COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 576 final

Brussels, 16 November 1993

Green Paper

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

(presented by the Commission)

ACCESS OF CONSUMERS

TABLE OF CONTENTS

I. THE PROBLEM

I.A Access to justice

In countries governed by the rule of law, general norms oblige the legislator to establish a balance between each individual's rights and duties; if the rights recognised by the legal order thus created are infringed through a breach of one of these norms, a procedure (judicial or administrative) must exist in order to "render justice" to the victim and at the same time to redress the balance of interests as required by the legislator[1].

If such a procedure did not exist or was not "accessible" to the holders of the interest protected by the legal order, there would clearly be a gap between the legislator's designs and the reality experienced by citizens. The problem summarised here under the rubric "access to justice" is nothing other than that of this gap between law and reality.

Access to justice is at once a human right[2] and a prerequisite for an effective legal order -any legal order, including the Community one. As regards the latter, however, making access to justice work poses very particular and unprecedented problems.

The Community legal order has established a system of norms whose enforcement[3] is not normally the responsibility of a separate judicature[4] but that of the national courts, which normally adhere to the procedures established in the Member States[5].

---

1 The difference between a "legal" and "moral" norm lies precisely in the coercive force of the former: the penalty for infringement is just a (coercive) application of the general norm to the concrete case.

2 Article 6 of the European Convention on Human Rights signed in Rome on 4 November 1950. The principle of equality before the law, which is common to the constitutional traditions of all the Member States, implies an **"equality of arms"** before the courts (as to the scope of this principle, see the judgments of the European Court of Human Rights in *Neumeister v. Austria (1968), Bönisch v. Austria (1985) and Feldbrugge v. Netherlands (1986)*). Concerning accession of the Community as such to this Convention see:

- Common Declaration of the Assembly, Council and Commission of 5 April 1977 (OJ No C 103 of 27.4.1977, p. 1);
- Communication from the Commission of 19.11.1990 (SEC(90)2087 final);
- Treaty on European Union, Article f, paragraph 2.

3 Direct in the case of a regulation, or via national transposing rules in the case of a Directive.

4 The Court of Justice of the European Communities reviews the legality of acts of the Council and the Commission (Article 173) as well as "respect of the law" in the interpretation (Article 177) and application (examples: Articles 169 and 170) of Community law but does not offer any "remedies" (direct redress) against the violation of subjective rights in relations between individuals. It is up to the national legal systems to safeguard individuals' subjective rights in their reciprocal relations (Delimitis v. Henninger Bräu, case C-234/89, ECR 1991, I, p. 935, section 45, Grounds; Automec Srl v Commission of the European Communities, Case T-24/90, ECR 1992, pp II-2223, Grounds 85).

5 Exceptions to this principle will be treated in Chapter III.D.2.

Hence the enforcement of Community law generally rests with a multiplicity of courts and procedures. This also applies to some national legal orders (example: United Kingdom), but in these cases it is "rectified" by an overarching instance of last resort (in the United Kingdom, the House of Lords). This is why we speak here of an unprecedented situation.

However, it follows from Article 7 of the Treaty that the national courts must be equally accessible to all individuals, without discrimination on grounds of nationality[6], and that the divergences between existing national procedures - which as such are quite legitimate - should not be such as to affect the equality of treatment of Community subjects in different countries who invoke respect of one and the same Community provision[7].

It is up to the national courts to enforce Community law in the context of their powers and using their own procedures. But this means that if access to justice at national level is impeded, the effectiveness (and non-discriminatory application) of Community law is placed in jeopardy.

Thus there is a need to start a discussion which, without prejudicing competences (national, intergovernmental, Community) could give all interested parties food for thought. This is the purpose of this Green Paper, which follows the approach set out in the Communication on "Increased Transparency in the Work of the Commission"[8] and the Council Resolution of 7 December 1992 on making the Single Market work[9].

---

6 The principle of non-discrimination concerns both natural and legal persons: access to justice by consumer organisations or firms is addressed in the third part of this Green Paper.

7 This equality of treatment "*concerns not only the definitive finding of a breach of competition rules but embraces all the legal means capable of contributing to effective legal protection*", such as the possibility of obtaining provisional measures through the mechanism of an accelerated procedure (extract from Notice on Cooperation between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty: COM 93/C 39/05, OJ No C 39 of 13.2.1993, p. 7, paragraph 11).

8 93/C63/03 OJ No C 63, 5.3.1993, p. 8.

9 92/C334/01, OJ No 334, 18.12.1992, p. 1.

