THE COMMISSION OF THE EUROPEAN COMMUNITIES

THE JUDICIAL AND QUASI-JUDICIAL MEANS OF CONSUMER PROTECTION

SYMPOSIUM

The Montpellier Faculty of Law and Economics
with the Chamber of Commerce and Industry of Montpellier

Montpellier (France) December 10, 11, 12 1975

The Commission of the European Communities and the Montpellier Faculty of Law and Economics (France) organized a Symposium on the Judicial and Quasi-judicial means of Consumer Protection on 10, 11 and 12 December 1975.

The aim of the Symposium was to examine, in accordance with the Community's preliminary programme for a consumer protection and information policy, which was approved by the Council of Ministers on 14 april 1975 (point 33):

- systems of assistance and advice in the Member States;
- systems of redress, arbitration and the amicable settlement of disputes;
- the laws of the Member States relating to consumer protection in the courts, particularly the various means of recourse and procedures, including actions brought by consumer associations or other bodies;
- systems and laws of the kind referred to above in certain third countries.

The unanimous opinion of the Symposium was that the traditional judicial means held many disadvantages for consumers and were not capable of upholding their rights. In view of this regrettable state of affairs a number of countries had been forced to consider new means of enabling consumers to defend themselves more easily. These means were widely referred to and compared in Montpellier.

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SUMMARY

This, the opening report, may be considered to reflect the philosophy behind the Symposium. Professor de Cambiaire quotes from Plato, Aristotle and St Thomas Aquinas as well as the writings of Islam to define lawful selling and the obligation to charge a fair price and give a fair reward for services rendered, the guiding rules for trading down the centuries and still the basis of the demands common to all consumer associations.

But in the nineteenth century there emerged the idea of commercial value, based on the cost of production, including the value of labour from which capitalism derives profit by not paying for it at its full value.

The liberals' reply was that competition would restrain this wrongful profit-making and would ultimately be a powerful means of consumer protection. The crux of the matter is whether the purpose of competition is to satisfy demand more effectively or, on the contrary, to stimulate it by creating artificial needs. This in turn raises the question whether consumption should be increased indefinitely to provide new outlets for production, or whether production should be confined to the satisfaction of normal requirements. Which will be the stronger of the two partners in the economic process, the producer or the consumer? Under a capitalist system the producer, with his considerable material resources and extensive economic and even political powers, will always win. The consumer must therefore be protected. Professor de Cambiaire examines two forms of protection : firstly, against the multifarious external pressures and secondly against the consumer himself.

OPENING SPEECH

by Professor André de Cambiaire
Dean of the Montpellier Faculty of Law and Economics

Mr Chairman,
Mr Director,
Ladies and Gentlemen,

It is my task and privilege to make the opening speech at this, the Symposium on legal and para-legal means of protecting consumers.

Speeches are very often long, methodical, academic and solemn perorations. Luckily, I prefer to think of them as conversational gambits and so I shall attempt to present some of my thoughts on the matter in hand and paint a general picture of what we are going to talk about.

It might appear surprising that, at a time regarded as the heyday of the consumer society, we should want to protect consumers by galvanizing and extending the legal and para-legal means of doing so. On the face of it this sort of preoccupation would appear to be more appropriate in an economic context of scarcity.

However, from time immemorial the dealings of certain traders have been viewed with suspicion and, without in any way doing violence to the texts, there are certain striking points of similarity.

The French Law of 22 December 1972 concerning door-to-door selling provides for the signing of a contract bearing the name and address of supplier and salesman, the conditions of sale and a cooling-off period of seven days in which the purchaser may cancel the contract.

Three and a half centuries BC Plato wrote in Chapter XI of "Laws" that a merchant must be compelled to remain within the city for ten days following a sale. During this time a purchaser who is informed of a seller's address may have a sale cancelled.

The history of economic and social thinking bears the imprint of suspicion of dealing and the desire to protect consumers.

Aristotle made a clear distinction between economic acquisition and chrematistics. The former, designed to secure a family's sustenance, is legitimate, the latter blameworthy since its objective is the acquisition of wealth and the accumulation of money.

This distinction is made repeatedly in Islamic writings and tradition. Saint Thomas Aquinas used it as the basis for his thinking; in the "Summa Theologica" he asked four questions: Is it permissible to sell an article for more than it is worth? Is a sale illicit if the quality of the goods is misrepresented? Is it permissible for a trader to sell an article for more than he paid for it? Is a seller obliged to point out the defects in his goods?

