. Hence the Commission believes that if franchisees must accord a guarantee on the franchiser's products, then this obligation should also apply to goods supplied by other franchisees or other approved distributors. This principle is enshrined in Article 4(b) of the Regulation which specifies that "where the franchiser obliges the

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Report on Competition Policy Nos 104 and 105. Following the Commission's intervention, the distributors discontinued to their threats to refuse to perform servicing under guarantee.

64 Cf the 16th Report on Competition Policy, No 30

65 OJ No L 359 of 28.12. 1988

franchisee to honour guarantees for the franchiser's goods, that obligation shall apply in respect of such goods supplied by any member of the franchised network or other distributors which give a similar guarantee, in the common market." This obligation is a sine qua non for exemption by category. Hence, for the exempted franchises, the consumer must be entitled to have the guarantee honoured by any member of the franchise network, not only for the products sold by the franchisees, but also for the franchiser products sold by distributors through other forms of selective distribution.

2.4. Assessment

One of the objectives of Community competition law is to allow the consumer to import goods privately. Such a possibility not only enables him to benefit from lower prices in the short term but also recognises his important medium-term role in opening up the markets. The Commission considers that the possibility of getting guarantee work and servicing performed in the buyer's country of residence is a necessary corollary to this possibility of private importation. However this contribution of Community competition law to the development of a European guarantee system has some major limitations from the narrower perspective of consumer protection. Specifically:

- competition law merely obliges the producer who offers a guarantee to ensure that this guarantee will be honoured throughout the Community, without regulating either the existence of this guarantee, or its content, or the conditions for invoking it;

- competition law concerns only business activities which come within the ambit of the law on concerted practices or dominant positions.

- competition law imposes certain obligations on firms; however, it does not create any rights which the consumer can rely on. In effect, the penalty for failing to comply with obligations relating to guarantees imposed by the Regulations is withdrawal of the exemption. To be applied, such a penalty presupposes repeated infringements and in no way protects the consumer whose guarantee has not been honoured or who is victim of a contractual term prohibited by the Regulation, since the only remedy open to him is to file a complaint with a view to having the exemption withdrawn; the consumer can never demand that the guarantee which is his due under Community competition law be honoured because he does not have true subjective rights against the distributor at fault.

- competition law as such does not contribute either to harmonisation of guarantees or to the transparency necessary with a view to their application. All it does is provide that the guarantee offered to the consumer who shops abroad must be performed in conformity with the conditions practised in the country in which the guarantee is invoked, while recognising that the guarantee scheme offered by the same manufacturer for the same product may not necessarily be the same throughout the Community.

C.AFTER-SALES SERVICES

After-sales services in the strict sense, i.e. services which are not connected with honouring a guarantee, have not up to now been treated specifically in Community law. It is only very obliquely - again in the context of applying competition rules - that the problem has sometimes been addressed. The Commission considers that the need to provide consumers with high quality after-sales service is one of the reasons which may help justify a selective distribution system under Article 85(3) of the Treaty of Rome. However the, exemption regulations adopted in the field of selective distribution do not go so far as to require, as in the case of the commercial guarantee, that all distributors be mandated to ensure after-sales service for all products in the range covered by the agreement, independently of the place of purchase. Regulation No 123/85 on motor vehicle distribution restricts itself to stipulating that "any obligation imposed on the dealer to observe, for distributing and servicing, minimum standards which relate in particular to [...] the repair and maintenance of contract goods and corresponding goods, particularly as concerns the safe and reliable functioning of motor vehicles" does not stand in the way of an exemption[66].

Similarly, the specific question of the availability of spare parts has only been addressed in a very tangential manner. One example is the Commission Decision on Villeroy & Boch of 16 December 1985[67], in the field of competition, which refers to a commitment entered into by the producer to guarantee the availability of replacements for 15 years, a commitment which would contribute to justifying the implementation of a selective distribution system assuring continuity of supplies to the consumer.

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66 Article 4.1.a

67 OJ No L 376 of 31.12.1985.

V -ASSESSMENT OF THE SITUATION IN THE FRAMEWORK OF THE SINGLE MARKET

A.THE SITUATION WITH REGARD TO THE LEGAL GUARANTEE

1. DETERMINING THE APPLICABLE LAW

The national legal systems have come up with very different ways of protecting the purchaser/consumer against product defects.

In the framework of the Single Market, this diversity may pose major problems in cross-border transactions. The first problem is to determine the law that applies to guarantees. In the absence of a harmonised system of legal rules, a complex scheme of private international law standards are applied, the groundrules of which are set out in the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (CR). This Convention took effect in 1991 in the contractual relations of ten of the twelve Member States. Only in Portugal and Spain is the Convention not yet fully applicable, since the Treaty of Accession of these two countries has not yet been ratified by all the Member States.

1.1. Applicability of the Convention of Rome to consumer contracts

In principle the CR applies to all contractual obligations, hence also those which arise from consumer contracts. The exemptions set out in Article 1(2) and (3) do not significantly impinge on the questions which concern us in this context. However, it should be noted that with regard to proof, the CR is applicable only to certain aspects of the problem (subject and burden of proof, admissibility of modes of proof of legal acts)[68]. This means that for one and the same contract the rules of proof may be governed by different jurisdictions.

1.2. Determination of the applicable law - general rules

The basic principle which governs the determination of the law applicable is that of the choice made by the parties[69] (Article 3). However, this freedom of choice is limited when all the other elements relevant to the situation at the time of the choice are connected

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68 cf. Article 14.

69 As regards the practical procedures for determining whether there has indeed been an effective choice, cf. Article 3 and Giuliano and Lagarde Report, OJ No C 282 of 31 October 1980, p. 17.

with one country only: in such case the mandatory rules of this country remain applicable (Article 3(3)). In the absence of choice by the parties, the contract is governed by the law of the country with which the contract is most closely connected (Article 4). It is presumed that the contract has closest links with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence[70]. In the domain of consumer contracts, the characteristic performance is in most cases that of the professional.

However, one must also consider the mandatory rules of the state with which the situation has a close relationship, as well as the law of the forum. Specific rules on attachment are also provided to determine the material validity of the contract and the consent of the parties, as well as the form of the contracts.

1.3. Determination of the law applicable to certain contracts concluded by consumers

Article 5 of the Convention establishes a specific rule on conflict of laws for certain contracts concluded by consumers. This rule specifies that the choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the country in which he has his habitual residence; moreover, in the absence of choice by the parties, the applicable law shall be that of the state in which the consumer has his habitual residence.

This specific provision applies, under certain very strict conditions, to all sales of goods or supplies of services, and to any credit contracts relating to such sale or supply. However, this scheme excludes contracts of carriage and contracts for the supply of services where the services are to be supplied exclusively in a country other than that in which the consumer has his habitual residence. On the other hand, package tours are explicitly included (special rules in Article 5).

These protective principles apply only under certain conditions, set out in Article 5 (2):

- if the trader has solicited the consumer in the country in which the consumer is resident (doorstep selling, mail orders or other forms of distance selling, for example) and in which the contract was actually concluded. The text stipulates "if in that country the conclusion of the contract was preceded by a specific invitation addressed to him (i.e. the consumer) or by advertising[71], and he had taken in that country all the steps necessary on his part for the conclusion of the contract";

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70 With the exception of contracts relating to rights to immovable property or the right to use immovables: in this case the contract has its closest links with the country in which the immovable property is situated.

71 Cf. however, Report op.cit., p. 24, which spells out the limits on protection in the case of certain types of advertising on a world scale.

- if the other party or his agent received the consumer's order in the country of residence of the consumer. Although this case partly overlaps with the first indent, it tends to provide added protection over a wider range of contingencies, notably fairs or exhibitions in the consumer's country, or in dealings with permanent branches or agencies of a foreign firm;

- if the contract is for the sale of goods and the consumer travelled from his country of residence to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of persuading the consumer to buy.

Moreover, Article 9(5) stipulates that in the circumstances described in Article 5(2), the formal validity of the contract is governed by the law of the country in which the consumer has his habitual residence.

1.4. Scope of the CR in terms of consumer protection in cross-border contracts

The regime established by the CR in regard to cross-border consumer contracts may be summarised as follows:

- when the consumer purchases, in his own country, a product, whether it is "national", imported or offered from abroad, his protection in regard to guarantees is as follows:

  - in the absence of an express or implicit choice, the law applicable is that of the consumer's country of residence;

  - a clause specifying the choice of law applicable shall only be valid insofar as it does not conflict with a mandatory rule of the law of the country of residence.

- when the consumer purchases a product abroad, the following cases must be distinguished:

  - he is in one of the circumstances described in Article 5; in this case the rules mentioned in the preceding paragraph apply;

  - he goes abroad on his own initiative; in this case the general rules of the CR apply:

    - freedom of choice of the parties, except in respect of the mandatory rules of the foreign country;
    - in the absence of choice, application of the law of the country in which the vendor is established.

From the above it can be seen that determining the law applicable to consumer contracts is no easy matter. Moreover, the contract may be submitted, by virtue of the rules governing conflicts of laws integrated in the Convention, to several jurisdictions, which

adds to the complexity and lack of transparency as to the law applicable in the event of "cross-border" contracts.

It is true that the CR contributes to greater protection of consumers who partake in international contracts, by specifying quite specific attachment criteria and by allowing them under certain conditions to benefit from the protection of their state of residence. It is important to point out that this protection on the basis on the law of habitual residence is the minimum protection, to which should be added the protection of the law which the parties have chosen: in a manner it is the law most favourable to the consumer which is adopted. However, the conditions established by Article 5 are drafted and interpreted in a very restrictive manner, hence limiting the scope of protection specific to consumers.

Moreover, the specific protection which the CR affords to consumers applies only to the extent that the rules of his Member State of residence applicable to the contract are in fact mandatory rules or rules of public policy. But not only are the rules concerning consumer protection in the Member States not always mandatory rules or rules relating to public policy - in addition, this characteristic been the cause of major controversy in the legal literature. Specifically, as regards guarantees, the question as to whether the consumer is protected by the provisions of his state of residence depends on the mandatory nature of the national provisions relating to the legal guarantee.

More broadly, the rules underlying the CR mean in certain cases that the contract has to be dismembered. This results not only from the restricted scope of the Convention (cf. in particular the rules concerning proof) but also from the principle of applying the most favourable law - which can mean, for one and the same contract, the combined application of several jurisdictions.

Hence we can see that the CR, while constituting an important move towards better consumer protection in international transactions, is only one step towards a Community legal system applicable to the law of contracts. Because of its gaps and the controversies which the attachment criteria it establishes may give rise to, it cannot adequately stake out in global terms the contents of the rights and obligations of parties in international transactions.

1.5. Specific national provisions

In parallel with the CR, certain Member States have defined the international scope of the consumer protection rules which they have adopted.

One example is Article 6/247 of the Netherlands Civil Code, which provides that legal provisions relating to general contractual conditions are applicable to all contracts concluded by the Netherlands consumer, irrespective of the place of residence or activity of the vendor or indeed the law applicable to the contract. This means that even if the Netherlands consumer purchases a product in another country (other than in the circumstances described in Article 5 of the CR) and discovers a latent defect when he returns home, he is entitled to the protection of Netherlands law concerning unfair terms.

This legislation, in turn, contains several provisions which protect the consumer against unfair terms relating to guarantee conditions.

Similarly in Germany, Article 12 of the Act on general contractual conditions AGB specifies the cases in which this act is applicable even to a contract governed by foreign law.

The validity of such a national provision may be recognised under the terms of Article 7 of the CR, which specifies the precedence of certain types of national mandatory rules.

In Spain things are more complicated because the law on guarantees is partly determined by the autonomous communities, which have adopted various provisions in this area. This means that different rules on protection may apply even when the consumer shops only within Spain. Possible conflicts between the jurisdictions of the autonomous communities will also have to be resolved by applying the Spanish rules relating to private international law.

2. THE DIVERSITY OF THE LEGAL RULES

Apart from determining the law applicable, the crux of the matter for the consumer is his ignorance of the foreign law. The consumer who purchases abroad will have difficulties in learning about his rights and of how precisely to invoke them. Consequently, he will hesitate to make major purchases outside his country of origin. Moreover, the differences in national legislation both as regards guarantee periods (ranging from six months in German or Portuguese law to an indeterminate period in French, Belgian and Luxembourg law, and to up to six years in British law), and the conditions for invoking the guarantee (which ranges from the irrebuttable presumption of bad faith of the seller established in French law to very strict conditions in Portuguese law) or the remedies available to the consumer, are destined to discourage consumers from shopping abroad. Moreover, 24% of consumers interviewed for the Eurobarometer No 35 of July 1991 mentioned "uncertainty as regards conditions of sale" as a major obstacle to shopping abroad, together with "difficulties in settling disputes" cited by 29% of consumers.

As regards professionals the situation is hardly any better. Manufacturers must take into account national laws concerning the legal guarantee in drafting the conditions for the commercial guarantees they offer. This is an obstacle to establishing a global market strategy and encourages manufacturers to diversify guarantee conditions depending on the Member State. Moreover, the divergency of national legislations is of a nature to encourage distortions in competition among vendors and manufacturers.

In this connection one should recall the Altshom/Sulzer case[72] which properly raised the question of the distortion of competition caused by French law relating to the legal guarantee, which is stricter than elsewhere in the Community.

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72 See Chapter IV.A.4.1.

B. THE SITUATION WITH REGARD TO THE COMMERCIAL GUARANTEE

1. DIVERSITY AND IMPRECISION OF THE COMMERCIAL GUARANTEES

1.1. Defects covered by the commercial guarantees

There is a certain uniformity in the positive definition of defects covered by commercial guarantees. In most of the guarantees analysed defects in workmanship or material are explicitly included. However, certain guarantees refer only to the notion of a defective part or defective product. Some guarantees specify that certain cosmetic defects are also covered. One initial point to note is that certain guarantees offer different coverage depending on the country of sale.

Neither should we forget the contingencies which are not covered in the guarantee documents: numerous types of defects are excluded from the guarantee and these exemptions vary with the professional and the country concerned. Here are some examples:

- defects due to normal wear and tear;
- defects due to external causes (accidents, natural phenomena, etc.);
- incorrect installation or use of the appliance;
- repair by unauthorised third parties;
- damage due to transport;
- defects concerning certain components;
- minor defects;
- any damage occurring after purchase;
- exclusion of damage caused by the product;
- illegibility of the appliance's serial number.

Numerous exemptions listed in the guarantee documents are quite justified: there is no way that damages due to failure to observe installation instructions or instructions concerning use or accidental damage can be covered by a guarantee. This is in a way a negative illustration of the notion of defect in material or workmanship. However, some guarantee documents lend themselves to a certain number of criticisms:

- sometimes the wording is too vague. Again we have to tackle the question of defining in practice the real scope of the guarantee, since the notion of damage subsequent to purchase, the notion of components, or again that of minor defect are open to interpretation;

- certain defects that are excluded concern the professional's sphere of control and should not allow him to escape liability under the guarantee: damages due to transport, exclusion in principle of certain components, etc.

It should also be noted that the exemptions listed in the guarantee documents vary not only from make to make but also for a given make depending on the country in which the good is marketed.

1.2. The parties honouring the guarantee and the beneficiaries of the guarantee

Guarantee documents envisage the following conditions as regards the parties against whom the consumer may bring a claim:

- the guarantee is granted by the importer or manufacturer's agent, without further particulars;
- the guarantee is granted by the importer, who gives the client the right to invoke the guarantee against any official distributor of the make;
- the guarantee is granted by the importer, who indicates to the client that he should contact his vendor or send it to the importer at his expense;
- certain documents specify that it is the manufacturer who grants the guarantee, but sometimes it is the vendor who has to be contacted;
- sometimes the client is only given a telephone number to ring in order to find out who is responsible for giving effect to the guarantee.

Further, the consumer often finds it hard to say who exactly the guarantor is. Sometimes the importer may have the same name as the manufacturer - does this mean that the guarantee is from the manufacturer or is the importer legally an independent entity? Again in certain cases the consumer is informed that another party will perform work under the guarantee, but without being told anything about the legal bonds between the different parties. Hence the consumer is unable to determine the validity and scope of the third-party obligations set out in the guarantee document and the legal possibility of invoking the guarantee against that party.

This state of affairs calls for greater transparency, to the benefit of consumers, as regards the links which exist between the various participants in the product marketing network. Hence, when a product is sold through a selective distribution network or a franchise the consumer should be informed, because his expectations vis-à-vis the different participants in the network may be higher than in the case of non-integrated distribution systems.

Not all brands have the same policy as regards the consumer's opposite number when invoking guarantees in the different Member States studied.

Again, few guarantee documents refer to the question of the guarantee's beneficiaries in the event of transfer of property by the first purchaser: however, the guarantee documents do not limit the validity of the guarantee to the first purchaser. The conditions imposed concern rather the submission by the complainant of the invoice made out to the first user

or the restriction that the guarantee begins to run from the date of purchase by the first purchaser.

1.3. Consumers' rights as regards invoking the guarantee

Anyone perusing guarantee conditions cannot fail to be struck by the great complexity of the different solutions proposed by the guarantors, of which the examples given below are merely illustrations. Moreover, these different cases are sometimes combined, depending on the severity of the defect, and it is difficult for the consumer to determine clearly his rights in this domain.

More to the point it seems that the information contained in the guarantee documents does not necessarily tally fully with actual practice - hence, for example, on the basis of what appears to be one and the same guarantee document, certain firms pursue quite different strategies in different Member States. Such privileged information is not available to the consumer about to buy something in a shop.