Clearly the problem of redress does not affect consumers[10] alone. However, there are two reasons for opening the debate with a Green Paper devoted to "consumer access to justice"[11]. These can be summarised as follows.

I. Firstly, the "credibility" of European construction in the public eye.

Consumer protection is a domain of Community law that affects all European citizens in their everyday life, and which thus brings European construction "closer" to them - the gap between law and reality, summarised under the rubric "access to justice", would hence correspond to the disparity between the overarching principles of a "People's Europe" and the everyday experience of the European citizen.

II. Secondly, if there are disputes whose settlement clearly concerns the goal (and the management) of the Single Market, they are precisely those disputes which may result from this market - above all disputes in the context of consumer contracts[12].

In all Member States, non-performance or faulty performance of a contract entitles the promisee to bring an action with a view to settlement.[13] From an economic point of view there is also - and above all - a preventive aspect. If there are no effective procedures, cases of non-performance will proliferate, and eventually the market system will suffer; conversely, the existence of appropriate procedures for settling disputes encourages the "spontaneous" performance of contractual obligations.[14]

The function of dispute settlement procedures in a "Community" market is no different.

---

10 For example, provision of redress for firms has already been the subject matter of two directives creating specific procedures for the award of public contracts (see Chapter III.D.2).

11 Consumer access to justice has always been treated as a separate chapter. The background to the dossier, which goes back to the seventies, is summarised in chapter I.B.1. The theme of this Green Paper is access of consumers to justice in civil law and out of court settlement of consumer disputes - mediators or ombudsmen who supervise the activities of public authorities are not covered in this analysis.

12 Free movement takes the form of a series of contracts (producer-distributor, distributer-trader, trader-consumer), but it is only in the latter that the economic function of the "chain" is realised (where there is no final consumer, production and distribution make no sense).

13 In a state governed by the rule of law disputes must be regulated through legal channels.

14 In economic terms the purpose of the litigation process is to internalise costs which would remain external if it were not for the existence of the process. The economic aspects are even more important in the case of consumer disputes. Often the consumer is at the mercy of the professional, not because he lacks discernment or because the professional is systematically trying to defraud him, but because consumer contracts are often for very small sums. Hence the consumer's loss does not justify his initiating a costly procedure.

However, in this "space without internal frontiers" (Article 8a of the Treaty), judicial frontiers still endure: the good functioning of the Single Market (and the confidence of the economic agents) hinges on a multiplicity of national procedures.

Thus there is a need to examine these procedures, which are used to regulate a growing number of transfrontier disputes, on the same lines as of procedures for the award of public contracts (see Chapter III.D.2).

I.B Consumer access to justice

I.B.1 Background

This Green Paper is a follow-up to the first Communication from the Commission on consumer redress, transmitted to the Council in the form of a memorandum on 4 January 1985 (COM (84) 692 final) and a Resolution of the European Parliament of 13 March 1987 (OJ No C 99 of 13.4.1987, p. 203). The first Communication was followed by a "*supplementary*" Communication of 7 May 1987 (COM (87) 210 final).[15]

The Council responded in a Resolution of 25 June 1987 devoted exclusively to consumer redress (87/C 176/02, OJ No C 176 of 4.7.1987, p. 2), in which it invited the Commission to complete the analysis, taking into account the enlargement of the Community (Spain, Portugal and Greece had not been covered in the communications).

The *specific* problems which consumers encounter in establishing their rights and the *Community* dimension had already been acknowledged in the Council Resolution of 14 April 1975 (Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy)[16].

In this Resolution, five *"categories of fundamental rights"* of the consumer are established, the third being the *"right to proper redress for ... injury or damage by means of swift, effective and inexpensive procedures"* (paragraphs 3 and 32).

The time, cost and effectiveness of the procedure were thus the three candidates for analysis (since this first resolution) with a view to evaluating the *"barriers"* which might prevent consumer access to justice.

These principles were reiterated in the Council Resolution of 19 March 1981 (Second Programme of the European Economic Community for a Consumer Protection and Information Policy)[17] and by the Council Resolutions of 23 June 1986 (Future Guidelines

---

15 These Communications can be obtained from the Consumer Policy Service's documentation unit (archives).

16 OJ No C92 of 25.4.1985, p. 1-16

17 Oj No C 133 of 3.6.1981, p. 1-12

for Community policy for the Protection and Promotion of Consumer Interests[18]) and 9 November 1989 (Future Priorities for Relaunching Consumer Protection Policy[19]).