He answered these questions by defining a fair price and a fair reward for service rendered - now the basis for the demands of all consumer associations.

In 1817 Ricardo in his "Principles of Political Economy and Taxation" made a distinction between the utility value and the exchange value of goods. To maintain the freedom of consumer and seller exchange, value must be based on an objective criterion, i.e., the cost of production which, by analysis, derives from the labour content. The labour value theory was taken over by Karl Marx who made it the foundation of scientific socialism by showing the fundamental contradiction of capitalism which extorts surplus value by the money-goods-money cycle in order to accumulate profits while the natural exchange cycle is goods-money-goods.

The liberals' comeback is that competition only appears to exploit the workers; in reality it brings them enormous benefits as consumers, since it is the genuine and strongest safeguard.

Although this argument is losing ground with the growth of monopolies and industrial integration, large firms claim to defend consumer interests better than ever before by diversifying production and using extremely sophisticated marketing techniques designed merely to meet demand more effectively.

But are they satisfying demand and real needs or using demand as a vehicle for profitability by creating artificial needs?

According to Mr Guy Serraf, in an analysis of the growth-induced syndrome in the marketing sphere :

"Le vrai problème posé à notre Société est de savoir comment passer d'une croissance incohérente, fondée sur le gaspillage, à une Société d'Economie qui considérera l'humanité comme une fin et non comme un moyen?

... L'homme est-il fait pour assurer le développement de la consommation, ou bien la consommation est-elle définie par ce qui permet à l'homme d'être?"(*).

This reawakening of our fellow men is enshrined in the Club of Rome's controversial and thought-provoking publications. Leaving aside the debatable question of "zero growth", we have here a trend in society today; it seeks its identity in being rather than in just having. Behaviour-based civilization versus artificially imposed, possession-orientated society: is this the end of consumer passivity?

Over the next three days you will be studying ways of protecting the consumer using comparative law as a means of lending greater precision to new legal rules.

To make a comparison requires thought, however, and as comparative law leads straight to the philosophy of law, it might be worthwhile to cast light some way ahead. Leaving aside ways and means of protecting the consumer I shall discuss, taking my inspiration from history, both the motives and the substance of consumer protection in contemporary society.

If my thinking seems too remote from your own, in rejecting it you will consolidate your progress along the path that you have chosen.

(*) "The real problem facing our society is how can we go from disordered growth based on waste to an Economy of Conservation in which mankind will be considered an end and not a means? ... Is man intended to boost consumption or is consumption circumscribed by what enables man to be?"

I. The motives of consumer protection in contemporary society

Short measure is age-old, as is cheating on quality and price, and they put considerable difficulties in the way of effective protection; but today's consumer expects more, namely, twofold protection: against over-hard selling techniques and, above and beyond this, against himself, protagonist and victim in a consumer society which he does not understand.

Protection against aggressive sales techniques

An international code of advertising was proposed in 1937, but if we believe that language is significant what are we to think of marketing handbooks which nonchalantly employ aggressive expressions such as : "staff planning; marketing strategy and tactics; target market-sectors; market penetration channels; sales drives; advertising and products to spearhead the sales offensive; saturation effect of advertising; campaign planning; promotions with plenty of sales punch; support for the salesman in the front line;" and so on.

Our generation accepted the incursion of war in all fields of human activity. It is easy to understand why our children prefer love and reject a set-up in which it is more profitable to lie than to tell the truth. But just how far can you take a lie, as the philosophers of old used to ask. They did not always give a precise answer, leaving contemporary lawyers the task of wading through the morass of age-old practices with the help of modern technology and fine-sounding phrases; free credit - with exorbitant interest rates; the journey of your dreams, but no return trip; unspoilable views, obscured by blocks of flats; second-hand cars, done up like new; chemical-free products, containing hormones; new-laid eggs which stay new-laid for months; disposable packaging, which pollutes; chemical industries which care little about what is and is not allowed; new products according to the labels anyway; eroticism which is supposed to deliver us from pornography.

To combat these excesses we could appeal to the legal system or have recourse to more flexible and more fitting para-legal institutions, unless the companies themselves, with the help of the consumer organizations, can establish the best defence : information, marking, labelling, guarantees, after-sales service, and Better Business Bureaus as in the United States, etc.