Indeed there seems to be no uniform trend for manufacturers/makes and that the guarantee conditions vary in the different Member States.
Examples:

- no information is provided as to the consequence of a defect;
- repair only;
- replacement of the defective part;
- repair or replacement, at the professional's discretion;
- repair or replacement, at the consumer's discretion;
- in addition to repair or replacement, reduction in price or compensation;
- repair or replacement without indicating who is to decide;
- repair, and if the repair is ineffective or impossible, replacement of the item or even repudiation of the contract or reduction in price;
- repair of the appliance, repair or replacement of parts.

Certain guarantee documents go so far as to exclude any remedy on the consumer's part involving repudiation of the contract or award of damages.

In most cases labour costs for work under guarantee are included and hence free of charge. However, certain guarantee documents are silent on this subject. Again, some document explicitly guarantee the consumer against the consequences of the repair.

Apart from these essential aspects, certain guarantee documents also cover ancillary services, such as emergency service and towing costs, transport costs, and travelling costs.

In addition, as already mentioned, certain direct consequences of the defect, such as damage to other products or costs incurred through failure of the appliance, are expressly excluded from certain guarantee documents. Extension of the guarantee period is not generally foreseen for and is sometimes even explicitly excluded.

Moreover, certain documents provide for extensions to the guarantee, sometimes against payment or only provided certain conditions are fulfilled, mainly regarding maintenance by an approved vendor (cf. the guarantee documents for motor vehicles, notably anti-rust guarantees). Sometimes these extended guarantees are included in the initial price of the product, and are subject to specific conditions.

1.4. Duration of the guarantee

Certain guarantee documents are silent as to the duration of the guarantee. Many documents mention a guarantee period of 12 months, either from the date of purchase or the date of installation, provided this date is certified by the distributor. Other documents make a distinction between the first six months (completely free of charge) and the following six months (where certain expenses have to be met by the client). Some guarantees are far shorter, others longer.

This diversity in the duration of the guarantee is explained by the product's presumed lifespan and commercial strategies with respect to different makes. For example, commercial guarantees on cars are often limited to one year, but certain manufacturers offer three-year guarantees. Indeed, sometimes there may be major differences in the duration of the guarantee even within a given industry. This may be an important factor in consumer choice and can help stimulate competition.

However, the consumer must offset this advantage against other potentially applicable guarantee conditions which sometimes considerably restrict the scope of the guarantee. Hence, the emerging balance may be very fragile and it is often very difficult for the consumer to weigh all the pros and cons.

1.5. Formal conditions for invoking the guarantee

Apart from the conditions relating to the existence of a defect, numerous guarantee documents stipulate that certain formal conditions must be observed if the guarantee is to be invoked. Examples:

- copy of the invoice;
- valid proof of purchase;
- original invoice or receipt;
- presentation of the warranty form and invoice issued to the first user;
- guarantee certificate with date of purchase;
- indication on the certificate of the purchaser's name or additional details;
- return of guarantee certificate within eight days of purchase;
- purchase certificate filled in by the concessionary/vendor;
- obligation on the client to pay for return post;
- purchase from an approved member of the network;
- performance of initial servicing under guarantee by an approved workshop;
- replacement of parts by original spare parts or parts approved by the manufacturer;
- installation to be conducted by an approved installation firm;
- merchandise to be returned in its original packaging.

Moreover, almost all guarantees state that any intervention by a third party, notably with regard to modifications or repairs connected with the wear and tear of certain parts, nullifies the guarantee, even when the claim has no bearing on the components in question.

Many guarantee documents specify that failure to observe these formal conditions invalidates any right to invoke the guarantee on the consumer's part. Others are less explicit on this subject.

As to the formal conditions and other aspects of the commercial guarantees, there is a remarkable variety not only between makes but also for a given make, depending on the country in which the merchandise is marketed.

1.6. Consumer information on the commercial guarantee

It is only rarely that the consumer gets to see a guarantee document before purchasing a good in order to analyse its conditions and to assess the genuine scope of the benefits it offers. Mostly all the consumer knows at the time of purchase is the existence and duration of the guarantee. This information may come from advertising, be mentioned on the product's packaging, or be provided by the vendor. Likewise this information is not enough to allow the consumer to compare guarantees offered by different manufacturers with a view to stimulating competition as regards the quality of these guarantees.

1.7. Other services

The guarantee documents do not explicitly provide for a specific after-sales service other than what is part of the guarantee, except where they mention extensions of the guarantee (see above). Information concerning after-sales services is often limited to specifying the point of contact for repairs. Generally, no information is provided on the availability of spare parts or on how long repairs will take.

1.8. Presentation of the commercial guarantee as compared with the legal guarantee

One introductory comment on the information provided by the commercial guarantee concerning the consumer's rights under the legal guarantee: the guarantee documents do not provide information on what rights the consumer has under the terms of the legal guarantee. Moreover, few documents indicate that the commercial guarantee goes hand in hand with the legal guarantee, it being implied that the consumer has automatic rights independently of the guarantee document, without however delving into the details. Depending on the documents, the information may be presented in one of two ways:

- either the guarantee document states that the commercial guarantee in no way impinges on the consumer's rights under the legal guarantee (for example: the guarantee offered is applicable "except where other mandatory national rules apply");

- or the guarantee document states that it supplements the legal guarantee and that the rights it confers on the consumer are supplementary to those he may rely on under the legal guarantee.

However, it often seems that the restrictive conditions for invoking the consumer's rights contradict what these same documents say about the supplementary nature of the commercial guarantee[73].

Hence it is difficult for the consumer to know what rights he has under the legal guarantee or to assess the relationship between the legal guarantee and the commercial guarantee.

Moreover, even for a given make, the information provided on the link between the legal guarantee and the commercial guarantee is not necessarily the same. For example, guarantee documents for a certain very well-known make in the domestic appliances sector are silent as to how they relate to the legal guarantee in Germany. In Belgium, it is specified that repudiation of the contract, compensation for reduced value or damages are excluded, except where otherwise provided for by law. In the United Kingdom, this make specifies that the commercial guarantee supplements the legal guarantee and does not affect consumers' rights in this domain, whereas in the Netherlands it specifies that the obligations are limited to those set out in the guarantee document.

As to differences between Member States, guarantee documents in the United Kingdom more often specify their link with the legal guarantee. The same should apply to France, since guarantees must now by law include an explicit reference to Articles 1641 et seq. of the Civil Code mandating the vendor to observe the legal guarantee - all guarantee documents must provide this information.

The absence of any reference - and a fortiori of a precise and detailed reference - as to the existence and content of the legal guarantee is a serious drawback for the consumer and gives the impression that the commercial guarantee is the sole and unique obligation applicable to the sale of the good in question.

1.9. Territorial scope of the guarantees

Few guarantees contain express and/or clear reference to their territorial scope. Certain makes come with guarantees that have international validity, in terms which are identical for all European countries, but most manufacturers, when they provide a so-called "European guarantee", specify that this guarantee is provided under the conditions prevailing in the country in which the appliance is used.

Many guarantee documents state that the guarantee is valid in the European Community, provided the purchaser undertakes the necessary technical adaptations to ensure that it meets the safety standards of the country of use. Finally, many the guarantee documents expressly limit the guarantee to the national territory.

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[73] notably as regards travel costs, labour costs, definition of defect.

Manufacturer policy concerning the territorial scope of the guarantees offered also depends on the country. For example, one household name in the domestic appliances sector has adopted quite a flexible policy: while in certain countries no reference is made to the territorial limits of the guarantee (NL, B, E) in others, application of the national guarantee depends on registering the product with the importer (IRL). In the United Kingdom this producer specifies that the guarantee applies to all appliances sold by him (but does this refer to the manufacturer or the importer?) that are located on the national territory. However, the "double cover warranty" applies only to appliances manufactured in conformity with British specifications and purchased in the United Kingdom. In Denmark the guarantee applies to appliances purchased and used in Denmark. In Germany yet other guarantee conditions apply: the guarantee is valid only if the appliance is purchased by an approved retailer in Germany, is located in Germany and installed by a manufacturer-approved installation firm.

A motor vehicle manufacturer provides another example of disparate policies: in Portugal, the document specifies that the guarantee is valid only in the country of purchase, while in other countries (NL, DK) the vehicle must have been purchased from an authorised concessionary (without mentioning the country) or the vehicle must be new, without specifying the need to purchase it from a concessionary (B). In Spain, the manufacturer's representative limits the guarantee to cars made by this manufacturer and restricts validity of the guarantee to Spain.

On the other hand, another carmaker exemplifies a more European policy, because all the guarantee documents specify that the guarantee is provided by the manufacturer as such and is applicable to all vehicles purchased from an approved member of the network. In several countries the document specifies that the commercial guarantee supplements the legal guarantee where such a legal guarantee is foreseen (B, E, UK, DK). The Portuguese version states that the commercial guarantee supplements the existing legal guarantee in the country in which the vehicle is sold.

Moreover, the guarantee documents, even when they specify their territorial scope, are silent as to how the consumer should in practice go about invoking the guarantee in the case of cross-border contracts. Providing the names and addresses of the different importers or representatives in the Member States would make things a lot easier for the consumer.

1.10. Evaluation

Reading the guarantee documents, one cannot but be struck by the great diversity of consumers' rights and duties in this domain. Although a few offer the same (or very similar) guarantees everywhere in the EC, most offer very different guarantees for the same products depending on the Member State in question. Points of difference may include such aspects as duration, scope, exclusion clauses, or procedures for invoking the guarantee.

Even when a producer offers a guarantee "valid throughout the common market", commercial practice means that the guarantee conditions will vary from one country to another and that the purchaser can only invoke the guarantee that applies in his own

country. In other words, a consumer who shops abroad is completely unaware of what rights he will be able to rely on when he returns home - rights which, very probably, will not correspond to the text of the guarantee that came with the product.

Hence there is a real source of potential conflict in the case of cross-border purchases, because the diversity of guarantee conditions in the different Member States, in conjunction with the territorial scope of the guarantees, gives rise to very complex situations in which it is very difficult for the consumer to determine precisely, before or even after purchase, what the actual scope of the guarantee is, and under what specific conditions it can be invoked in practice.

2. THE ABSENCE OF A GENERAL LEGAL FRAMEWORK

Among the plethora of factors which influence consumer choice, the offer of a guarantee is certainly one of the foremost. It gives the consumer the reassurance that the manufacturer is willing to assume responsibility for the quality of his product and consumer satisfaction and may create the impression, on the part of the consumer who knows his existing rights under the legal guarantee, that these rights are being extended.

However, as the United Kingdom's Office of Fair Trading has remarked: "All too often, it seems that guarantees are used merely as a marketing ploy, a source of additional revenue of the supplier, or even a means of diverting consumers' attention from their legal rights[74]". Whereas ideally guarantees should express the manufacturer's confidence in the quality of his product and his certainty that it will be trouble-free - this confidence on the manufacturer's part in turn engendering consumer confidence, which is essential to any commercial strategy.

The fundamental problems facing the consumer spring from the general absence of a legal framework applicable to commercial guarantees. We know that few national legal systems have specific rules on commercial guarantees, notably those offered by manufacturers. Even the basic issue as to the nature of the manufacturer's commitment vis-à-vis the final consumer is not clearly answered in many Member States. It is interesting to note that the British authorities are considering a statute establishing the principle of producer liability for their guarantees, and have raised the question as to whether such liability is to be considered as contractual or non-contractual (cf. the above-mentioned DTI consultation document).

The absence of a legal framework also means that gaps in guarantee documents cannot be filled and diminishes their real value. Moreover, this legal vacuum leaves commercial guarantees at the mercy of unconstrained economic liberty and invites abuse and fraud on the part of less scrupulous operators, to the detriment of consumers and healthy competition.

However, certain Member States have adopted a number of specific proposals with a view to filling this legal vacuum. Other Member States are likely to follow suit. This situation

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74 Office of Fair Trading, Consumer Guarantees, London, 1986, p.27.

could stymie the establishment of a truly European industrial strategy and could well prove a headache for the business community who would have to fine-tune their guarantee conditions to the different national laws. Likewise distortions of inter-firm competition could occur whenever the national legal systems adopt widely different approaches.

C. THE SITUATION WITH REGARD TO AFTER-SALES SERVICES

Normally after-sales service is provided by the retailers themselves or by firms specialised in this type of service. It is rare for a manufacturer as such to provide after-sales service direct to the final consumer. As a rule he restricts himself to organising the network of authorised agents, whom he provides with the necessary training and technical support and intervenes directly only in very specific circumstances in which these agents fail to provide satisfaction. However, the manufacturer's contribution is vital for a good after-sales service. Both retailers and repair firms normally rely on the manufacturer, if not for technical assistance, at least for the supply of spare parts.

Certain countries, conscious of the problem, have adopted provisions with a view to securing for consumers the benefits of an appropriate after-sales service for the repair or maintenance of products during their foreseeable lifespan. Such national-level initiatives have already been adopted, as can be seen from a study of the systems in force, in Portugal, Spain, France, Greece and above all Ireland. Moreover, this question cannot be divorced from the concerns of the national authorities and the general public in regard to environmental protection: assuring an optimal lifespan of products will help to reduce pollution and waste creation.

However, in a market without frontiers, where products are expected to move freely and where "importers" strictly speaking no longer exist, any national legislation which imposes stringent obligations on producers to provide after-sales service for their products, including the obligation to stock the spare parts necessary for the maintenance and repair of the products, risks being ineffective or indeed provoking distortions to competition or barriers to trade.

In the context of cross-frontier purchases, the problem of access to adequate after-sales service is compounded in that the consumer can no longer turn to his vendor, and at the time of purchase is not always able evaluate the conditions under which these services will be provided in his country of residence.

VI -POSSIBLE SOLUTIONS

In the preceding chapters we highlighted the diversity of legal systems in regard to the legal and commercial guarantee and also commercial practices; we identified the problems contingent on this diversity in the perspective of the Single Market and cross-border trade.

We have also seen that Community initiatives designed to create a harmonised and consistent framework in the domain of guarantees are but embryonic and inadequate.

In a Europe keen to abolish frontiers there is much to be said for adopting a common approach to the guarantees offered to the consumer. Such an approach is justified because it will promote consumer interests insofar as the consumer should not be treated differently depending on the country in which he purchases or uses a product, depending on whether he has to travel or not, etc. It is also good for the business community, who will be able to market their products everywhere in the Community on the basis of similar rules.

In the context of the objectives set out in this Green Paper, the Commission in this chapter does not claim to present either definitive solutions or even to state its predilection for one solution as opposed to another. It is just a matter of indicating a number of avenues or pathways which will be explored in the course of future work with a view to triggering a public discussion designed to generate new insights and to cast a fresh light on the problems addressed.

Since it is impossible here and now to present an exhaustive picture of all possible solutions to the problems averred to, the Commission has restricted itself to airing certain options it considers appropriate. The working hypotheses presented are sometimes to be seen as alternatives, sometimes as supplementary or indeed reinforcing one another. At any rate the Commission does not rule out further proposals and expects that the public debate will open new horizons.

By the same token, it will be impossible to scrutinise exhaustively all the options put forward in this communication. Hence the Commission has focused on some working hypotheses which seem to deserve closer consideration. These choices are based on methodological considerations and say nothing about the quality of the individual solutions analysed. Naturally the Commission expects feedback on the analyses it has advanced, but it also expects that the addressees will themselves study and flesh out the options the Commission has "played down", if they think this is desirable.

A.SOLUTIONS AT THE LEVEL OF THE LEGAL GUARANTEE

In regard to the legal guarantee, the problems of the European consumer have their origin in two givens:

- the disparity between the national legal systems;
- the mismatch between some traditional legal rules and life in a modern consumer society.

In the face of these realities, we think there are two possible approaches - one based on the adaptation of the applicable rules of private international law (1) and another that strives to harmonise national laws (2).

1. THE SOLUTION OF PRIVATE INTERNATIONAL LAW (PIR)

This solution is to adapt the applicable rules of PIR, so as to ensure that the European consumer will always be protected by the law of his country of residence. Even the active European consumer who travels abroad will thus take with him "his" law as regards the legal guarantee. The diversity of national laws will thus no longer be a reason not to shop abroad.

The advantage here would be that the Member States would not have to tamper with their legal systems in any way. The responsibility for whether or not to reform outdated laws concerning the legal guarantee would lie exclusively with the Member States, in strict observance of the principle of subsidiarity. In the event the Commission might adopt a recommendation in this regard.

However, there are a number of drawbacks to such a solution:

- depending on the provenancence of the buyer, not only would the vendors (and in certain cases the manufacturers) have to cope with the application of 12 national systems, all of whose rules they could not know, but they would not even know in advance which domestic law would be applicable, because they might not know the buyer's nationality or country of residence;
- the national legal systems might continue to diverge, adversely affecting the construction of a genuine European legal space;
- the disparities between national laws would continue to cause distortions in competition among vendors and manufacturers;
- consumers from countries with less protective laws would be discriminated in trying to benefit from the Single Market vis-à-vis consumers residing in countries affording greater legal protection.

2. THE HARMONISATION SOLUTION

Harmonising national provisions could help overcome these difficulties. A minimum harmonisation would be sufficient to guarantee effective protection to the European consumer, independently of the place of purchase and the law applicable to the transaction, and to prevent major distortions in competition among vendors and

manufacturers in the different Member States. This option would hence respect the principle of subsidiarity.
The first question which might be raised as regards harmonisation of this kind concerns its scope: should it be general or should it focus on problems specific to consumer protection?