In the above-mentioned Communication 84/692, which surveyed the situation in the nine Member States[20] as of 31 December 1982, the Commission affirmed that the *"overall aims .. remains clear: to ensure that consumers throughout the Community enjoy a broadly similar standard of redress."*

To attain this objective and *"while not excluding the long-term possibility of a binding legal solution"*, the Commission committed itself *"to supporting pilot schemes in order to learn how to solve the problems experienced in practice ... and ... on the basis of the information thus obtained, to propose concrete solutions"* (solutions mentioned include: *changes in the legal system itself, setting up of administrative or extra-judicial procedures*, or *arbitration and conciliation procedures, arrangements improving consumer advice and information)*.

On the basis of the guidelines set out in these Resolutions, the Commission began to support "pilot schemes" at national and local level, with a view to assessing the practicality of the new procedures[21] or how best to improve existing ones[22].

In 1987, in its supplementary Communication COM(87)210, the Commission gave an overview of the most recent developments (including recommendations adopted by the Council of Europe in this domain) and drew certain general conclusions, *"only on a preliminary basis"* (paragraph 1 of the Annex), concerning the four pilot projects which it had been supporting. Moreover, the Commission announced in its Communication that it intended to study *"whether it was opportune to draft a framework directive introducing a general right for consumer associations to act in the courts on behalf of the general interest of consumers"* (penultimate paragraph, p. 3).

This final point had also been addressed in the Resolution which the European Parliament adopted on 13 March 1987 (Resolution on consumer redress)[23], calling upon the Commission *"to propose a directive harmonising the laws of the Member States to provide for the protection of the collective interests of consumers; giving the consumers' associations the possibility of acting in legal proceedings on behalf of the category they represent and of individual citizens"*.

---

18 OJ No C 167 of 5.7.1986, p. 1-2

19 OJ No C 294 of 22.11.1989, p. 1-3

20 Spain, Portugal and Greece were not covered.

21 Example: pilot project at Dundee, Scotland.

22 Example: pilot project at Deinze and Marchienne-au-Pont (Belgium).

23 OJ No C 99, 13.4.1987, p. 203-205, paragraph 4

Following the transposition of Directive 84/450/EEC, most of the Member States have accorded consumer associations the right to bring actions in the field of misleading advertising[24].

The same philosophy was recently upheld in Directive 93/13/EEC on unfair terms in consumer contracts,[25] which must be transposed by 31 December 1994 at the latest.

In addition the Commission, from the Eighties onwards, has continued to analyse existing procedures[26] and how to improve things in a large number of studies and pilot projects.

From the beginning the "pilot projects" instrument was informed by the principle of subsidiarity - instead of proposing a single model for one and all, different approaches were advanced and "tested" at national or local level, the choice of projects to be supported being based on three main criteria:

- **decentralisation** (management of projects was always entrusted to consumer associations or national or local authorities);
- **co-financing** and cooperation (as far as possible - in certain countries no public money is available for consumer protection) with the national or local authorities concerned;
- adaptation of the initiative to the country's legal and socio-economic environment.

The results of this analysis are summarised in the second part of this Green Paper, which also reviews projects supported from 1987 (date of adoption of the latest Communication in this domain).

THE WORK OF THE COUNCIL OF EUROPE

On 8 January 1993, the Council of Europe adopted a Recommendation [R(93)1] on effective access to the law and to justice for the very poor.

This is a sequel to several recommendations published by the Council of Europe between 1978 and 1986, discussed in the above-mentioned Commission Communication COM (87) 210.

At present, a project group on effectiveness and fairness of civil justice is preparing two draft recommendations, the first of which concerns improvement in redress in civil procedures.

---

24 In certain countries this was already the case even before adoption of the Directive, but in other countries - such as Italy - it was the legislation transposing the Directive which first gave consumer associations the right to institute proceedings.

25 OJ No L 95 of 21.4.1993, p. 29

26 Whether they belong in the context of legal procedures or the domain of self-regulation.

I.B.2 Completion of the Single Market and the new dimension of the problem

In the past, the settlement of consumer disputes was considered to be an almost exclusively national problem. Any attempt to probe into the "Community" dimension was countered on the following lines: the "average" consumer would not go abroad to do his shopping and suppliers of services would generally have to open an outlet in each country, thus permitting "national" control on the part of the host country.