Large firms can do a great deal provided that they bear in mind what a French manager said recently : "It took us too long to recognize trade unions as the wage-earners' pre-eminent representatives; don't let us make the same mistake today with consumer protection organizations." Nevertheless, more than this is required to protect the consumer against the excesses which typify the consumer society; in a nutshell, the consumer must be protected against himself.

Protecting the consumer against himself

In some cases buying becomes an end in itself and increasingly expresses a desire to assert social standing. As needs become much more psychological than physiological, it is easy to see how the systematic use of psychology and psycho-analysis can result in the consumer being completely brainwashed; this will heighten the effects of the new industrial structures.

The key to the contemporary industrial society lies in the interplay of publicity, industrial integration, technical progress and self-financing.

"Price wars" have been abandoned in favour of "new product wars" and profit is ploughed back into the research laboratories, producing the vicious circle : new product - profit - research - new product.

A paradoxical situation results. The eminently forward-looking consumer society which should be capable of offering everybody durable consumer goods, tends to provide increasingly less-durable goods by persuading consumers that social status is measured by the frequency with which they change their car, TV set, etc. ...

This is how the waste-making society works, with all its useless gadgets and spurious innovation; the private-enterprise economy is being distorted and, in the worst cases, private initiative is being diverted.

The reckless consumption boom creates more frustration than satisfaction and is both the cause and effect of a deep-rooted distortion of the market economy. It clearly shows that contemporary capitalism has failed to comply with the fundamental rules of the system : widespread self-financing removes all checks on how savings are allocated; the concentration of economic power results in the sort of private collectivism which defies control denounced by President Roosevelt before the Second World War; the spend, spend, spend mentality results in thrift becoming a dirty word.

The leading lights of economics raised the alarm long ago. As Myrdal wrote : "La constellation des crises dans tous les domaines est pire qu'elle ne l'a jamais été. Les pays démocratiques sont actuellement minés par l'inflation, la drogue, les tensions sociales, le cynisme et l'apathie" (*). And if, as Von Hayek wrote, "toutes les grandes crises ont été précédées par l'inflation laquelle tôt ou tard conduit à l'effondrement (**), we have to admit that inflation, a product of the consumer society, is caused by general greed, the irresponsibility of go-go entrepreneurs and financiers, the calculated thoughtlessness of professional claim-makers, the laxity of those in authority and the snobbery endemic in our society which makes it easier to change than to stay the same.

Because we have pushed the machine too hard and it is time to revise the way of running it, consumer protection will therefore have to encompass a great deal.

II. Substance of a consumer protection policy

In 1973 the Assembly of the Council of Europe adopted a consumer protection charter, which defines the principles of an active policy on assistance, redress, information, education, representation and consultation.

Endeavours to shape substantive and effective action will unleash a driving force, first to enlarge the field of consumer protection and secondly to turn consumers into responsible individuals.

A broad concept of consumer protection

Obviously, we must consider the consumption of food, non-food consumables, and semi-durables and durables, but it is becoming increasingly important to focus attention on services to keep up with technical, economic and social developments.

(*) There are more crises everywhere than ever before. The democratic countries are being ravaged by inflation, drugs, social tension, cynicism and apathy.

(**) All major crises are preceded by inflation which sooner or later leads to collapse.

In 1974 for example the French spent only 25,9% of the family budget on food but 34,2% on services. Nobody would deny that it is especially difficult to define, assess and check the quality and the price of services and that a lot of imagination and flexibility is needed to devise appropriate legal and para-legal means of protection. What about protection for deferred consumption, for example? It is debatable whether it is right to instigate proceedings against people charging excessive prices when purchasing power progressively diminishes in proportion to the fall in the value of money.

This gives us some idea of the limitations of specific and individual protection but also the limitations of mass protection introduced in piecemeal fashion.

As far as protecting incomes is concerned, the indexation of savings is far more important than guarantees against unfair trading practices affecting everyday expenditure. To protect the consumer in this way will require decisive political intervention by the State which can only be triggered off by action on the part of all consumer associations and the like.