2.1. General harmonisation

The advantage of general harmonisation would be to permit common rules concerning the legal guarantee, regardless of the products in question and the status of the contracting parties. The civil law of the Member States would be the same.

Nevertheless, the existence of specific rules governing "consumer contracts" is already a fact, both at national and Community level. The latest national initiatives in this domain also show that this approach is not likely to be abandoned.

General harmonisation would also have the drawback of being a cumbersome and inflexible solution ill-fitted to the objectives pursued.

2.2. Harmonisation focussing on consumer protection

Limiting the scope of harmonisation to the requirements of consumer protection might, broadly speaking, be tackled from two different perspectives: a subjective perspective emphasising the status of the contracting parties, or an objective perspective relating to the nature of the products in question.

2.2.1. The subjective criterion

The subjective criterion is the one traditionally applied in the various directives adopted in the context of consumer protection[75]. The scope of the instruments is defined by reference to the nature of the involvement of the two contracting parties in the transactions in question: one of the contracting parties must be acting in the course of business (i.e. a professional) and the other in his capacity as a consumer[76]. These requirements are derived from criteria already contained in the Brussels Convention of 1968 on International Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters and in the Rome Convention of 1980 on the Law Applicable to

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75 See for example Directive 85/577 of 20 December 1985 on consumer protection in the case of contracts negotiated outside of business premises, OJ No L 372 of 31 December 1985, p. 31, Directive 87/102 of 22 December 1986 on harmonisation of the laws, regulations and administrative provisions of the Member States in the field of consumer credit, OJ No L 42 of 12 February 1987 p. 48, Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, OJ No L 95 of 21 April, 1993, p. 29

76 Note however that Council Directive 90/314 of 13 June 1990 on package travel, package holidays and package tours constitutes an exception to this rule and lays down a more objective criterion. In effect the consumer is simply defined as whoever "purchases" or agrees to purchase a package.

Contractual Obligations. One example are the definitions contained in the Council's latest Directive in the field of consumer protection[77]. According to this Directive:

- consumer means "any natural person who .... is acting for purposes which are outside his trade, business or profession"
- the seller (i.e. professional) is "any natural or legal person who .... is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned".

However there are two disadvantages to this solution in the context of harmonisation of the legal guarantee:

- the same goods are subject to different legal systems depending on the status of the purchaser; why should the buyer of a motor car be subject to different rules as regards the legal guarantee, depending on whether he buys his car for private or for business purposes?
- this approach is at odds with the modern understanding of a guarantee as being in some way an attribute of the product itself.

2.2.2. The objective criterion

The Council opted for an objective criterion when directly regulating products. Council Directive 92/59 of 29 June 1992 on general product safety[78] is limited in its scope to "any product intended for consumers or likely to be used by consumers" i.e. goods that can be called "consumer products".

Council Directive No 85/374 of 25 July 1985 on liability for defective products contains another implicit definition of "consumer good", in the context of limiting the manufacturer's liability in regard to damages caused by the merchandise. According to this definition a consumer product is a product "of a type ordinarily intended for private use or consumption"[79]

The choice of the concept of "consumer good" as a criterion for delimiting the scope of a Community harmonisation measure seems appropriate in our context. However, at this stage the Commission would not like to rule out the traditional (subjective) criterion which depends on the status of the contracting parties and which, moreover, can be combined with the objective criterion. The notion of "consumer good" in no way tells us which products are to be covered by such a measure. Indeed the need to limit Community measures to the strict minimum necessary to attain the objectives pursued may lead to

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77 Directive No 93/13 of 5 April 1993 on unfair terms in consumer contracts

78 OJ No L 228 of 11 August 1992, p. 84

79 c.f. Article 9 of the Directive. However it should be noted that this Directive adds a supplementary criterion: the good must also have been "used by the injured person mainly for his own private use or consumption". Nonetheless, accepting this supplementary requirement leads us back to the legal guarantee and in some way amounts to recognition of the subjective criterion.

even further restrictions on the scope of such measures to types of consumer good whose cross-border purchase on the part of consumers poses additional problems.

The goods concerned are movable goods that are new and durable. Hence we will take this working hypothesis as a point of departure in trying to identify a harmonised regime for the legal guarantee.

THE ANALYSIS BELOW IS THUS DESIGNED TO EXPLOIT THE POSSIBILITIES OF HARMONISATION OF NATIONAL PROVISIONS CONCERNING THE LEGAL GUARANTEE APPLICABLE TO THE SALE OF MOVABLE CONSUMER GOODS THAT ARE DURABLE AND NEW[80]

3. THE LEGAL GUARANTEE SCHEME

3.1. Subject matter of the guarantee (defects covered)

Determining the subject-matter of the legal guarantee means above all defining the defects covered by this guarantee. The question of determining the purchaser's rights to bring a claim with regard to these defects may be a prerequisite for or a consequence of the definition of "defect covered". Traditionally this question has been the point of departure for defining the "defect". For example, it is because the purchaser's rights have traditionally been defined in the French Civil Code as including redhibitory-type action (repudiation of the contract: restitution of the product and reimbursement of the price)and assessment-type action (partial reimbursement of the price), - i.e. quite drastic rights - that the defects covered have been considered as concerning only serious and latent defects.

By contrast the modern school, which reflects developments in statutory and case law in most Member States, prefers starting with the idea of a single notion of the defect covered and then fitting the purchaser's rights to the type of defect in question.

The notion of failure to meet the consumer's legitimate expectations would seem well-suited to the role it is meant to play:

- it constitutes a good synthesis of most recent legal developments in the Member States. In Belgian, French and Luxembourg law, the distinction between the obligation concerning delivery or conformity and the guarantee obligation has become obsolete with the development of case law and the adoption of a functional notion of defect. Similarly in Italy, where there are two express provisions in the Civil Code - one on latent defects and one on quality defects - most jurists see few differences between the two provisions as regards the definition of the legal guarantee. The concept of failure to conform has also been enshrined in the new Netherlands Civil Code. The notion of conformity with the

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80 "Between a person acting by way of trade and a final consumer" if one also includes the subjective criterion. At any rate the fact that the products are "new" rules out sales between consumers.

purchaser's legitimate expectations may also be compared with that of "merchantable quality" in Irish and English law, the objective and subjective criteria elaborated by the German courts to establish the existence of a defect and the factors taken into account in Danish law. The notion is close to that of absence of qualities assured by the vendor or preventing the merchandise from being used for the purpose for which it was purchased, as the Portuguese Civil Code puts it.

The United Kingdom proposal to replace the concept of "merchantable quality" by that of "satisfactory quality" with a view to extending coverage to clearly minor defects and product durability as well is a further argument in favour of this approach.

- it is close to the definition of defect contained in Directive No 85/374 on liability for defective products, which already refers to the notion of "legitimate expectations";
- it includes the taking into consideration of other notions such as those of "latent defect", "manifest defect" or "known defect". Indeed if a product has a defect which is known to the purchaser, there is no failure to conform because the consumer's expectation as to the nonexistence of this defect would obviously not be "legitimate". The manifest nature of the defect will also influence the way the customer's "legitimate" expectation is judged, without excluding it completely (for example, in the event of deception on the vendor's part);
- it allows a more subtle assessment of the defect with respect to the different subjects who may be liable (see point 3.2);
- it allows one to take into account the purchaser's special technical knowledge of the product;
- it allows one to consider differences in the types of defects with a view to determining the purchaser's rights (see point 3.4).

It goes without saying that the notion of "legitimate expectation" must be considered as a dynamic concept to be assessed taking all the circumstances into account and, notably, the provisions of the contract, the presentation of the product, the price, the brand, the advertising or any information provided on the product, the nature of the product, its purpose, the laws and regulations concerning the product, and other features. The requirement that the expectation be "legitimate" transforms this criterion, which is in principle "subjective", into a fundamentally "objective" one.

3.2. The persons liable for the guarantee

Traditionally, in an economy where crafts and small business predominate, the bond of trust between the purchaser and the vendor was a primordial element in the contractual relationship. In modern consumer societies, based on systems of mass production and distribution, consumer confidence concerns the product as such, and is bound up more with the consumers' faith the manufacturers than in the sellers: competition between similar products is also more between brands than between vendors; the latter compete mainly on the basis of "price" and "after-sales service" (without totally ignoring their role as "advisers"). When a product's defect results from its manufacture it is illogical that the

vendor, who has no influence on the production process and who in many cases may not even have packed the product, should be the only person to whom the purchaser can turn.

It is also counter-intuitive that the producer should be held liable when the defective product causes injury to individuals or (in certain cases) to other goods[81] but that he can disclaim liability when, quite simply, the product fails to work or when a manufacturing defect causes damage to the product itself. Moreover, extending liability to the manufacturer increases the likelihood that the consumer will be compensated for the damage, since the manufacturer's financial resources are often greater than the retailer's.

Accordingly certain legal systems have already moved towards making the manufacturer directly liable for the legal guarantee. As we have seen, this applies to France, Belgium and Luxembourg; the proposal aired by the British authorities in their document (see annex) also goes in this direction.

It is likely that the other Member States will adopt a similar tack. To some extent, this has already occurred in Spain.

This is bound to cause distortions in competition between manufacturers in the context of the Single Market[82] and will stand in the way of giving consumers a genuine opportunity to invoke their guarantee in the case of cross-border purchases. Indeed it is very difficult for a consumer to return to a foreign vendor in order to complain about a product defect[83]. Normally it will be a lot easier for him to address a representative or a branch of the manufacturer in his own country. All the more so in that the person liable for the original defect is indeed the manufacturer and it is with the manufacturer that the consumer establishes a relation of trust when he purchases a brand-name product abroad.

In fact this option would simply bring the law more into line with reality. The relation between the consumer and the vendor falls back on the manufacturer anyhow, since the vendor normally returns the defective products. To allow the consumer directly to address the manufacturer would in no way upset the de facto situation.

Hence in this approach the persons liable for the legal guarantee would be the vendor and the manufacturer jointly. This does not mean that their liability would be the same. Distinctions would have to be made as regards assessment of the defect and the purchaser's rights.

a) Assessment of the defect

The notion of "legitimate expectation" can be opposed to the manufacturer only in regard to the features for which he is liable. The vendor's declarations concerning the product's quality and the content of the contract could not normally be taken into account in assessing the existence of a product defect vis-à-vis the

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81 cf. article 9 of Directive 85/374 on liability for defective products

82 See in this context the Altsham/Sulzer ruling, quoted in IV.A.4.1

83 Or possibly to bring an action against this vendor

manufacturer. On the other hand, advertising by the manufacturer would be a decisive feature.

b) The purchaser's rights

Since a sale is a contract between a purchaser and a vendor, the price having been agreed between them and paid to the vendor, it seems fitting that the purchaser's rights vis-à-vis the manufacturer should not include either repudiation of the sale or reduction in price (c.f. point 3.4). Hence the purchaser would only be entitled to require the manufacturer either to replace or to repair the product; however, the latter would also be liable for direct losses suffered by the consumer (price paid or reduction in the value of the good) in the event that such a replacement or repair was not or could not be realised[84].

As regards looking on the manufacturer's "joint" liability as being a form of "several" or "subsidiary" liability[85], a midway solution could be adopted. Such liability could be qualified as "quasi-subsidiary", the consumer being entitled to enjoin the producer only if it is impossible to sue the vendor or if to do so would be too onerous. This would normally apply to cross-border purchases or if the vendor had disappeared from the market or gone into liquidation. This solution lags behind the legal systems which have enshrined full manufacturer liability and which, as we have seen, have established a scheme of joint and several liability. However, a scheme of "quasi-subsidiary" liability would have the advantage of solving the most pressing problems arising from the operation of the Single Market, without necessitating a radical change in the legal rules existing in the Member States which limit liability for the legal guarantee to the vendor alone.

3.3. Beneficiaries of the guarantee

The solution most attuned to the modern notion of the guarantee as being an element intrinsically linked to the product is to consider as beneficiary of the guarantee not only the initial purchaser but any subsequent owner of the product, provided he can furnish evidence of the first purchase.

This solution would help overcome problems connected with the transfer of goods, which may eoften affect the "average" consumer, for example when he buys somebody a present. It in no way adds to the guarantor's burdens and could easily be integrated into national law through the theory of "legal cession of rights". It also corresponds to the law already in force in France, Belgium and Luxembourg governing resale. The Netherlands Civil Code goes even further by allowing any user of the product - even if he is not the owner - to invoke the legal guarantee.

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84 It should be noted that this is a solution which lags behind national laws which extend liability for the legal guarantee to the manufacturer. In effect these Member States also provide for "price restitution" by the manufacturer.

85 A term which normally implies that legal action is first brought against the main person liable

3.4. Effects of the guarantee

The traditional effects of the legal guarantee are the purchaser's right to repudiate the contract or to obtain a price reduction. In modern contractual relations involving consumers, these remedies are both overly rigid and inadequate. Often they will satisfy neither the consumer nor the vendor. This is why some legal systems have ended up introducing into the framework of the legal guarantee, in one form or another, the traditional remedies of the commercial guarantee - i.e. replacement or repair of the good. Whenever possible, replacement or repair should be preferred to other solutions - this being the counterpoint to the broader interpretation of the concept of "defect".

Thus the idea is to safeguard consumers without imposing excessive burdens on vendors acting in good faith[86].

This compromise could be based on the following principles. The purchaser would in principle be free to exercise one of the following four rights:

- repudiation of the contract, implying reimbursement of the price and restitution of the product;
- reimbursement of part of the price paid, i.e. the difference in value between the selling price and the value of the defective product;
- immediate replacement of the defective product free of charge by a product "in working order" (in the case of fungible products)
- repair of the product within a brief period[87] free of charge. After repair the product should be as new.

Nonetheless the vendor should have the option of proposing the following remedies. In lieu of:

- repudiation of the contract: replacement or repair of the product;
- partial reimbursement: one of the three other remedies;
- replacement: repudiation of the contract or repair, but only when the repair is done immediately or, in the event of repudiation, when the replacement is not possible or is not possible immediately and the consumer is not willing to wait for this replacement;
- repair: replacement within the same period as repair, or, if neither repair nor replacement are possible, repudiation of the contract.

Moreover, in the case of minor defects, the professional could impose the second alternative (reduction in price) unless the consumer can prove that the defect is one of major significance for him. On the other hand the consumer would only be obliged to tolerate one attempt at repair or replacement of the product. If the product were still

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86 The vendor in good faith, i.e. the vendor who was not aware of the existence of the defect

87 The notion of "brief period" could possibly be specified by establishing a maximum period taking into account, where relevant, the nature of the products. The notion of repair would mean that the product should be restored to the state it would be in if there had been no defect.

defective after one of these attempts the purchaser would be free to repudiate the contract.

As regards compensation for other damages caused by a defective product (lost profits, hiring of a replacement good, etc.), it would be entirely up to each Member State to find a solution, without attempting harmonisation, bearing in mind the subsidiarity principle. This is only of marginal concern for the functioning of the Single Market. However, damages caused by "a safety defect" already come within the ambit of Directive No 85/374 on product liability.

3.5. Conditions for applying the legal guarantee

3.5.1. Ignorance of the defect

Ignorance of the defect on the consumer's part is obviously a condition for invoking the legal guarantee, but this is not an independent condition because it already falls under the notion of "legitimate expectations".

However the requirement as to ignorance of the defect on the vendor's part is a different matter altogether. Certain traditional solutions held that the vendor could repudiate liability except when he was aware of or should have been aware of the defect. For example, Portuguese law considers, as we have seen, that the vendor is not obliged to repair or replace the product when he is unaware of the existence of the defect through no fault of his own. Such a solution no longer corresponds to modern business realities in a consumer society. More often than not the vendor does not know the defects and no such knowledge could be required. The vendor's job is to market mass-produced wares, similar to those exhibited in his shop, without ever testing them or, very probably, even opening the packaging. Hence the national legal systems have evolved with a view to overcoming this difficulty, often by establishing an irrebuttable presumption of "bad faith" on persons selling by way of trade.

Thus it is preferable to recognise market realities and to abandon any requirement concerning the vendor's knowledge or ignorance of the defect.

Actual knowledge of the defect on the vendor's part should nonetheless continue to be an important aspect. Vendors who are truly acting in "bad faith"[88] will not be able to rely on the right to oppose the consumer's demands (c.f. point 3.4 above). Hence the consumer will have an absolute right to impose, at his choice, one of the four forms of redress set out above. Clearly, this does not prejudice the application of other relevant national provisions, notably those concerning deception and fraud. However, in this connection the professional's "bad faith" has to be proven by the purchaser.

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[88] i.e. vendors who were actually aware of the product's defect and not simply "presumed" to have been aware of it.

3.5.2. Pre-existence of the defect

The vendor is responsible only for defects existing at the time of delivery. The date of delivery should be preferred to the date of sale. The consumer should receive his merchandise in good condition and it seems unjust that, when the date of sale precedes that of delivery, transport risks should be borne by the consumer.

The manufacturer in turn will only be responsible for defects existing at the time the good was placed on the market. Defects that occur subsequently are not the result of the manufacturing process and it would be unjust to hold the manufacturer liable in this regard.