At present, this objection stands on very weak foundations for the following reasons:

a) the principle of host country control has been replaced, in many key domains, by the principle of source country control in, with a view to fully assure the free movement of services;

b) the spread of new techniques of "distance selling and provision of services" (for the legal definition and for more about the quantitative dimension of this selling technique, see the Commission's amended proposal for a directive[27] and the explanatory memorandum which accompanied the initial proposal[28]) now means that products can cross all geographical frontiers without the intermediary of a local distributor; in the event of problems, the consumer would have nobody to turn to in the country where he lives;

c) consumer mobility, notably in frontier regions - partly in consequence of the abolition of customs controls and the new VAT rules for private individuals - is expected to grow rapidly;

d) intra-Community tourism (thanks also to the above-mentioned measures) is growing steadily[29], and in most cases problems concerning goods or services (hotel, transport, Eurocheques) purchased abroad cannot be settled during the holiday: if a tourist's rights are infringed and the trader refuses immediate settlement, the problem has to be solved working from a country other than the one in which it arose[30].

In all these cases the consumer is domiciled in a country other than the one in which the professional is established.

---

27 COM (93) 396 final

28 OJ C 156 of 23.6.1992, p. 14

29 Council Decision (92/421/EEC) of 13 July 1992 on a Community action plan to assist tourism (OJ No L 231 of 13.8.1992, p. 26) stresses the importance of supporting initiatives which "improve the information of tourists and their protection, in areas such as ... time-share arrangements, over-booking and procedures for redress" (paragraph 4 of the Annex).

30 This situation concerns not only tourists: the official (or national expert) who goes to Brussels for a Council meeting (or for a meeting of experts) faces the same difficulties if his luggage is stolen from a hotel foyer or if he is a victim of overbooking or buys a defective product. He will clearly not be able to settle the problem before he leaves unless the professional agrees to immediate reimbursement.

After all, the objective of the Single Market is the creation of "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty*" (Article 8a of the Treaty).

However, this free movement takes place in an area in which legal frontiers still exist. Consequently, the disputes which may arise from the above-mentioned contracts (cases a, b, c and d) will remain "transfrontier" disputes[31].

Taking these points into account, the question is to determine:

a) what specific and supplementary difficulties (as compared with a similar domestic dispute) arise from the transfrontier nature of performance of the contract;
b) will these difficulties prevent or dissuade consumers (or SMEs) from benefiting from the Single Market and, if so, to what extent.

The Green Paper will attempt to answer these questions.

For the present, let us recall that the new dimension of the problem has already been discussed in several Community documents:

- the Resolution of the European Parliament of 10 March 1992;
- the Council Resolution of 13 July 1992;
- the opinions adopted by the Economic and Social Committee on 26 September 1991 and 24 September 1992.

In its Opinion on Consumer Protection and Completion of the Internal Market adopted on 26 September 1991 the Economic and Social Committee affirmed that:

"The problems of access to the courts which the creation of a European area will pose are far from having been resolved. If there is a dispute, the single Market will be replaced by 12 - or even more - legal systems, all jealous of their independence and sovereignty. European political leaders will have to address the problem of the settlement of cross-frontier disputes if they are not to produce an imperfect, inconsistent economic system. The Committee urges

---

31 According to the definition proposed here, a dispute is a transfrontier one when the complainant is domiciled in a country other than the one in which the defendant is legally established (see Chapter III.A.2).
In principle, the "specific" difficulties or supplementary difficulties which arise are as follows:
- the court handling the case is not the court of the country in which the consumer is resident (cases c and d);
- the legal documents may be required (letters rogatory) in a country other than that of the adjudicating court (cases a, b, c and d);
- service of the documents must take place in a country other than the one in which the complainant is domiciled (cases a, b, c and d);
- enforcement of the judgment may be required in a country other than the one of the adjudicating court (cases a and b).

Other supplementary difficulties (or "barriers") may concern, for example, translation of the court documents,attendance in person of the parties and legal aid. The international conventions applicable in this domain will be dealt with in the third part (chapter III.A.3) of this Green Paper.

the Commission to carry out as a matter of urgency the work needed to identify possible solutions to the problem of settling cross-frontier disputes."

On 21, 22 and 23 March 1992, under the aegis of the Portuguese Presidency and the Commission, the "Third European Conference on Consumer Access to Justice"[32] was held in Lisbon. Approximately 300 experts from the 12 Member States of the EEC and certain EFTA countries participated (the problem of transfrontier disputes also arises a fortiori, for the European Economic Area which was the subject of the agreement between the EEC and the EFTA).

The conclusions of the four working parties (access to law and justice, legal procedures, out-of-court procedures, protection of collective interests and transfrontier disputes) confirm the concerns already voiced by the Economic and Social Committee and the European Parliament.