A fresh difficulty will be encountered when we turn our attention to consumer protection, in such fields as education and health-care which are consumed collectively. In real terms, expenditure on medical care in France increased about fourfold between 1959 and 1974, and public health insurance cover rose from 54% tot 72%. The rapid increase in expenditure on medical care is not the major cause of the public health insurance deficit, but there are choices to be made at every level : between private medical care and the public health service, between controls and complete freedom in the public health service, between centralized decision-making and the establishment of priorities by consumers who have at last got themselves organized. It is no longer possible to accept that the private consumer must be protected in the name of justice, and yet turn a blind eye to his behaviour when using public services.

It is naïve to imagine that the State has anything to give away : it can only distribute the yield of taxes and other compulsory levies.

The reason why the State and the public health insurance system can offer the services they do is because taxes and other compulsory contributions in France amount to 40% of the gross domestic product. In a country where such a large proportion of the national product has been "collectivized" the consumer can no longer be regarded as passive, and users just as claimants.

The responsible consumer

GeorgesFriedmann, the sociologist, has written : "Malgré tous les biens que leur offrent la consommation et les communications de masse, beaucoup de membres de la "foule solitaire" sont insatisfaits. La carence affective, le besoin d'aimer, l'impossibilité de trouver à quoi se donner sont un des signes de la misère actuelle." (*). It is inherent in man's nature to want a say in organizing society, and once material poverty is banished and the intellect moulded, there emerges a need to take responsibilities, i.e., to turn one's back on fate.

Satisfying and protecting consumers in developed societies might enable them to lose their passiveness and help organize society through consumer groups. Technical progress, universal education and the certainty of basic needs being satisfied will make it possible, with the toning down of the eternal conflict between producers and consumers, to transcend the obsolete patterns of traditional liberalism and centralist collectivism. Leaving all the initiative to firms, since the consumer judges and approves via his free choice, is an antiquated concept, just as the collectivist precept of social needs being determined by the central authorities has lost virtually all its credibility with the passage of time.

Only with a social structure based on solidarity and the sharing of decisions and risks will it be possible to free the producers by giving the consumers responsibilities.

The cooperative and mutualist doctrine is valuable in this respect, provided that it is brought up to date and that we accept that what the Rochdale Pioneers did on a small scale with a lot of enthusiasm and very little cash can be done on a much larger scale today using the material and intellectual resources of the advanced industrial society.

The idea of responsibilities being shared by all varies from case to case and from country to country, but is gaining a lot of ground everywhere, and is crystallizing in projects to reform firms, in the management of nationalized industries and in the recognition of consumer associations as critics, advisers and decision makers. This is the evolutive aspect of the new consumer

(*) Despite all the goods at their disposal thanks to mass consumption and communications, many of the "lonely crowd" are not satisfied. Emotional deficiency, the need to love, and the impossibility of finding something to which to devote oneself epitomize today's poverty.

law developing before our very eyes, and indicates that in modern society consumer power, for the educated, will be a prerequisite for the survival of private initiative.

In the space of three centuries we shall have gone through the most outstanding stages in legal history : property and capital law in the XVIIIth century; labour law in the XIXth century; consumer law in the XXth century.

If consumer law succeeds in crowning the other two and permeating them, some will see this as the beginning of a more egalitarian society, others love of real freedom, still others the establishment of solidarity, and some perhaps a synthesis of freedom, equality and solidarity which is as yet impossible in a social context.

In the present crisis let us give the poet his due, even though he may be wrong, when he addressed himself to pessimists :
"I gaze at the stars, you at the darkness; we all have our own way of seeing the night."

After reading through the text of my speech, I should like to emphasize my indebtedness to the thesis of Mr Jacques Pierre of the University of Toulouse. I had the pleasure to supervise his project and our exchanges were extensive.

SUMMARY

Professor Calais-Auloy of the Montpellier Faculty of Law opened the Symposium and defined its objectives.

He demonstrated that consumers are generally at a disadvantage vis-à-vis vendors, since the minor injury they suffer individually discourages them from seeking redress, which would cost them far more than the value of the damage, while, for the vendor, who is well aware of this, a large number of small, unlawful profit items adds up to a tidy sum.

What judicial or quasi-judicial measures can be taken therefore to guarantee effective consumer protection?

They fall into these two categories.

The first category means recourse to a civil, criminal or administrative court, as appropriate. There are many drawbacks : the excessive cost of legal proceedings, the red tape involved and, finally, if the judge rules in favour of the plaintiff, the latter alone will be compensated and the many consumers who have suffered in the same way will not benefit.