The touchstone as regards pre-existence of the defect concerns the burden of proof. As we have seen, case law in several Member States has made things easier for the purchaser by establishing the presumption that the defect already existed. This solution seems adequate from the consumer's viewpoint. It is easier for the vendor or manufacturer to prove that the defect occurred after sale or placing on the market than for the consumer to prove the contrary. This is also the solution adopted by vendors and manufacturers in their own commercial guarantees. To invoke a commercial guarantee the consumer does not have to prove the pre-existence of the defect, and the person offering the guarantee simply reserves the right to refuse the guarantee in certain cases, notably when the defect arises from misuse of the product in respect of which the burden of proof, as a rule, lies with the professional.

3.5.3. Notification of the person liable

No special procedure or formality should be stipulated for notification of the defect and the consumer's choice of redress. It goes without saying that the traditional "registered"letter is always to be recommended since it makes establishment of proof a lot easier.

3.5.4. Guarantee periods

This is a delicate question since national solutions vary considerably as regards the duration and the approach adopted and since there is some confusion between the time limit for remedies and the guarantee period as such.

Two periods have to be distinguished: one starts to run the moment the product is delivered; during this period discovery of the defect entitles the purchaser to invoke the legal guarantee (guarantee period); the other, which extinguishes the action on a guarantee, begins to run the moment the defect is discovered (limitation period).

This is also the approach adopted in Directive 85/374 on liability for defective products[89].

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89 See Article 10 (limitation period) and Article 11 (extinction of rights)

The guarantee period must be established taking into consideration both the need to secure a high level of consumer protection and the fact that the legislation of half the Member States in practice stipulates quite a long period (in four Member States the guarantee is not limited to any specific period, while in two other Member States the guarantee period is six years), while the other half have established somewhat shorter periods (between six months and one year). The Commission wishes for the moment to refrain from proposing any specific period. At any rate, the period should be considerably extended in the event of bad faith on the guarantor's part.

The time limit for submitting claims should be short, but once the person liable has been notified the period should be suspended until one of the parties terminates negotiations designed to settle the dispute in an amicable manner. This is the only way to ensure that the consumer acting in good faith is not deprived of his rights through procrastination on the part of the guarantor.

Again, the guarantee period should be suspended while the item is being repaired. A new guarantee period should begin to run:

- in the event of replacement of the good, as though there had been a new contract of sale
- in the event of repair of the good, depending on the actual defect which had to be repaired.

3.6. Relations with the commercial guarantee

When the manufacturer or vendor of a good offers a commercial guarantee, the consumer will not normally invoke his legal rights arising from the legal guarantee and will begin by trying to invoke the commercial guarantee. This situation is to the advantage both of parties because they have recourse to an "advance agreement" between one another and not to the letter of the law.

However, uniform principles should be established governing the relations between the legal guarantee and the commercial guarantee, so as to undermining the consumer's position through application of the commercial guarantee (or the attempt to apply it).

This could be done on the basis of two principles:

- principle of complementarity: the consumer's right to demand the simultaneous application of the legal guarantee and the commercial guarantee with a view to guaranteeing full compensation (example: invoke the commercial guarantee to demand repair of the product and the legal guarantee to demand compensation for other damages caused by the product's defect).
- Principal of subsidiarity of the legal guarantee: when the consumer has chosen to invoke the commercial guarantee, this should not prevent him (by virtue of time limits, for example) from invoking the legal guarantee when he has not obtained satisfaction (example: annulment of the sale under the terms of the legal guarantee after the vendor has genuinely attempted to repair the merchandise under the terms of the commercial guarantee).

3.7. Mandatory nature of the legal guarantee

In most Member States the provisions relating to the legal guarantee are mandatory, whether this is set out in the text of the provisions themselves or in a distinct rule which prohibits - or restricts - disclaimers in contracts. This is the only way to ensure that the law will enhance consumer protection.

Hence the Community text should clearly establish a mandatory scheme which cannot be waived by the parties to the contract.

3.8. Information of the consumer

If the consumer is to get his deserts, he has to be aware of his rights and the remedies at his disposal. All the more so in that the consumer often confounds the legal guarantee and the commercial guarantee, unaware that his rights in the domain of guarantees do not depend exclusively on the goodwill of the person acting by way of trade.

Several national legal systems already provide that commercial guarantees offered by professionals must mention the existence of the legal guarantee and that the commercial guarantee in no way prejudices rights arising from the legal guarantee.

This solution could be adopted at Community level, though it might even be desirable that the seller should mention in the general contractual conditions (when he applies them) the existence of a legal guarantee protecting the customer against defects, even in the absence of any commercial guarantee.

This could also contribute to informing and sensitising the business community itself as to the existence and importance of the legal guarantee, thus making it easier to apply it "amicably". This would certainly encourage the disappearance of certain unfair terms frequently present in standard contracts[90].

B. SOLUTIONS AT THE LEVEL OF THE COMMERCIAL GUARANTEE

Two kinds of problem arise at the level of the commercial guarantee:

- the first concerns commercial practices relating to these guarantees, such as presentation of the guarantee, its application, its legal status, its relations with the legal guarantee, advertising made in regard to this guarantee, inadequate information of the consumer, etc. These problems call for the definition of a legal framework at European level concerning the commercial guarantee;

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90 Frequently the contractual conditions accompanying order forms, invoices or delivery documents contain such clauses as "claims must be introduced within 48 hours"

- the second concerns the functioning of the commercial guarantee in the context of the Single Market and calls for the creation of a genuine "European Guarantee" which could easily be invoked in all the Member States, regardless of the country of purchase.

There are three possible solutions:

- a regulatory and unitary option designed to resolve the two types of problem by adopting a mandatory Community legal scheme applicable to the commercial guarantee;
- a voluntarist option which would resolve both problems via optional schemes;
- a "mixed" option which would involve resolving the first type of problem by adopting a mandatory Communty legal scheme, where relevant supplemented by voluntary rules on the basis of self-regulation, and the second by an entirely voluntary scheme.

1. THE REGULATORY AND UNITARY OPTION

The advantage of this solution would be that it would fully solve both the problems resulting from the absence of a legal status for commercial guarantees and problems resulting from the operation of the guarantee in cross-border situations. The decision to offer or refuse a guarantee would remain entirely subordinate to the principle of freedom of contract. However, such an approach assumes that the guarantees offered by producers are valid throughout the common market and subject to uniform conditions.

All the commercial guarantees offered by a producer in a Member State would hence inevitably have to be "European Guarantees".

However such a solution might well be an excessive burden on business, notably smaller firms which often do business only in a few Member States and which would thus find it hard to guarantee after-sales service throughout the common market. In principle such a solution would benefit big companies present in all the Member States, which could offer a guarantee for their products, as opposed to smaller firms which in practice would often be unable to do so, because they could no longer limit the territorial scope of their guarantees.

2. THE VOLUNTARIST OPTION

The voluntarist approach would mean abandoning the idea of establishing a mandatory legal status for commercial guarantees at Community level. A voluntary scheme would be adopted to improve the quality of the guarantees offerred and resolve the problem of applying these guarantees in the large market. Professionals would be free to adhere to this scheme if they wished. There are two variants: either a Community legal instrument, which would permit access to a "quality label" concerning the guarantee[91] or the use of

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[91] Inspiration could be drawn from the Community system concerning the eco label, see also point

a protected designation or by brand name, or to rely purely on self-regulation in the form of codes of conduct. In the first case, control would be effected a posteriori on guarantee conditions applied by those who claim to belong to the "system",[92] by the competent organisations or national authorities. Supplementary protection of consumers in regard to "untruthful" conditions would make it essential to consider as null and void guarantee conditions incompatible with established quality standards. In the second case (self regulation) the codes of conduct would have to include effective mechanisms to ensure compliance.

Giving all professionals access to a voluntary system of quality guarantees without coercing them into providing a European guarantee would mean envisaging the creation of a supplementary voluntary scheme concerning the "European" status of the guarantee.

This solution would mean having to deal with three types of guarantee: the normal guarantee, entirely subject to contractual freedom, the quality guarantee, subject to the established quality standards, and the European guarantee subject to the additional requirement that it be valid throughout the common market under uniform conditions.

However, there are two major drawbacks to this approach:

- it does not solve the problems of consumers in connection with "normal" guarantees or the unresolved legal aspects of these guarantees;
- probably the Member States would feel they had to legislate for these guarantees, on the lines of Member States where specific legislation already exists, hence risking a multiplicity of approaches which might lead to distortions in competition and barriers to trade.

3. THE MIXED OPTION

This approach would lead to the creation of:

- a mandatory legal framework applicable to all commercial guarantees;
- an optional-type "European Guarantee", subject to certain supplementary rules on uniformity and applicability throughout the Community.

3.1. The Community legal scheme applicable to commercial guarantees

The idea would be not to interfere with the optional nature of the commercial guarantee, but to ensure, through simple groundrules, adequate information of the consumer and the necessary market transparency, with a view to encouraging healthy competition based on good commercial practices.

3.2

92 Inspiration could be drawn from the Community Directive on unfair terms

The Community rules would be reduced to the minimum necessary and might possibly be developed via standardisation[93] or by codes of practice.

In establishing the Community scheme, one might draw inspiration from Irish legislation and the recommendations of the Danish ombudsman[94], which are the two most forward-looking national texts in this domain. The initiatives of the business community itself with a view to establishing rules of conduct could also serve as a point of reference for the Community. In this context the general principles issued by the British Retail Consortium deserve mention[95].

The Community legal scheme applicable to commercial guarantees could be based on three principles:

- establishment of certain mandatory rules concerning the legal status of guarantees and of certain elements which should be present in the guarantee document;
- establishment of supplementary rules concerning the concrete guarantee scheme applicable in the event of gaps in the commercial documents;
- establishment of the principle in accordance with which advertising concerning the guarantee is considered as being part of the guarantee documents, making the advertiser directly liable vis à vis the individual consumer.

3.1.1. Legal nature of the guarantee

The commercial guarantee should clearly be considered as a contract between the guarantor and the holder of the good, even if there is no direct relationship between these two persons. Hence the consumer would have a clear right directly opposable to the manufacturer when it is the manufacturer who offers the guarantee. However, this would not mean that the consumer could directly turn to the manufacturer for implementation of the guarantee. The consumer would obviously be obliged to observe the relevant clauses in the guarantee document and to address either the vendor or the distributor of the product. The consumer would be free directly to address the manufacturer only if all other avenues had led nowhere.

3.1.2. Relations with the legal guarantee

The commercial guarantee should confer additional benefits on the consumer over and above the rights already arising from the legal guarantee. Moreover the guarantee documents should also mention the existence of the legal guarantee and summarise its content.

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93 By applying in this domain the spirit of the "new approach" to technical harmonisation

94 Cf. chapter III. B. The ombudsman's recommendations and the Irish legislation are published as annexes to this Green Paper

95 This text is also annexed.

3.1.3. Subject-matter of the guarantee (defects covered) and duration

The content of the guarantee should be freely established by the provider of the guarantee, likewise its duration. However, restrictive terms which gainsay the principle of the guarantee itself should be considered as null and void.

Whenever the document does not specify the scope of the guarantee, it should be considered as covering the good in its entirety against any defect which could arise after delivery, unless the defect was the user's fault. The guarantee would also be considered as entitling the beneficiary to have the item repaired or replaced free of charge.

It no period is mentioned, the guarantee would be considered as valid for one year after delivery to the final purchaser. Unless the guarantee documents clearly state the contrary, the guarantee would be automatically extended for the duration of repairs, while spare parts would automatically come with by a new guarantee having the same duration as the initial guarantee.

3.1.4. Persons liable for the guarantee

Should the vendor be held legally liable vis-à-vis the final consumer for the guarantee offered by the manufacturer? This question has been raised in particular by the British authorities in the consultation document on guarantees. This approach has been adopted in Irish law where it is held that when the vendor transmits to the purchaser the guarantee issued by a third party, he is liable vis-à-vis the purchaser as though he himself were the guarantor, unless the contrary is stated at the time of delivery. This makes it easier for the consumer to invoke his rights arising from the producer's guarantee and corresponds in some way to the consumer's expectations and current commercial practices. Nonetheless, it obliges vendors to "control" all guarantees offered by manufacturers for the products which they have on sale and this may be asking too much.

In the context of selective distribution systems, this solution may however be adequate because contractual relations between vendors and manufacturers are more formal and normally include provisions governing the application of the producer's guarantee. But for distribution systems of this type, one might consider going one step further - namely establishing the joint and several liability of all vendors belonging to a selective distribution network set up by the same manufacturer.

Such a solution would enormously facilitate application of producer's guarantees, notably in the context of cross-border shopping. Far from being a legal revolution, such a solution would simply extend existing solutions already present in Regulations No 123/85 and 4087/88 in the competition field to all selective distribution sectors by adding a supplementary but essential element which up to now has been lacking - namely a subjective right on the part of the consumer.

3.1.5. Beneficiaries of the guarantee

The legal concept of "guarantee" should correspond to its economic substance, i.e.a feataure of the product itself. Hence any person in possession of the guarantee document and able to furnish evidence of initial purchase would have the right to invoke the guarantee.

3.1.6. Conditions for implementing the guarantee

The guarantee documents should clearly specify the persons to contact and the formalities required for implementing the guarantee. Unreasonable formalities or formalities presenting abnormal difficulties by comparison with normal commercial practices should be outlawed and any terms to this effect should be considered as null and void.

3.1.7. Requirements relating to form

All guarantee documents should indicate at least, over and above the particulars referred to above, the name and address of the person offering the guarantee. Moreover, all guarantee documents should be worded clearly and understandably. All obscure terms should be interpreted in the most favourable light from the beneficiary's angle[96].

3.1.8. Transparency

Consumers should be free to consult the guarantee conditions prior to purchase of the merchandise. They should also be available in the shops just like the products displayed.

3.1.9. Advertising

Advertising should not mislead consumers as to the real conditions contained in the guarantee document. Whenever this is the case, the guarantors should be obliged to honour the guarantee as advertised.[97] If the guarantee is subject to major restrictions, the guarantor should have to indicate this in his advertising, otherwise these restrictions could not be opposed to the beneficiaries of the guarantee.

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96 In accordance with the rule already established by Article 5 of Directive 93/13 on unfair terms.

97 This solution has to some extent been adopted at Community level in Directive 90/314 of 13 June 1990 on package travel, package holidays and package tours. Article 3 (2) of this Directive stipulates, in effect, the principle in accordance with which "particulars contained in the brochure are binding on the organiser or retailer"

3.2. The European guarantee

Two conditions would be imposed on economic operators if they wished their commercial guarantees to be considered as "European":

- application of standard guarantee conditions in all the Member States for the same type of goods of the same brand;
- real possibility of implementing the guarantee in all Member States, no matter where the goods were purchased.

Uniformity of the guarantee conditions would in no way oblige the producers to market the goods in all EC countries. It would be enough for the guarantee offered to be the same wherever the goods are sold.

On the other hand, giving the purchaser the opportunity to invoke the guarantee anywhere in the Community does not mean that the producer must be present or represented in all the Member States or that he should have to organise an integrated distribution network. It is enough for him give the consumer Community-wide access to any system which will allow the latter to invoke the guarantee. This might even include returning the defective product to the producer at his expense. The system would have to be a really effective one and the consumer would have to be fully informed about the formalities involved.

In this flexible and general framework, the Euroguarantee would be something not only large corporations could afford but also small and medium sized undertakings.

Two conditions seem necessary for success:

- creation of a label or protected designation indicating the specifically "European" character of the guarantees. The expression "Euroguarantee" is advanced as a suggestion;
- prohibition on the use of all designations or claims which might lead to confusion with "Euroguarantee", such as European guarantee, EEC guarantee, etc.

As regards the systems to be established, two solutions might be considered, as already indicated under point 2:

- a labelling system similar to that of the Eco-label[98] or the scheme that applies to the protection of geographical indications and designations of origin for agricultural products and foodstuffs[99];
- a system based simply on protection of the designation "Euroguarantee", whose use would be subject to rules worked out in advance.

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98 Council Regulation No 880/92 of 23 March 1992, OJ No L 99 of 11 April 1992, p. 1

99 Council Regulations No 2081/92 and 2082/92 of 14 July 1992, OJ No L 208 of 24 July 1992, pp. 1 and 9 respectively

The advantage of the first system is that it would allow prior control and monitoring of the guarantee conditions applicable and of implementation of the guarantee. The downside is that it would mean setting up new "bureaucratic" structures.

The second system has the advantage of simplicity but would be more open to fraud and abuse.

C. AT THE LEVEL OF THE AFTER-SALES SERVICES

Any requirement to provide spare parts imposed exclusively on vendors is both unjust and ineffective. It is unjust because it places on the vendor a burden which he cannot shoulder on his own in a domain over which he has little say. It is ineffective because the vendor simply cannot be made entirely responsible, either for providing spare parts or for informing the consumer in this respect.

Hence a solution at Community level means that the manufacturer himself must be held liable. We believe that three solutions merit consideration at Community level.

The most stringent solution would be to impose a standard obligation on manufacturers to stock the necessary spare parts during a certain period from the date they quit selling the products. This product-specific period should correspond to the normal lifespan of the merchandise in question and could be "fleshed out" through codes of conduct or through recourse to standardisation[100].

Another solution would be to seek - on a purely voluntary basis - with commitments on the part of different industial sectors to respect certain minimum conditions relating to the availability of spare parts (codes of conduct, standardisation or even direct negotiation between those concerned - authorities, firms, consumers).

A final solution, focussing purely on the information aspects, would be to require stating, on the product label, the period during which the manufacturer commits himself to stocking spare parts. The advantage here would be to ensure market transparency and giving free rein to competition without requiring manufacturers to respect specific time limits.