I.B.3 The Sutherland Report and the strategic Programme on the internal market

In March 1992 the Commission invited a group of independent personalities, under the chairmanship of Mr Peter Sutherland, to prepare a report on the functioning of the Internal Market[33].

The Report ("The Internal Market after 1992: meeting the challenge") was presented to the Commission on 26 October 1992 and transmitted by the Commission to the Council, the European Parliament and the Economic and Social Committee. This report "*examines in depth the issues which need to be resolved to enable Community law to be administered fairly and equitably*" and considers "*what is required to meet the continuing expectations ... of those involved in the marketplace - consumers and businesses*" (preface, ultimate and penultimate paragraph).

Considering "*that the rules of the Internal Market must have equivalent effect throughout the Community*" (page 3, penultimate paragraph) and that "*it is not enough to pass laws and simply hope that they will be applied evenly in all Member States*" (page 5, first paragraph), the Report formulates a series of "*recommendations*".

As regards access to the courts (pages 34 to 39) the Report affirms that "*doubts about the effective protection of consumer's rights need to be overcome. The issue should be given rapid attention by the Community*" (Recommendation No 22, page 35).

---

32 The first Conference on Consumer Access to Justice had been held in Montpellier in France in 1975 and the second in Ghent in Belgium in 1982. A summary of the conclusions of these conferences is provided in Communications (84)692 and 87(210).

33 The members of this "high level group on the functioning of the Internal Market" were: Peter Sutherland (chairman), Ernst Albrecht, Christian Babusidux, Brian Corby, Pauline Green and Giuseppe Tramontana.

In the Communication from the Commission to the Council and the European Parliament of 2 December 1992 (SEC(92)2277 final - The Operation of the Community's internal market after 1992 - Follow-up to the Sutherland Report), Recommendation No 11 is retained (page 12, third indent of paragraph 31).

The working document "on a strategic Programme on the internal market", (COM(93)256) presented by the Commission in June 1993, recognised the necessity of establishing a consistent operational framework on access to justice; this framework is to integrate a group of actions which aim at the diffusion, transparency and application of community law. The Green Paper is to be replaced within this framework and endeavours to carry out the following analyses : a study of the procedures existing in the Member States (part II) and an analysis of the difficulties in appplying these procedures to "transfrontier" disputes (part III).

The second three-year Commission action plan in the field of consumer policy adopted on 28 July 1993[34] established *"selective priorities to raise the level of consumer production,"* including access to justice and the settlement of disputes (Part II, paragraphs 36 to 39).

The action plan announces new initiatives, mainly concerning the settlement of transfrontier disputes.

Part IV of this Green Paper describes certain initiatives which might be envisaged, taking into account the principle of solidarity, in the perspective of the three-year action plan.

In-depth consultations with the parties concerned on the options envisaged will give us a clearer idea of the scope for Community action in this domain.

---

[34] COM(93)378 final

II. THE SITUATION IN THE MEMBER STATES

II.A Introduction

In view of the Communications already presented by the Commission (COM(84)692 and COM(87)210), the following analysis mainly concerns developments since 1987[35];

Procedures applicable to consumer disputes which date from before 1987 are referred to in the form of a "cross-reference" to these Communications.

To provide a better overview the national chapters have been structured around four themes, three of which were already addressed in Communication (84)692:

- legal procedures applicable to (individual) consumer disputes;
- out-of-court procedures especially devoted to these disputes (arbitration is treated only in this perspective), including mediators and ombudsmen (and similar structures) which have recently been created in various economic sectors;
- the protection of collective interests[36], including both the capacity to bring an action on the part of consumer organisations and the powers of certain administrative bodies (examples: consumer ombudsman in Denmark, Director of Fair Trading in the United Kingdom);
- the "*national*" pilot projects, for countries in which such projects have been implemented (a table summarising the pilot projects supported by the Commission is annexed to the Green Paper); transfrontier initiatives are dealt with in Chapter IV.E.

The situation in the individual Member States was discussed at a meeting of national experts held in Brussels on 9 February 1993. Following this meeting, the draft version of each national chapter was sent to the national authorities for review and the text was verified and completed after receipt of their comments. Thanks to this feedback it has been possible to prepare a picture of the situation at 30 April 1993.

---

35 Except for the Member States which were not covered by the Communications (Spain, Portugal and Greece).

36 The legal defence of collective interests is not to be confounded with the collective defence of individual interests - hence "class actions" are considered as a separate category.

II.B The current situation in the Member States