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100 Again, this option could be inspired by the "new approach" to technical harmonisation. The "new approach" technical harmonisation directives merely lay down essential requirements at regulatory level and leave it to the European standardisation organisations to "flesh out" the technical aspect in the form of standards; these standards are never mandatory but, in principle, if the economic agents comply with them, the products are deemed to be in comformity with essential requirements at regulatory level.

VII - CONCLUSIONS

This Green Paper is designed to trigger an in-depth public discussion of the subjects aired, with a view to giving the Commission access to the views and information it needs to define future actions in this domain. All interested parties, notably the social groups concerned, are hence invited:

- to supply the Commission with any data of an economic, social and/or legal nature they consider pertinent, notably as regards the operation of the commercial guarantee, the relations between producers and distributors, and consumer grievances;
- to propose to the Commission any measure which they think would improve the functioning of guarantees and after-sales services in the context of the Single Market;
- to submit pertinent comments concerning application of the subsidiarity principle in the context of the proposed solutions, and also as regards possible simplification of the relations between Community law and national law, in the light of the analysis made of these relations in the context of this Green Paper;
- to comment on the solutions presented in this Green Paper and in particular to reply to the following specific questions:

- 1. Is it desirable to harmonise national legislation relating to the legal guarantee?
  - a) If yes
    1. What type of harmonisation (total or minimal)?
    2. What scope? (See point VI.A.2)
    3. Should liability for the legal guarantee be extended to the manufacturer and if so to what extent? (See point VI.A.3.2)
  - b) If no
    1. Would amendment of the rules of Private International Law (see point V.A.1) be an appropriate solution?
    2. What other solution could be envisaged?

- 2. Should improvement of the commercial guarantee in the context of the Single Market be achieved through regulation (hard law, see point VI.B.1), through a voluntary approach based either on a Community legal instrument or on codes of conduct (soft law, see point VI.B.2) or a mixed approach (see point VI.B.3)?

- 3 If preference is given to the "voluntary" or "mixed" option, would it be preferable to base the voluntary systems on a Community legal instrument or to rely entirely on self-regulation?

- 4. In the context of the latter solution, how could one guarantee and monitor good application of the codes of conduct and how could one get all interested parties involved in drawing up these codes (see point VI.B.2)?

- 5. In the framework of these solutions, would it be a good thing to involve the European standardisation bodies?

- 6. Should the voluntary European guarantee be based on a system of prior monitoring or a system of post-market monitoring (c.f. point VI.B.3.2 and the reference to point VI.B.2)?

- 7. Should the spare parts problem be solved through regulation (general obligation on all manufacturers to stock the necessary parts during a specific period) through a voluntary approach (codes of conduct specifying for how long spare parts must be kept available) or an information-oriented approach (obligation to inform the consumer about policy on stocking spare parts) (c.f. point VI.C)?

The Commission invites communications from interested persons, which should be submitted by 30 April 1994, at the following address :

Commission of the European Communities
Consumer Policy Service
Rue de la Loi, 200
B-1049 Brussels

ANNEX I

COMPARATIVE TABLES OF NATIONAL LAWS

BELGIUM

A.1. Legal basis	- *Articles 1641 to 1649 of the Civil Code* - guarantee for all products - the courts have extended the guarantee to services performed in connection with the delivery of a product - Mandatory provisions in relations with consumers - *Article 32 of the Act of 14 July 1991* - prohibition of unfair terms - mandatory provisions
A.2.Notion of defect and other conditions of application	- notion of functional defect - gradual approximation via case law of the conformity defect (obligation to supply) and the latent defect; - moreover, the defect must be: - prior to sale - latent - have a certain severity
A.3. Parties liable for the legal guarantee	The vendor is liable for the legal guarantee under the Civil Code - the preceding vendor and the manufacturer are also liable on the basis of a direct action created by case law and considered as accessory to the good sold
A.4. Beneficiaries of the legal guarantee	The purchaser benefits from the legal guarantee - the subsequent purchaser also benefits via the remedy of direct action
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract and reimbursement of costs - Reduction in the price of the product - Payment of damages, if the vendor is in bad faith, i.e. if he knew of the defect at the time of the sale; a rebuttable presumption that he knew of the defect in the case of professional vendors
A.6. Guarantee period and time limit for action	The action must be brought within a "brief period" - determined on a case by case basis as regards the legal guarantee and the Civil Code - starts at the time the defect is discovered
A.7. Rules concerning the burder of proof	- The purchaser must in principle prove the existence of the defect at the time of sale - as a result of very far-reaching case law, the remainder of the burden of proof lies with the vendor; there is a presumption of bad faith on the part of the vendors acting by way of trade (knowledge of the defect) and, often, that the defect existed prior to sale.
B. Commercial guarantee	- No specific provisions
C. After-sales service and durability	- no legal obligation in these matters - however, the non-durability of a product may be considered as a defect

GERMANY

A.1. Legal basis	*Articles 459 ff of the Civil Code* - guarantee for all products - supplementary provisions *Act of 1977 on general contractual conditions (AGB)* - prohibition of unfair terms - mandatory provisions
A.2.Notion of defect and other conditions of application	- notion of functional defect (as assessed empirically by the courts) - moreover, the defect must be: - prior to sale - of a certain severity - unknown to the purchaser at the time of sale
A.3. Parties liable for the legal guarantee	Only the vendor is liable for the legal guarantee
A.4. Beneficiaries of the legal guarantee	Only the purchaser benefits from the legal guarantee
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract and reimbursement of costs - Reduction in the price of the product - Replacement of the product, if it is a fungible good; - Payment of damages, if the vendor is in bad faith or has promised certain characteristics or qualities which are not present
A.6. Guarantee period and time limit for action	Time limit for bringing an action: - 6 months from the date of delivery - interruption of time limit in the event of inspection or repair of product by the vendor, with simple notification of the defect to the vendor
A.7. Rules concerning the burder of proof	The purchaser must prove: - that the defect existed at the time of sale - that the conditions for application of the guarantee are present - unsatisfactory quality of repairs, where relevant
B. Commercial guarantee	- No specific legislation, but the AGB contains provisions on contractual terms relating to the guarantee and allows a certain control over the conditions of commercial guarantees
C. After-sales service and durability	- no legal obligation - the courts have established an obligation to provide spare parts in the motor vehicle sector.

DENMARK

A.1. Legal basis	- *Consumer Sales Amendment Act to the Sales of Goods Act (1979)* - guarantee of products in relations involving consumers - extention by the courts to performance of service - certain provisions are mandatory - *Article 36 of the 1975 Contracts Act* - control of unfair contractual terms - mandatory provisions
A.2.Notion of defect and other conditions of application	- according to Sections 76 and 77 of the SGA, the fundamental criterion resides in the product's non-conformity with the consumer's legitimate expectations bearing in mind the information at his disposal - the defect must concern an important feature in the purchaser's mind
A.3. Parties liable for the legal guarantee	- The vendor is responsible for the legal guarantee - the producer or prior vendor in the distribution chain may be held liable, according to the general rules, in the case of incorrect conduct notably as regards the information given to the consumer
A.4. Beneficiaries of the legal guarantee	The purchaser benefits from the legal guarantee - the subsequent purchaser is also entitled to remedies under the theory of the succession of contracts
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract, if the defect is a serious one; - Reduction in price of the product; - Replacement of the product, if it is a fungible good; - Repair of the product - Payment of damages if the vendor is in bad faith or has promised certain characteristics or qualities which are not present
A.6. Guarantee period and time limit for action	- The purchaser must notify the vendor within a reasonable period after discovering the defect - the period for bringing an action is limited to one year after delivery except in the case of a longer guarantee, expressly or implicitly provided by the vendor
A.7. Rules concerning the burder of proof	- The purchaser must prove the existence of the defect at the time of sale - existence of the defect at the time of the complaint establishes a presumption that the defect existed prior to sale
B. Commercial guarantee	- The term "guarantee" can only be used if the beneficiary is in a more favourable position than the one resulting from the legal guarantee - Ombudsman recommendations (with quasi-legal effect) stipulate the information which the guarantee documents must contain as well as certain prinicples concerning the operation of the guarantee
C. After-sales service and durability	- no legal obligation to provide after-sales service, however: - if no after-sales service is available at the time of conclusion of the contract, the good may be considered as defective (absence of spare parts for example); - if no after-sales service is provided after conclusion of the contract , the consumer may in certain circumstances invoke general principles of contract law to demand repudiation of the contract - no legal durability requirement, but aspects linked to durability may constitute a defect

SPAIN

A.1. Legal basis	- *Articles 1484 ff of the Civil Code:* - product guarantee scheme - mandatory provisions - *GAPCU of 19 July 1984*: - prohibition of unfair terms - obligation to supply a commercial guarantee for durable goods - mandatory provisions - *royal decrees implementing the GAPCU*: - applicable only to relations involving consumers - applicable to products and services - *legislation of the autonomous communities* - applicable only to relations involving consumers - applicable either to products or to products and services
A.2.Notion of defect and other conditions of application	- Notion of functional defect - moreover, the defect must be: - prior to sale - latent
A.3. Parties liable for the legal guarantee	- The vendor is liable for the legal guarantee - the importer or manufacturer may also be held liable, notably in the context of the commercial guarantee required by law
A.4. Beneficiaries of the legal guarantee	The purchaser benefits from the legal guarantee - the subsequent purchaser and the non-purchaser user also benefit from the guarantee by virtue of the general obligation imposed by the GAPCU on all participants in the product distribution network, but this has yet to be confirmed by case law
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract and reimbursement of expenses - Reduction of price of the product or service - In the context of the mandatory commercial guarantee: - Repair or replacement of the good - Payment of damages, if the vendor is in bad faith
A.6. Guarantee period and time limit for action	- An action must be brought within 6 months of delivery under the terms of the Civil Code
A.7. Rules concerning the burder of proof	- The purchaser must prove the existence of the defect at the time of sale and the conditions for applying the guarantee in accordance with the Civil Code; in the context of the mandatory commercial guarantee, this proof is in principle facilitated
B. Commercial guarantee	- Mandatory commercial guarantee for certain durable goods. The GAPCU also contains certain rules on the substance of these guarantees.
C. After-sales service and durability	- Framework provisions in the GAPCU on the obligation to provide after-sales service - specific provisions on after-sales service and the availability of spare parts in certain sectors; - no legal durability requirement

FRANCE

A.1. Legal basis	- *Articles 1641 to 1649 of the Civil Code:* - guarantee for all products - extention by the courts to services performed in connection with the delivery of a product - mandatory provisions in relations involving consumers - *Decree No 78-464 or 24 April 1978*: - prohibition of terms limiting consumer rights in the event of the professional failing to fulfil his obligations - mandatory provisions
A.2.Notion of defect and other conditions of application	- Notion of functional defect - progressive approximation in case law of the conformity defect and the latent defect; - moreover the defect must be - prior to sale - latent - significant
A.3. Parties liable for the legal guarantee	- The vendor is liable for the legal guarantee - the preceding vendor and the manufacturer are also liable on the basis of a direct action created by case law and considered as an accessory to the good sold
A.4. Beneficiaries of the legal guarantee	- The purchaser benefits from the legal guarantee - the subsequent purchaser also benefits from the guarantee via the remedy of direct action
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract and reimbursement of expenses - Reduction of price of the product - Payment of damages, if the vendor is in bad faith; irrebuttable presumption of bad faith on the part of the vendor acting by way of trade
A.6. Guarantee period and time limit for action	- Action must be brought within " brief period" - case-by-case assessment, but normally starts with the discovery of the defect
A.7. Rules concerning the burder of proof	- The purchaser must prove the existence of the defect at the time of sale as well as its latent character - as a result of very far-reaching case law, the remainder of the burden of proof lies with the vendor - irrebuttable presumption of knowledge of the defect (bad faith) on the part of the professional vendor
B. Commercial guarantee	- Obligation to mention in the guarantee documents that the legal guarantee remains applicable - standardised format of the guarantee for electrical household appliances and audio-video appliances - any period of immobilisation of the good for over 7 days entitles the purchaser to extension of the guarantee
C. After-sales service and durability	- No legal obligation; the non-durability of a product may however be considered as a defect - mandatory standard form for after-sales service contracts in the electrical household appliances and electronic appliances sectors - obligation of the vendor to provide information as to the duration of availability of spare parts.

GREECE

A.1. Legal basis	- *Articles 513 ff of the Civil Code:* - product guarantee - supplementary provisions - *1991 Consumer Protection Act:* - mandatory provisions - prohibition of unfair terms, notably those that limit or exclude the vendor's liability under the legal guarantee - mandates the vendor of new and durable consumer goods to provide the purchaser with a written guarantee which must be for a reasonable period
A.2.Notion of defect and other conditions of application	- According to case law, the defect must be intrinsic and must influence the value of the product or its conformity with use - moreover, the defect must be: - prior to sale, - latent, - have a certain severity
A.3. Parties liable for the legal guarantee	- Only the vendor is liable for the legal guarantee
A.4. Beneficiaries of the legal guarantee	- Only the purchaser may benefit in principle from the legal guarantee
A.5. Remedies accorded to the consumer (effects of the guarantee)	Repudiation of the contract if the product does not correspond to the agreed quality - Reduction in product price - Replacement of the product if it is a fungible item - the vendor may also propose repairing the product (in the framework of the 1991 Act this is the normal solution) - payment of damages if the vendor is acting in bad faith or if he is responsible for the defect
A.6. Guarantee period and time limit for action	- Time limits for action of 6 months from the date of delivery of the product - the guaranatee period must be fixed in a reasonable manner in the framework of the 1991 Act
A.7. Rules concerning the burder of proof	- The purchaser alone must prove the existence of the defect at the time of sale and the presence of the conditions required for invoking the guarantee. In the context of the mandatory commercial guarantee, this proof is made easier.
B. Commercial guarantee	Obligation on the vendor to provide a commercial guarantee for new and durable goods - legal rules on presentation of guarantees and guarantee schemes.

IRELAND

A.1. Legal basis	- *Sale of Goods and Supply of Services Act of 1980:* - legal and commercial guarantee for products and services - also contains provisions specific to the motor vehicle sector - mandatory provisions in relations with consumers
A.2.Notion of defect and other conditions of application	- Absence of "merchantable quality" and unsuitability for the particular use of which purchaser apprised the vendor - Merchantable quality: the product is suitable for the use for which it is intended and the durability that can reasonably be expected
A.3. Parties liable for the legal guarantee	- The vendor is liable for the legal guarantee - persons who finance hire purchases may also be held liable
A.4. Beneficiaries of the legal guarantee	- The purchaser benefits from the legal guarantee - in certain cases the user and passengers of a motor vehicle may benefit (safely defects)
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Rejection of the contract unless the consumer has "accepted" the good; - Payment of damages, often in the form of a reduction in the price agreed on in the contract - when the purchaser is a consumer he may also demand repair or replacement of the good; when repair or replacement fail the consumer reacquires the right to reject the contract - Where relevant, supplementary damages, even in the absence of fault
A.6. Guarantee period and time limit for action	- Time limit for action is maximum 6 years from the date of conclusion of the contract - However, actions to reject a contract must be introduced within a brief delay after delivery
A.7. Rules concerning the burder of proof	- The purchaser must prove existence of the defect at the time of sale
B. Commercial guarantee	- Quite detailed regulation of the commercial guarantee furnished by the manufacturer or other distributor (except for the vendor). The guarantor is liable as though he himself had sold the goods. Obligatory mentions in the guarantee document. The vendor is liable for a guarantee issued by a third party (normally the manufacturer) unless he expressly indicates the contrary to the buyer at the time of delivery. Later purchasers benefit from the guarantee.
C. After-sales service and durability	- The durability requirement is part of the concept of "merchantable quality" - legal obligation to provide after-sales service and supply spare parts during a reasonable period.

ITALY

A.1. Legal basis	- *Articles 1490 to 1496 of the Civil Code:* - guarantee against latent defects - supplementary provisions - *Article 1497 of the Civil Code* - guarantee against quality defects - mandatory rule established by the courts - *Extension via case law: aliud pro alio (obligation to deliver)*
A.2.Notion of defect and other conditions of application	- *Articles 1490 to 1496*: - notion of intrinsic defect which must be prior to sale, latent and which must prevent normal use of the item or considerably diminish its value - *Article 1947*: - absence of qualities promised or of qualities which are essential for use of the item, provided the quality defect exceeds normal tolerance limits
A.3. Parties liable for the legal guarantee	Only the vendor is liable for the legal guarantee
A.4. Beneficiaries of the legal guarantee	- Only the purchaser benefits from the legal guarantee
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract and reimbursement of expenses associated with the sale (only remedy provided for in Article 1497); - Reduction in the price of the product - Payment of damages, if the vendor is acting in bad faith, rebuttable presumption of bad faith: the vendor must prove his ignorance without fault of the defect
A.6. Guarantee period and time limit for action	- Double condition for the time limit for action: - notification of the defect to the vendor within 8 days of discovery - the action must be brought within a maximum of 1 year after delivery
A.7. Rules concerning the burder of proof	- The purchaser alone must prove the existence of the defect at the moment of sale and the presence of the conditions for applying the guarantee; bad faith on the vendor's part is presumed (knowledge of the defect)
B. Commercial guarantee	Provisions in the Civil Code relating to the guarantee offered by the vendor or imposed by him through custom
C. After-sales service and durability	No legal obligation

LUXEMBOURG

A.1. Legal basis	- *Articles 1641 to 1649 of the Civil Code, amended by the Act of 15 May 1987*: - guarantee for all products - the courts have extended the guarantee to the performance of services in connection with the delivery of a product - mandatory rules in consumer contracts - *Act of 25 August 1983* - prohibition of unfair terms - mandatory rules
A.2.Notion of defect and other conditions of application	- Notion of functional defect - moreover, the defect must be : - prior to the sale - latent - significant
A.3. Parties liable for the legal guarantee	The vendor is liable for the legal guarantee; - the preceding vendor and the manufacturer are also liable on the basis of a direct action construed by the courts and considered as an accessory to the item sold.
A.4. Beneficiaries of the legal guarantee	- the purchaser benefits from the legal guarantee; - the subsequent purchaser also benefits through the remedy of direct action
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract and reimbursement of expenses associated with the sale; - reduction in the price of the product - payment of damages if the vendor was acting by way of trade or was the manufacturer, or if he was aware of the existence of the defect, in the case of the non-professional vendor
A.6. Guarantee period and time limit for action	- Two time limits for action: - notification of the defect to the vendor within a brief period of discovery - legal action within one year from the date of notification
A.7. Rules concerning the burder of proof	- The purchaser must prove the existence of the defect at the moment of sale - as a result of very broad interpretation by the courts, the remainder of the burder of proof lies with the vendor. There is an irrebuttable presumption of bad faith in the case of vendors acting by way of trade (knowledge of the defect)
B. Commercial guarantee	All advertising relating to the guarantee of the product is part of the contract of sale
C. After-sales service and durability	- No legal obligation, but non-durability may be considered as a defect; - obligation to provide information as to the extent of after-sales service and the conditions under which it is offered

NETHERLANDS

A.1. Legal basis	- *Section 1 to 48 of Book 7 of the Civil Code:* - product guarantee - mandatory rules in contracts involving consumers - *Sections 231 to 247 of book 6 of the Civil Code:* - rules relating to general contractual conditions; prohibition of unfair terms - mandatory rules. More detailed provisions apply to contracts concluded with consumers
A.2.Notion of defect and other conditions of application	- Non-conformity with the purchaser's legitimate expectations or absence of qualities required for normal use of the product; - the purchaser's legitimate expectation is assessed with regard to all relevant elements: the contract, advertising, vendor's declarations, brand, price of product, etc.; - the defect need not necessarily be latent
A.3. Parties liable for the legal guarantee	Only the vendor is liable for the legal guarantee.
A.4. Beneficiaries of the legal guarantee	- the purchaser benefits from the legal guarantee; - all users of product who may be able to justify bringing an action
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract and reimbursement of the expenses associated with the sale, if the defect is significant; - reduction in the price of the product - replacement of the product, if it is fungible, unless the defect is trivial - repair of the product, if reasonable - payment of damages on the basis of the general rules of contract law
A.6. Guarantee period and time limit for action	- Double condition for the time limit for action: - notification of the defect to the vendor within a reasonable period after discovery -actions must be brought within a maximum of 2 years of notification of the defect to the vendor
A.7. Rules concerning the burder of proof	- The purchaser must prove: - the existence of the defect at the time of sale: however, in recent case law there is a tendency to reverse the burden of proof in this respect; - notification of the defect to the vendor within a reasonable period
B. Commercial guarantee	- no specific legislation - recommendations by the "Reclame Code Commissie" concerning advertising relating to guarantees
C. After-sales service and durability	- No legal obligation, but obligation of conformity provided for in the Civil Code may include notably the availability of replacement parts

PORTUGAL

A.1. Legal basis	- *Articles 913 ff of the Civil Code:* - guarantee of products - mandatory and supplementary provisions - *General Consumer Protection Act of 1984* - *Decree Law No 446/85 on general contractual conditions*: - prohibition of unfair terms; more detailed in consumer contracts - mandatory rules.
A.2.Notion of defect and other conditions of application	- Notification of intrinsic defect and functional defect, determined in a concrete and subjective manner; - the defect must be prior to the sale; but need not necessarily be latent
A.3. Parties liable for the legal guarantee	Only the vendor is responsible for the legal guarantee.
A.4. Beneficiaries of the legal guarantee	- only the purchaser benefits from the legal guarantee.
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract or reduction of the price of the product in accordance with the conditions governing error or deception; - or again: - replacement of the product if necessary, if it is a fungible good, or repair of the product except (in both cases) if the vendor was unaware of the defect through no fault of his own; - payment of damages for injury suffered by the purchaser when the vendor is at fault; this fault is presumed
A.6. Guarantee period and time limit for action	- Double condition for the time limit for action: - notification of the defect to the vendor within a maximum of 30 days after discovery and 6 months after supply of the product; -actions must be brought within 6 months after notification of the defect
A.7. Rules concerning the burder of proof	- The purchaser must prove the existence of the defect and prove that it existed prior to sale. It is up to the vendor to prove that there was no error on the part of the consumer, that this error was not essential, or that he (the vendor) was unaware of the defect, without fault. Hence there is the presumption that the vendor is aware of the defect.
B. Commercial guarantee	The Civil Code contains provisions relating to the commercial guarantee offered by the vendor or required by the vendor in accordance with custom.
C. After-sales service and durability	- No legal obligation concerning durability; - legal obligation on the supplier of durable consumer goods to provide after-sales service, including the supply of spare parts during the average life of these products.

UNITED KINGDOM

A.1. Legal basis	- *Sale of Goods Act 1979:* - guarantee of products - mandatory rules in consumer contracts pursuant to the Unfair Contract Terms Act - *Unfair Contract Terms Act 1977:* - ban on terms limiting the guarantee in an absolute manner in contracts involving consumers
A.2.Notion of defect and other conditions of application	- Absence of merchantable quality or unfitness for the particular use of which the purchaser has informed the vendor; - merchantable quality; the product is suitable for the use for which it is intended
A.3. Parties liable for the legal guarantee	- The vendor is liable for the legal guarantee; - Persons who provide finance for hire purchase may also be held liable for the guarantee
A.4. Beneficiaries of the legal guarantee	- The purchaser benefits from the legal guarantee; - this benefit may be extended under the theory of mandate, notably to other members of the family
A.5. Remedies accorded to the consumer (effects of the guarantee)	- Repudiation of the contract unless the consumer has "accepted"the good; - payment of damages, often in the form of a reduction in price; - where relevant, payment of other damages even in the absence of fault
A.6. Guarantee period and time limit for action	- The action must be brought within 6 years of conclusion of the contract; - however, the action must be brought within a brief period of delviery when the purchaser wishes to repudiate the contract
A.7. Rules concerning the burder of proof	- The purchaser must prove existence of the defect at the time of sale
B. Commercial guarantee	The documents concerning the commercial guarantee must indicate that they in no way effect the rights arising from the legal guarantee. Failure to provide this information is a punishable offence.
C. After-sales service and durability	- No legal obligations - the courts however consider that the obligation to provide an after-sales service is inherent to the notion of merchantable quality, as is the requirement of reasonable durability.

ANNEX II

THE IRISH ACT ON COMMERCIAL GUARANTEES AND AFTER-SALES SERVICES

SALE OF GOODS AND SUPPLY OF SERVICES ACT, 1980

Spare parts and after sale service

(Article 12)

1. In a contract for the sale of goods there is an implied warranty that spare parts and an adequate aftersale service will be made available by the seller in such circumstances as are stated in an offer, description or advertisement by the seller on behalf of the manufacturer or on his own behalf and for such period as is so staded or, if no period is so stated, for reasonable period.

2. The Minister may, after such consultation with such interested parties as he thinks proper, by order define, in relation to any class of goods described in the order, what shall be a reasonable period for the purpose of subsection.

3. Notwithstanding section 55 of the Act of 1893 (inserted by section 22 of this Act) any term of a contract exempting from all or any of the provisions of this section shall be void.

Guarantees

(Article 15)

1. In sections 16 to 19, "guarantee" means any document, notice or other written statement, howsoever described, supplied by a manufacturer or other supplier, other than a retailer, in connection with the supply of any goods and indicating that the manufacturer or other supplier will service, repair or otherwise deal with the goods following purchase.

(Article 16)

1. A guarantee shall be clearly legible and shall refer only to specific goods or to one category of goods.

2. A guarantee shall state clearly the name and address of the person supplying the guarantee.

3. A guarantee shall state clearly the duration of the guarantee from the date of purchase but different periods may be stated for different components of any goods.

4. A guarantee shall state clearly the procedure for presenting a claim under the guarantee which procedure shall not be more difficult than ordinary or normal commercial procedure.

5. A guarantee shall state clearly what the manufacturer or other supplier undertakes to do in relation to the goods and what charges, if any, including the cost of carriage, the buyer must meet in relation to such undertakings.

6. It shall be an offence for the manufacturer or other supplier of goods to supply in connection with the goods a guarantee which fails to comply with this section.

(Article 17)

1. Where the seller of goods delivers a guarantee to the buyer, irrespective of when or how it is delivered, the seller shall be liable to the buyer for the observance of the terms of the guarantee

as if he were the guarantor, unless he expressly indicates the contrary to the buyer at the time of delivery.

2. Where, however, the seller, being a retailer, gives the buyer his own written undertaking that he will service, repair or otherwise deal with the goods following purchase, it shall be presumed, unless the contrary is proved, that he has not made himself liable to the buyer under the guarantee so delivered.

3. Sections 16, 18 and 19 shall apply to any such undertaking as they apply to a guarantee.

4. The liability of a seller to a buyer under this section is without prejudice to the rights conferred on the buyer under section 19.

(Article 18)

1. Rights under a guarantee shall not in any way exclude or limit the rights of the buyer at common law or pursuant to statute and every provision in a guarantee which imposes obligations on the buyer which are additional to his obligations under the contract shall be void.

2. A provision in a guarantee which purports to make the guarantor or any person acting on his behalf the sole authority to decide whether goods are defective or whether the buyer is otherwise entitled to present a claim shall be void.

(Article 19)

1. The buyer of goods may maintain an action against a manufacturer or other supplier who fails to observe any of the terms of the guarantee as if that manufacturer or supplier had sold the goods to the buyer and had committed a breach of warranty, and the court may order the manufacturer or supplier to take such action as may be necessary to observe the terms of the guarantee, or to pay damages to the buyer. In this subsection, "buyer" includes all persons who acquire title to the goods within the duration of the guarantee and, where goods are imported, "manufacturer" includes the importer.

2. In any case in which a guarantor is liable to an owner in damages, the court may at its discretion and on such terms as the court may deem just afford the guarantor the opportunity of performing these obligations under the guarantee to the satisfaction of the court within a time to be limited by the court.

ANNEX III

CODE OF GOOD CONDUCT BY THE DANISH OMBUDSMAN CONCERNING THE COMMERCIAL GUARANTEES

GUARANTEES

In 1987 the Consumer Ombudsman (FO) drew up the following new guidelines for guarantees on goods and services on the basis of discussions with trade and consumer organisations:

Guidelines for guarantee declarations in advertisements and conditions of contract

Following discussions with the Danish Organisation of Retail Chains, the Federation of Danish Retail Organisations, the Danish Chamber of Commerce, the Federation of Danish Industries, the Danish Organisation for Fair Competition, the National Consumer Agency of Denmark, the Consumer Complaints Board and the Consumer Council, I have drawn up the following guidelines. Account is also taken in these guidelines of a report drawn up by the NEK (Nordic Council of Ministers' Committee of Senior Officers) on guarantees in connection with consumer protection and consumer problems in the Nordic countries.

Under § 4 of the Marketing Practices Act, "a guarantee, warrant or declaration of similar nature shall be given only when such guarantee, warrant or declaration affords the consumer a better legal position than otherwise provided by existing legislation".

Furthermore, § 1 of the Marketing Practices Act - which refers to proper marketing practice - rules out guarantee conditions which can be regarded as unreasonable.

The advertising of guarantees shall also be assessed in the light of § 2.1 of the Marketing Practices Act, according to which the trader may not make use of any false, misleading or unreasonably incomplete information likely to affect supply and demand.

It is clear from the preparatory work on the Marketing Practices Act (Consumer Commission report II No 681/1973, page 22) that guarantees and similar declarations must offer the consumer a better deal and that account must be taken of the guarantee or similar declaration as a whole in assessment of whether the legal position of the consumer is better than under the existing legislation.

These guidelines - which, in the opinion of the Ombudsman, cover the requirements which should, as a general rule, govern the wording of guarantees - apply to guarantees associated with the sale of goods and agreements on the provision of services, including producer and supplier guarantees.

The guidelines apply basically to sales of both new and second-hand goods. Guarantees provided on new goods shall, as a general rule, cover a period considerably longer than the one-year claim period under the Sale of Goods Act. In the case of guarantees on second-hand goods, on the other hand, a guarantee covering a period which corresponds to - or is shorter than - the one-year claim period in the Sale of Goods Act, can be regarded as a real improvement in the legal position of the purchaser, on condition that the guarantee makes it clear that defects covered by the Sale of Goods Act can also be taken into account within the one-year period mentioned in that Act.

In the Ombudsman's view guarantees which restrict the rights the purchaser has under general rules, including the existing legislation, will not be consistent with § 4 of the Sale of Goods Act in the vast majority of cases.

Advertising guarantees

1. If the word "guarantee" is used to describe qualities other than functional efficiency (useability, operating safety/durability), the meaning of the word guarantee in this connection shall be clearly explained. This can, for example, be achieved by the use of a composite word as long as the other component clearly applies to the guarantee.

2. The guarantee period shall be indicated at the advertising stage.

3. If the guarantee includes special conditions which the consumer would not necessarily expect an explanation shall be given.

Minimum requirements for the content of guarantees

I The written guarantee shall clearly state:
   a. what the guarantee covers
   b. who is providing the guarantee
   c. the period of validity of the guarantee
   d. what the purchaser is to do if he/she needs to make a claim under the guarantee
   e. that the guarantee runs from the time of delivery.

II It shall be made clear in the written guarantee that, in purchasing the goods, the purchaser, notwithstanding the guarantee, retains his/her rights under general rules, including the existing legislation.

The written guarantee shall, furthermore, be drawn up in Danish.

III The guarantee shall cover the cost of all spare parts and labour and the travelling expenses of fitters within the country, as long as the guarantor considers it necessary for the repairs to be effected at the purchaser's place of residence.

If the guarantor considers it necessary for the product to be sent to a factory or workshop for repairs, he/she shall bear all costs associated with carriage.

Once the one-year claim period under the Sale of Goods Act has elapsed, the guarantor's obligation to bear the cost of spare parts, labour, travelling expenses or dispatches can be restricted under the guarantee.

IV If repairs are carried out under the guarantee the guarantee period shall be extended by a period corresponding to the period running from the time when the claim is introduced until the time when the requirement has been met.

V A guarantee shall be provided for parts which have been changed or repaired under the guarantee under the same conditions as for the product as a whole and for a corresponding period.

VI If a requirement under the guarantee is that the purchaser shall make a claim through, for example, the retailer within the guarantee period, a claim made to the guarantor within that period is regarded as having been made in good time as far as the retailer is concerned.

VII The guarantee may not lapse if the product is passed on to another person.

VIII If the guarantee does not apply to deficiencies caused by lack of (or inadequate) maintenance, instructions for maintenance of the product must be given to the purchaser - if necessary in the form of written guidelines in Danish.

IX If provision is made for the guarantee to be annulled or possibly to lapse if the purchaser does not comply with his/her obligations, this condition shall not apply in cases where the purchaser refuses to pay on the grounds that the goods or services are deficient.

Furthermore the guarantee cannot be allowed to lapse before a demand has been made and the purchaser has been given the opportunity to pay.

X The following provisions - and this is not an exhaustive list - are not regarded as reasonable:

1. The guarantee does not apply unless a written guarantee or similar form has been completed and sent to the retailer or manufacturer.

2. The guarantee is not valid unless the purchaser is able to produce a written guarantee or give the manufacturer's number or similar.

   It should be pointed out in this connection that it is generally the responsibility of the purchaser to provide evidence of where the goods or services were purchased, when they were purchased and of the existence of a guarantee.

3. The guarantee depends on the guarantor being covered by his/her supplier's guarantee or similar.

4. The retailer's or guarantor's decision about whether there is a deficiency is final and the matter cannot be taken to court.

5. There are departures from the general rules in the Sale of Goods Act on the transfer of risk which put the purchaser at a disadvantage.

6. That the venue in the case of legal proceedings shall be the retailer's or guarantor's venue.

These guidelines replace the previous note on the presentation of written guarantees of July 1978.

(Consumer Ombudsman, December 1987)

New guidelines for guarantees on goods

Following discussions with trade and consumer organisations the Consumer Ombudsman has drawn up new guidelines for guarantees on goods and services.

If the trader provides a guarantee that guarantee shall afford the consumer a better legal position than otherwise provided under the law.

The guidelines apply to both new and second-hand goods and the requirements, in accordance with the Marketing Practices Act, refer to the *content* of the guarantee itself and the *advertising* of guarantees.

In the case of a guarantee on *new goods* the guarantee period shall as a general rule be considerably longer than one year. Guarantees on *second-hand goods* can be restricted to a shorter period.

The *written guarantee* shall be drawn up in Danish and shall explain what the guarantee covers, who is providing the guarantee, the period of validity and what the purchaser should do in order to claim under the guarantee. Furthermore, it shall be clear from the written guarantee that the guarantee runs from the time of delivery and that the purchaser retains his/her rights under the legislation in force.

The guidelines also cover *responsibility*, in the case of *repairs*, for the cost of spare parts and labour, the extension of the guarantee period by the period up to the time when the repair has been completed and the provision of a new guarantee for parts which have been changed or repaired.

Finally, there is a list of conditions which are not regarded as reasonable, e.g. the guarantee does not apply unless the written guarantee has been completed and sent to the retailer or manufacturer; the guarantee is not valid unless the purchaser is able to produce the written guarantee; the guarantee lapses with a change of owner.

(Consumer Ombudsman, February 1988)

The advertising of insurance schemes and guarantees for marketing purposes

After consultation and discussions with the Danish Organisation of Retail Chains, the Federation of Danish Retail Organisations, the Federation of Danish Cooperative Wholesale Societies, the Motor Touring Club of Denmark, the Danish Car Dealers Association and the Consumer Council I have the following to report:

I have recently had an opportunity to look into the advertising of insurance schemes and guarantees for marketing purposes. Examples are advertisements for a "full five-year guarantee" or "five years' guaranteed insurance". In both cases the consumer is offered a five-year service or repair scheme when he/she purchases an article against payment of a specific amount for the "guarantee" or "insurance".

Neither of these schemes can be regarded as a guarantee under the terms of §§ 4 and 2 of the Marketing Practices Act. The word "guarantee" in this connection may be used only if the trader, without requiring extra payment, takes responsibility for the risk of material or functional failure of the article purchased within a specific period of over one year.

If, in his marketing, the trader uses the word "insurance" the use of this word shall be in accordance with the legislation on insurance.

If, in connection with the purchase of goods or services, legitimate insurance is also offered the question of collateral gift may arise (see § 6.1 of the Marketing Practices Act).

The sale of an insurance policy in connection with the purchase of a product is basically regarded as a collateral gift. I have the impression, however, that the tendency in recent years has been for many trades to try instead to provide a service for the consumer by selling combined products. According to the circumstances and on the basis of a concrete assessment schemes of this sort can be accepted as legitimate combined sales.

For me to regard combined sales as legal the service provided must have a natural connection with the product sold. For example, a package tour may be sold in combination with a cancellation and accident insurance policy. Another factor which may play a part is whether the procedure is common in the trade in question.

A combined offer of this kind may still come up against the prohibition of collateral gifts if the secondary service (insurance) is made the main attraction in the marketing of the product or if the combined offer camouflages the price.

A press report is annexed for guidance.

(Consumer Ombudsman, November 1990)

ANNEX IV

CODE OF CONDUCT OF THE BRITISH RETAIL CONSORTIUM CONCERNING COMMERCIAL GUARANTEES

RETAIL CONSORTIUM
GUARANTEES - GENERAL PRINCIPLES

There is no obligation to offer a Guarantee but where one is offered, it should conform with the following principles where applicable.

These principles constitute minimum standards of good practice. Guarantors may offer such additional benefits as they see fit.

The principles have been developed in respect of Guarantees for goods but where applicable it is intended that they should also apply to services.

1. All Guarantees should be clear and unambiguous and should state as a minimum the name and address of the Guarantor, the period of the Guarantee and all its relevant terms.

2. There should be no charge additional to the purchase price of the new goods for any Guarantees however described of one year or less.

3. Where a Guarantee is specific to particular goods, a document stating clearly the terms of the Guarantee should be available for purchasers.

4. All forms of Guarantee, promises and undertakings of this nature however described whether specific or general should be binding on the Guarantor.

5. Purchasers should be given the opportunity to study, if they wish, the terms of the Guarantee before being committed to purchase.

6. A Guarantee should contain a statement making it clear that it does not affect the purchasers' statutory rights.

7. Guarantees should be transferable to future owners for the balance of the Guarantee period subject to reasonable proof of the original purchase and transfer of ownership.

8. (a) Guarantees should not be subject to unreasonable or onerous conditions such as:

   (i) Return to the Guarantor, in the "original" packaging. Such a requirement would be reasonable where the Guarantor allows the Goods to be returned within a short period after purchase because they are not required.
   (ii) Return to the Guarantor of goods not reasonably considered as transportable.
   (iii) Insistence that the purchaser registers the Guarantee.

   (b) However, reasonable condition may be applied including:

   (i) The Guarantee is invalid if the product has been subject to misuse.
   (ii) Restriction to non-trade use, where appropriate.
   (iii) Reasonable care in packaging for return.

9. The Guarantor will on the presentation of reasonable documentary evidence extend the Guarantee by the amount of time the purchaser has been without the use of the goods as a result of repair under the Guarantee.

10. For specific Guarantees of more than one year for which the consumer makes an extra payment there should be a clear indication as to whether or not the Guarantee is covered by insurance.

11. Guarantors will ensure that any insurers used to underwrite Guarantees are appropriately authorised to carry on insurance business in the UK or another member state in the EC

ANNEX V

DEPARTEMENT OF TRADE AND INDUSTRY (DTI)
DISCUSSION DOCUMENT ON THE LEGAL AND
COMMERCIAL GUARANTEE (UK)

dti

the department for Enterprise

CONSUMER GUARANTEES

A Consultation Document

February 1992

CONSUMER GUARANTEES

1. Edward Leigh, Parliamentary Under Secretary of State for Consumer Affairs, in a speech to the Institute of Trading Standards Administration in Rotterdam on 4 July 1991, announced plans to strengthen the position of consumers when they buy goods or services.

2. This document seeks the views of interested parties on certain proposals on consumer guarantees and redress which were referred to by Mr Leigh.

3. The Government is considering whether to make the following changes in the law:

(1) **The manufacturer should be civilly liable under statute for the performance of his guarantee to the consumer.** In cases where the manufacturer is outside the UK, the manufacturer's guarantee would be enforceable against the importer.

(2) **The retailer should be jointly and severally liable with the manufacturer for the manufacturer's guarantee to a consumer.**

(3) **Manufacturers or, in the case of imported goods, importers, should be liable with the seller for the satisfactory quality of goods under the Sale of Goods Act.**

The views of interested parties are sought on the merits of these proposals. In particular we would welcome views on the possible cost of compliance with the proposed changes.

Nature and Current Legal Status of Guarantees

4. In his June 1986 Report "Consumer Guarantees" the Director General of Fair Trading identified five broad categories of guarantee:

(a) Guarantees offered by manufacturers

Manufacturers frequently give guarantees in the form of a printed card or other document included in the packaging of goods. Typically under such a guarantee the manufacturer promises to repair or replace the goods free of charge during a specified period, such as 12 months from the date of purchase. Such a guarantee may be given with goods sold and with goods supplied during the provision of a servce. The guarantee may require the buyer to register the guarantee, date and place of purchase and perhaps other details before it becomes valid.

Such a guarantee is the type which would be affected by proposals (1) and (2) described in paragraph 3 above.

(b) Short-term guarantees offered by retailers

Some retailers guarantee the goods they sell whether or not there is a manufacturer's guarantee available. For example, the code of practice observed by members of RETRA (the Radio Electrical and Television Retailers Association) requires them to guarantee new goods in respect of both parts and labour for at least 12 months, even where the manufacturer's guarantee is shorter.

(c) Short-term guarantees offered by suppliers of services

Some suppliers of services give short-term guarantees, usually on repairs or servicing work which they carry out. For example, the code of practice operated by AMDEA (the Association of Manufacturers of Domestic Electrical Appliances) require a 12-month guarantee to be given on repairs for both parts and labour in most cases.

(d) Long-term guarantees

These are guarantees, often found in the home improvements sector, where the work done or materials supplied are guaranteed for long periods, for example 10, 30 or 50 years.

(e) Extended Warranties

In a somewhat different category from the above are "extended warranties" where the consumer is offered the option of paying for protection against product failure for a fixed period after the expiry of a manufacturer's guarantee. Such warranties may also be available in respect of second-hand goods (particularly cars) where the manufacturer's guarantee may have expired. Such warranties are often linked to insurance policies taken out with a third party and are offered as an optional addition to the product itself, but are sometimes included in the selling price.

Unlike the first mentioned type of guarantee, the other kinds of guarantee do not appear to give rise to the same problems of legal responsibility for repair, replacement or a refund in the event of the goods being defective or in practice of obtaining redress. This is because of the existence of a contract between the consumer and the supplier or the

guarantor. For this reason they are not covered by the proposals in this document.

Current Legal Status of Guarantees

5. Whereas the legal position regarding the responsibility of the manufacturer of goods for their safety is clear (the manufacturer may be liable for breach of statutory duty under the Consumer Protection Act 1987 and/or under the common law of negligence) the position as regards the manufacturer's responsibility for the quality of goods and under any guarantee given is less certain. As the law stands at present in regard to quality of goods, the consumer's right of redress is primarily against the seller, who is usually a retailer. Under the Sale of Goods Act 1979, the seller is responsible for the quality of the goods he supplies: under section 14(2) the goods must be of merchantable quality. The Law Commissions have recommended (in their 1987 report on Sale and Supply of Goods) that this implied term should be reformulated so as to make it clear that it applies to minor defects and covers the durability of goods. They also recommended that the term "merchantable" should be replaced by "acceptable". The Government has accepted these recommendations but with the substitution of the word "satisfactory" for "acceptable". A copy of Section 14(2) amended in the light of these recommendations is set out in the Annex. Similar changes would be made to the Supply of Goods and Services Act 1982.

6. There is no legal obligation on a manufacturer to offer a guarantee. Nor, if he does offer a guarantee, are there any legal obligations as to the nature and extent of the guarantee. But whilst the manufacturer may be liable to supply goods of satisfactory quality under the contract whereby the goods enter the supply chain, the consumer is not a party to that contract and therefore cannot sue upon it. Even where the manufacturer has offered a guarantee it is not always clear that the consumer has a contractual remedy

against the manufacturer. Where no separate payment is made for the guarantee (and this will most frequently be the case) the question whether the guarantee will be legally enforceable against the manufacturer will depend on the influence the guarantee has on the consumer when buying the goods from the retailer. Thus in some cases a guarantee may be enforced against a manufacturer as a collateral contract, ie parallel to that relating to the contract of sale. Again, depending on the circumstances, it might be argued that the guarantee comprises a unilateral contract to which no formal or other acceptance on behalf of the consumer is necessary. But in the event there may well be cases where a guarantee is not legally enforceable by the consumer. The position will depend largely on the facts of the particular case, and may not be the same in Scotland as in the rest of the United Kingdom.

Background to the Proposals

7. The National Consumer Council (NCC) in their April 1989 Report "Competing in Quality", and the subsequent Consumer Guarantees Bill (a private Member's Bill presented in 1989/90 which did not reach the statute book) favoured legislation defining different categories of guarantee and prescribing minimum provisions for each of them. Such an approach would, in the Government's view, be unnecessarily bureaucratic and run the risk of creating loopholes that could be exploited by manufacturers seeking to avoid taking responsibility for the quality of their products. A better approach would be to legislate by focusing on the substance of the manufacturer's promise, whether it is called a guarantee or warranty, given in relation to the goods in question. This was the approach taken in the Unfair Contract Terms Act 1977 (section 5(2)(b)).

8. Whilst the proposals acknowledge that certain legal underpinning may be desirable, the Government does not consider it appropriate to lay down in legislation the detailed provisions that should be contained in guarantees, or

to prescribe the periods they should cover. Such matters are best left to market forces operating in a free competitive environment. Legislation requiring manufacturers to give guarantees is also not favoured, for similar reasons. Nor does the Government believe that the present proposals should be restricted to particular identified goods or classes of goods. The proposals are intended to be of general application and contemplate no special cases.

9. Guarantees play an important part in the marketing of goods and in the competition between manufacturers on quality and service. The Government does not expect that the present proposals will lead to any reduction in the availability of guarantees from manufacturers. Manufacturers compete inter alia on quality and guarantees will remain one measure of it. But any decision to change the law should take account of the associated economic costs and benefits (not merely the direct costs to business mentioned in para 28 below). **In particular views would be welcomed on whether the functioning of the market would be sufficiently improved through increased consumer confidence to offset any costs to industry of meeting the manufacturers' increased liability to consumers for the quality of their products, as a consequence of proposal (1). Would there be greater long term efficiency in the use of resources or would there merely be increased scope for conflict and litigation involving manufacturers and retailers?**

Proposal 1: Making the manufacturer legally liable for the performance of any guarantee to the consumer

10. The manufacturer largely controls the quality of the goods and may be better placed to provide repairs or replacement. The existence and extent of any guarantee that the manufacturer may choose to offer may therefore influence the consumer's choice. Making the manufacturer liable to the consumer for the performance of his guarantee would help to ensure that the consumer gets what he is promised.

11. This proposal is aimed at clarifying the law and would make it clear that a manufacturer's guarantee creates a legally enforceable liability, thus removing from the consumer the burden of having to establish a contractual or other liability. The new liability would be a statutory one and therefore free from any limitations created by common law contract doctrines such as privity, offer and acceptance, and consideration. Access to effective redress should be improved. Where the manufacturer is outside the UK, the Government believes that the consumer should not be at any disadvantage and therefore proposes that he should be able to turn to the importer in the UK to satisfy the terms of the manufacturer's guarantee.

12. The issue arises as to what compensation a consumer should receive where the manufacturer fails to fulfil his promise under the guarantee. The proposal creates a manufacturer's liability "under statute" independent of and additional to any contractual liability which might otherwise arise. What should be the measure of damages in the event that a consumer does not receive full and proper satisfaction under the guarantee? Should it be a contractual one (broadly, the difference between the purchase price and the value of the goods in their faulty condition) or a tortious one (broadly, for any loss that is reasonably foreseeable, which may include cost of putting the defect right and of other economic loss suffered)? The latter may reflect more the consumer's idea of what is fair but views are sought on this.

13. A separate issue is the relationship between the exercise of a consumer's rights under the guarantee (and redress in the event of failure) and the rights which he or she may have under the Sale of Goods Act vis-a-vis the retailer to reject the goods. The consumer should not be placed in a position where he or she has to choose, with potentially disadvantageous consequences, between rejecting the goods and

returning them to the retailer or trying to enforce the guarantee. The Government has accepted the recommendations of the Law Commissions (in their 1987 Report already mentioned) introducing a right of partial rejection and clarifying the circumstances in which the right to reject is lost: the effect on sections 34 and 35 of the Sale of Goods Act is set out in the Annex. The question raised by the present proposal is what effect, if any, the action of returning the goods for repair under the guarantee or the time taken up by the consumer thus or otherwise trying to have any defect remedied under the guarantee should have on his rights as against the retailer to reject the goods. It is arguable that provided the retailer knows of the consumer's efforts to obtain satisfaction under the guarantee, the actions of the consumer and the time taken up should not (as in the case where the consumer makes some arrangement for repair etc with the retailer - see the Law Commissions' proposal for section 35(5)(a)) prejudice the consumer's right to reject. The position as regards a so-called long term right to reject is discussed further at paragraph 25.

Proposal 2: The retailer should be jointly and severally liable with the manufacturer for the manufacturer's guarantee to a consumer

14. The purpose of making the retailer jointly and severally liable with the guarantor for the manufacturer's guarantee to a consumer is to make it easier for the consumer to obtain redress. In practice he may well turn to the retailer to make good any defects and the retailer will not be able to pass off the responsibility as being solely that of the manufacturer, as some retailers attempt to do in such circumstances at present. It was pointed out in the debates in Parliament on the Consumer Guarantees Bill that the law at present can result in consumers who approach retailers or manufacturers to seek redress for faulty products being confronted by the unwillingness of either retailer or manufacturer to take

responsibility for dealing with a consumer's problem. The retailer has supplied the goods with the guarantee and may well have benefited from the ability to do so. Under the proposal the retailer would not only be liable under the Sale of Goods Act but would also be liable under the guarantee which may be more extensive than the Act. Taken with the first proposal the effect would be that depending always on the terms of the guarantee given the consumer would be able to pursue the remedies of repair and replacement against both the manufacturer and the retailer. The consumer would not be limited to the rights of rejection and/or damages under the Sale of Goods Act. Nor, if the arguments in paragraph 13 are accepted, would enforcement of the guarantee prejudice those rights. Where goods are supplied by a service provider in connection with a service then it is proposed that the service provider should be jointly and severally liable for the manufacturer's guarantee to the consumer.

Proposal 3: Manufacturer's or importer's liability with seller for quality of goods

15. Making the manufacturer or, in the case of imported goods, the importer liable with the seller for the satisfactory quality of goods under the Sale of Goods Act would again be aimed at assisting the consumer to obtain redress for defects in goods which are attributable to the manufacturer. Since the retailer is not usually involved in the manufacture of the goods, he rarely has any direct control over their quality and like the consumer his influence is indirect, through the play of market forces. The manufacturer is already made responsible for safety defects by the Consumer Protection Act 1987 and there is a case for extending to manufacturers wider responsibility for quality defects. It is not self evident that the consumer's right of redress in the event of defective quality should be limited to taking action against the retailer. In order to secure the objective that the consumer gets what he bargains for there is a case for

empowering him to obtain relief from the party who makes the goods and therefore who may have the greatest control over their quality and may be better placed to provide any necessary repair or replacement. This proposal would also apply to the case where goods are supplied by a service provider in connection with a service.

16. The extent of this proposal may need to be closely defined. For example, under section 14(2A) of the Sale of Goods Act (using the formulation set out in the Annex) goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account inter alia, of their price, where this is relevant, and the description applied to them. The manufacturer has no control over the price, save in exceptional and limited circumstances, and may not be able to control any description that the retailer may attach to the goods or, indeed, may have failed to attach despite being asked by the manufacturer to do so. It might therefore be argued that the manufacturer cannot be expected to bear full liability with regard to these aspects. On the other hand if the manufacturer's liability is to be in some way limited or apportioned the consumer may face unnecessary or extensive argument (and possibly litigation) in determining its extent.

Other Issues

17. There are a number of subsidiary issues which arise from these proposals. These are described below. The Department would also welcome views on these.

Definition of Consumer Goods & Possible Extension to Traders

18. These proposals have been put forward primarily to assist consumers, but the issue arises of whether certain trade purchasers should in any way benefit also. Should the proposals be restricted to goods of a type ordinarily supplied

for private use or consumption when bought by a "consumer", ie a person who does not deal or hold himself out as dealing in the course of a business or otherwise to consumer transactions? The answer to this question may be different in relation to the different proposals. In other jurisdictions provision has sometimes been made in consumer protection legislation for goods and services sold at less than a specified sum to be covered even when supplied to trade purchasers. The reason advanced is that in negotiating small transactions traders frequently face the same inequality of bargaining powers as do consumers. Views are sought on whether the proposals should be restricted to purchases by consumers.

Possible Application to Second Hand Goods (Successors in Title)

19. In its consultation paper "Competing in Quality" the NCC suggested that the benefit of any guarantee should apply to the purchaser, donee or subsequent owner of the product throughout the guarantee period, as a guarantee is a statement about the product not about its purchaser. This is only the case at present if a manufacturer chooses to make the guarantee transferable on the sale of the goods in question within the guarantee period. For example, the British Retail Consortium's General Principles on Guarantees provide that guarantees should be transferable to future owners for the balance of the guarantee period subject to reasonable proof of the original purchase and transfer of ownership. Whilst many manufacturers may be willing to extend the coverage of their guarantee the question arises whether the manufacturer (or importer) should be legally obliged so to do and thus to compensate a consumer or his or her successors in title for any failure to observe the terms of the provisions given in respect of the goods. The Department would welcome views.

Position of Gifts

20. Perhaps special in this context is the case where goods are bought by one consumer for another; for example, as a birthday present. Usually, the time lapse between purchase and making the gift is a short one and in any case the goods are passed to the ultimate recipient in new condition. Often the goods are supplied to the ultimate recipient with a guarantee card that the latter sends off to register his guarantee. Whatever the theoretical position in law, it is usually impracticable for a manufacturer or even a retailer dealing with a subsequent complaint about a product to know whether the complainant was the actual purchaser or received the product as a gift. Should the position in English law be governed by the doctrine of privity of contract? A statute based liability need not be based on such common law concepts. The English Law Commission is presently consulting on the issue of Privity of Contract (Consultative Paper No.121) and their provisional recommendation is that a third party to a contract should be able to sue if that is what the contractors intended. This has implications for contracts for the sale of goods, including contracts with consumers. Should the matter depend on the retailer's actual or constructive knowledge (for example, through gift-wrapping the article) of the purchaser's intentions? The Department does not propose to anticipate the outcome of the Law Commission's review but would welcome any views from consultees on the position of the recipient of the gift in relation to the three proposals set out above.

Possible Exclusions

21. The Unfair Contract Terms Act 1977 provides for the control of clauses which seek to limit or exclude liability. Certain exclusions (for example, in relation to section 14(2) of the Sale of Goods Act in the case of contracts with consumers) are prohibited absolutely. Section 5 of the 1977

Act prohibits a guarantee from excluding liability for loss or damage arising from goods in consumer use and caused by the manufacturer's negligence. Some other exclusions are permitted only insofar as they satisfy a test of reasonableness, for which guidelines are provided in Schedule II of the Act. The question arises whether manufacturers or importers should be permitted to exclude the liability under proposal (3) above for quality and, if so, under what circumstances. Similarly the question arises whether exclusion by retailers of liability for a manufacturer's guarantee should be permitted, subject to the same limitation.

Other Forms of Supply

22. The above paragraphs have considered the application of the three proposals in relation primarily to the supply of goods by way of sale. The question arises whether the benefits of the proposals should also be afforded to the consumer where the goods are supplied to him by other means, for example by contract of hire or hire-purchase. In such circumstances the supplier will be responsible for the quality of the goods. Under the terms of the Supply of Goods and Services Act (which at present does not apply in Scotland) the goods supplied must be of merchantable quality. The consumer may expect to have the manufacturer's guarantee in some circumstances. Views are therefore sought as to whether the proposals should be restricted to supply to the consumer by way of sale or whether the consumer should have the benefit of the proposals (1) and (2) where a guarantee is given to a consumer acquiring the goods otherwise than by sale and of proposal (3) where the supplier is obliged to supply goods of merchantable/satisfactory quality.

Position of Goods Bought Under Hire-Purchase

23. Many of the more expensive consumer products are bought on credit. Purchases may be financed by a variety of

different credit agreements: eg credit sale; debtor-creditor-supplier agreement; and hire-purchase. Some of the agreements are regulated under the Consumer Credit Act 1974 and some not. The application of the present proposals to goods purchased on credit raises a number of issues. The first issue is whether a consumer who has not received satisfaction under the manufacturer's guarantee should in any circumstances be entitled to compensation from the manufacturer for the costs of discharging his liability under a related credit agreement. This is a particular example of the question posed in paragraph 12 about the measure of damages. The second issue concerns goods financed by credit agreements under which the creditor relies for security on his right to repossess the goods: eg a hire-purchase or conditional sale agreement. The issue is whether in order to protect the creditor's security in such cases there should be any restrictions on the right of the consumer to return the original goods and either obtain replacement goods under a manufacturer's guarantee or compensation from the manufacturer if he has not received satisfaction under the guarantee. The third issue concerns credit agreements such as hire-purchase and conditional sale agreements under which the creditor has legal ownership of the goods until the consumer exercises his right to purchase and the consumer has possession and use of the goods. The creditor may be liable under the contract and the Supply of Goods and Services Act 1982 for the quality of the goods. The issue is whether the creditor should take on the liability of the retailer under proposal (2). Views are sought on these three issues and generally on the application of the proposals to goods brought on credit.

Position of Hired Goods

24. It is arguable that the appropriate remedy in the event that hired goods prove to be faulty is that they be replaced by the supplier at no cost to the person who has hired the goods in question. And in the case of most short-term hiring

(eg, a car for a holiday) it is unlikely that the consumer will be the beneficiary, actual or intended, under the guarantee. Where the hiring is longer-term the position and expectations of the parties may be different. The Department would welcome information as to how frequent and in what circumstances a consumer hirer might expect to be able to enforce a manufacturer's guarantee and would also welcome views on the applicability of the present proposals in such cases.

Long Term Right to Reject

25. Closely connected with the question of guarantees and the quality of goods is the so-called long term right to reject. Under the Sale of Goods Act, the buyer is entitled, before "acceptance" (in the strict legal sense), to reject defective goods and to obtain a full refund from the seller. However, even if he has not otherwise accepted the goods expressly or impliedly, the buyer is deemed to have accepted them after the lapse of a "reasonable time". After acceptance the buyer no longer has a right to a refund and his statutory remedy is to sue for damages. The buyer does not therefore have what is commonly called a long-term right to reject the goods, that is a right to reject them for a defect however long after the purchase that may be discovered. Creation of a long term right to reject goods, other than in the situations referred to or described in paragraph 13 above, which persists until he knows of the defect, would, in the Government's view, introduce an unacceptable element of commercial uncertainty for sellers.

Relationship with existing Legal Rights

26. It is important to state that the purpose of these proposals is to provide additional remedies to the consumer when things go wrong and he or she does not appear to be getting what was promised. These proposals do not affect the

existing remedies, whether under statute or common law, which may be available to the consumer. The proposals, as already mentioned, anticipate the change from the concept of "merchantable quality" in the Sale of Goods Act to "satisfactory quality" and the amendment of sections 34 and 35 of that Act but otherwise do not contemplate any substantive amendment to the legislation and common law governing the safety and supply of goods to consumers.

Invitation of Views

27. Views and comments on any aspect of the proposals set out in paragraph 3 are invited. We should particularly welcome views on their legal and other impact and the likely benefits, burdens and costs that would result from implementation of the proposals in their current form.

Measuring the Impact on Business

28. In considering proposals for new legislation, the Government place great importance on giving due weight to the perception of business of the likely impact of the proposal on business. To measure this impact, a Compliance Cost Assessment (CCA) is produced for all proposals and is made available to business on request. Therefore, in giving views on the proposals described in this document, it would be particularly helpful if consultees from business could identify and quantify any additional direct or indirect costs (recurring or non-recurring) that would be likely to arise for their business, or for their sector of business, as a result of administering the proposals.

29. Examples of recurring costs include the need for extra administrators and consumable materials. Non-recurring costs might be expenditure on new computer systems and other capital expenditure. Consultees should make it clear if costs which they quote are simply transferred from one party to another,

for example the new liability that might fall to the retailer if he was to become jointly and severally liable with the guarantor for the manufacturer's guarantee.

How to Submit Views

30. Comments should be submitted in writing by Friday 30 October 1992 to:-

David Legg
Consumer Affairs Division 3A
Department of Trade and Industry
Room 413
10-18 Victoria Street
London
SW1H 0NN
Telephone No.071 215 3325 or 071 215 3337

CONSUMER AFFAIRS DIVISION

DEPARTMENT OF TRADE AND INDUSTRY

20 FEBRUARY 1992

ANNEX

Proposed amendment to section 14(2), 34 and 35 of the Sale of Goods Act 1979.

14 - (2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods -

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,

(b) appearance and finish,

(c) freedom from minor defects,

(d) safety, and

(e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory -

(a) which is specifically drawn to the buyer's attention before the contract is made,

(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or

(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

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34. [~~(1) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.~~
~~(2)~~]

Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and, in the case of a contract for sale by sample, of comparing the bulk with the sample.

**35 - (1) The buyer is deemed to have accepted the goods [~~when he intimates to the seller that he has accepted them, or (except whether section 34 above otherwise provides) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.~~
~~(2)~~]**

subject to subsection (2) below -

(a) when he intimates to the seller that he has accepted them, or

(b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.

(2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose -

(a) of ascertaining whether they are in conformity with the contract and,

(b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

(3) Where the buyer deals as consumer or (in Scotland) the contract of sale is a consumer contract, the buyer cannot lose his right to rely on subsection (2) above by agreement, waiver or otherwise.

(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

(4A)* The questions that are material in determining for the purposes of subsection (4) above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2) above.

(5) The buyer is not by virtue of this section deemed to have accepted the goods merely because (for example) -

(a) he asks for, or agrees to, their repair by or under an arrangement with the seller,

or

(b) the goods are delivered to another under a sub-sale or other disposition.

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* The Government would propose the addition of this subsection.

(6) Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit.

In this subsection, "commercial unit" means a unit division of which would materially impair the value of the goods or the character of the unit.

(7) Paragraph 10 of Schedule 1 below applies in relation to a contract made before 22 April 1967 or (in the application of this Act to Northern Ireland) 28 July 1967.

35A - (1) If the buyer -

(a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but

(b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods,

he does not by accepting them lose his right to reject the rest.

(2) In the case of a buyer having the right to reject an instalment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the instalment.

(3) For the purposes of subsection (1) above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.

(4) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

ANNEX 6

ILLUSTRATIONS OF TYPICAL CONSUMER PROBLEMS CONCERNING GUARANTEES AND AFTER-SALES SERVICES

1 Case dealt with in the context of one of the projects concerning access to justice which the Commission of the European Communities is promoting in several Member States (Greece)

Mr X purchases the car of his dreams at an approved garage. However, the day after the nightmare begins. Mr X discovers several defects in the car. He complains the vendor, who tries to repair the defects. Despite these attempts, the defects persist and new ones crop up. Mr X turns for help to the local consumer bureau. Acting on their advice, he commissions an expert report. Relying on the report, Mr X writes to his vendor and the regional distributors of the make calling for a replacement. He gets no reply to these letters. The consumer bureau also writes similar letters to the vendor, the national distributer and the manufacturer. The regional distributor replies that he is willing to discuss the case in order to iron things out. However, the distributor refuses to replace the car and proposes trying to repair it again. With the backing of the consumer bureau, the purchaser institutes legal proceedings. The case is published in the review of the local association. Finally the company agrees to replace the car.

2. **Complaints submitted to the BEUC (European Office of Consumer Unions) by a Member of the European Parliament**

Mrs Z, a resident of the United Kingdom, orders a kitchen from a catalogue at A, the British branch of German supplier B. This branch orders the kitchen from C, B's local distributor. The kitchen is sent directly from Germany and delivered wrapped; Mrs Z settles the bill, and only afterwards does she inspect the furniture. She then notices that the colours are defective and below the standard she expected.

A argues that C is liable. C recognises that the furniture is defective, but says there is nothing he can do, since Z's contract was not with him, but with A. Mrs Z writes to B (head office of the German firm which manufactured and supplied the product), but she gets no reply.

3. **Complaint addressed directly to the BEUC**

Mr Y, resident of a Member State, purchases a portable computer at the duty-free shop of an airport in another Member State. On returning home, he begins to use the computer but a few days later he loses all his data. An expert examination shows that the computer is defective. Mr Y contacts the vendor and proposes cancelling the sale (returning the computer and getting his money back). The vendor refuses and refers to the "general conditions of sale" printed on the back of the invoice, according to which " the goods purchased can neither be returned nor exchanged" Mr Y asks for legal advice but the lawyer says that he cannot inform Mr Y about his rights he knows nothing about the national law which applies to the case in question

4. **Complaint addressed directly to the BEUC on the advice of a local consumers' association**

Mrs W, resident of Member State A, purchases in Member State B a full porcelain dinner set from a well-known brand manufactured in Member State C. This set is sold with the guarantee that items will be replaced for a certain period of time. One year before expiry of the guarantee period, Mrs W's children break a fine milk jug belonging to the dinner set. Mrs W writes in turn to her vendor in Member State B, to the producer in Member State C, and to the producer's representative in A, but it turns out that it is impossible to replace the milk jug - the producer has already discontinued the line and the item is no longer in stock. Mrs W wants to know what use the guarantee is, what laws are applicable and how she can obtain redress.

5. **Complaint addressed to the Belgian Ministry for Economic Affairs, with copy to the Commission**

Mr V, a French citizen temporarily residing in Belgium, buys a Pal/Secam multistandard stereo television set in a store belonging to a hypermarket chain. The vendor assures Mr V that the television will work in France, where he intends to return in the near future.

Seven months later, Mr V returns to France. The television no longer works. Mr V seeks out an authorised representative of the brand and sends in the set for repair. A few weeks later the television set is returned to him with the mention "This is a Secam system for Eastern European countries; it is impossible to use the television set in France". Mr V tries to contact his vendor but the store has closed down. After some research Mr V succeeds in telephoning the head offices of the chain in Belgium, and they promise to call him back. A month later, not having heard from them, Mr V writes to the regional representative in Belgium. He gets no response. A few weeks later Mr V sends another letter, this time by registered mail. Not receiving any reply, Mr V personally contacts the representative during a trip to Belgium; the representative claims that the matter is no longer the company's concern - since the guarantee has in the meantime expired.

6. **Case dealt with in the context of one of the projects which the Commission of the European Communities is developing in several countries concerning access to justice (Ireland)**

Mrs I purchases a washing machine with a one-year guarantee. Six months later it breaks down for the first time: the door refuses to open after the washing cycle. She contacts the after-sales maintenance service but they do not turn up until a week later. In the meantime, the linen remains inside. A few weeks later the same thing happens again. This time the maintenance people take 10 days to come. Mrs I no longer has confidence in the washing machine and is disappointed with the after-sales service. Therefore she wants to cancel the sale and get her money back.

Mrs I consults the local consumers' association, which contacts the vendor. After offering to prolong the guarantee period by one year, the vendor says he will annul the sale but wants to give her a credit note rather than repay her. Mrs I refuses because she does not intend to purchase a new machine from the same vendor. At the insistence of the consumers' association, the case is finally resolved in Mrs I's favour.

7. **Textbook case illustrating problems caused both by the lack of harmonisation of the legal guarantee and the absence of a genuine European commercial guarantee**

Mr H lives in Strasbourg. Wanting to make the most of the single market, he decides to purchase a microwave oven at a Kehl supermarket, on the other side of the river - and of the frontier. The oven is made in France but sells cheaper in Germany. The manufacturer's guarantee is for one year. Mr H checks that the guarantee is valid throughout Europe and, on this assurance, buys the microwave and returns home. Eight months afterwards, a defect crops up and the oven breaks down. Mr H addresses his vendor with a view to invoking either the commercial guarantee or the legal guarantee. However, the vendor informs him that as regards the commercial guarantee he has to contact the producer's technical services, while the legal guarantee no longer applies, since German law limits the guarantee to six months after sale. Thus, Mr H consults the brand's technical services, but they refuse to honour the guarantee. For while Mr H's guarantee is valid outside of Germany, it is so "under the conditions accorded in the country of use". France is the country of use, and it turns out that this brand offers only six months' guarantee in France. This means that Mr H is deprived of any protection:

- if he had purchased the product in France he could have invoked the legal guarantee vis-à-vis the vendor and even the manufacturer;
- if he had not taken the so-called "European guarantee" at face value, he could have informed himself in advance of possible divergences in guarantee conditions.

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