One of the new judicial methods is to bring one case to cover the complaints of a large number of consumers who have suffered from unfair practices. Joint action is more effective and less expensive. Several methods have been used and they were outlined by the jurists who spoke during the Symposium.

But joint action is not a panacea. In some situations individual action is necessary. A simplified procedure is called for, with a minimum of red tape; if need be, the services of an advocate could be dispensed with and in any case costs should be kept as low as possible.

It might even be possible to set up special courts. Various techniques are used in the different countries; they were described during the discussions.

Apart from taking a case to a court of law, the idea has been mooted of calling in private organizations, to act either as legal and technical advisers to the consumer or as mediators between consumers and vendors; moreover, they would exert more effective pressure upon vendors in that they are more representative and would also be able to refer cases to all the public authorities responsible for stamping out economic offences. These organizations could conceivably act as mediators or as arbitrators whose decisions would be binding.

Finally, the appointment of a sort of Ombudsman for consumer protection could be considered.

All these solutions are examined in the following reports.

INTRODUCTION

by Jean Calais-Auloy
Professor at the Montpellier
Faculty of Law and Economics

On several occasions, and I am sure most of you have had the same experience, I have been approached by relations or friends who had complaints about a manufacturer, trader or door-to-door salesman and wanted to know how to get redress. I am ashamed to say that in almost all cases I am unable to tell them how they can effectively do so and am reduced to advising them -weakly - to be more careful in future. What other advice could I give to a friend who has bought some mouldy jam or is not satisfied with the repairs to his car?

Some people will say that I am overstating the case. That unwariness should be penalized and that, in any case, consumer affairs involve only trivial sums of money. I do not agree. It is not a case of unwariness-these are traps into which almost all consumers fall, you and I included. To prevent these so-called careless consumers from obtaining redress as a penalty for carelessness is basically the same as allowing certain members of society to take advantage of the weakness of others. It is very short-sighted to dismiss the interests at stake as being of small importance. True, the sums involved are individually small, but added up, they are immense.

Think for example of the huge saving to a manufacturer of putting a few grams less in each tin and the corresponding loss to buyers as a whole. Do not misunderstand me. I am not saying that vendors are swindlers by nature. Traders, like consumers, are on the whole very honest but there is always a small minority of dishonest people. What I am trying to say is that in our economic and legal system consumers are in a weak position - they are not nearly so well protected as vendors.

I feel therefore that we must endeavour to remove the obstacles which prevent the consumer from getting a fair deal. These obstacles are not so much due to a basic lack of rules but rather to the difficulty in applying them. If a consumer comes to me for advice, I could very often quote him the principle or the law which protects him. But this doesn't mean a thing because it almost always turns out to be impractical to go to court. It is no good passing law after law if they cannot be enforced. Consumers attempts to get legal satisfaction just come to a dead end.

Hence the aim of the Symposium - to investigate judicial and quasi-judicial means of consumer protection in the European countries to which we belong.

I. Judicial means

When we talk about judicial means this implies recourse to a court, of whatever it may be : civil, criminal or administrative. If a consumer who has suffered loss takes this course, he soon realises that the traditional legal process is of little help to him and that his only hope lies in the introduction of new processes.

A. The traditional judicial processes have a number of disadvantages for the consumer :

the main one is undoubtedly the excessive cost of going to law - a problem about which Mr Bihl, a lawyer from Paris, will be telling us later, and which in most consumer cases means that it is just not worth the trouble as the expense involved would exceed the sum at stake. Apart from these material objections there are psychological barriers as well : with all its red tape, the whole legal process is formal from the language right down to the judge's robes and this has the effect of discouraging most citizens from going to court. Saint Louis, holding court under his oak tree, dit not refuse justice to anyone. Today it is as if the legal authorities had developed a hard shell to keep out the small claims of ordinary people.

That is not all. Not only is the law not very accessible to the consumer but even when it is, the odds are generally against him. I am not criticizing anybody here, because nobody is responsible for the system which we have inherited from the past, but I do feel bound to point out that we members of the legal profession are mostly men, and rather reluctant to recognize the importance of these so-called women's problems connected with consumption by households. I must also say that we generally belong to the more privileged classes of society whose consumer problems are never over-dramatic. This state of affairs leads me to think that mothers of families who have been duped by misleading advertising or clever door-to-door salesmen have little hope of winning their case.

The traditional process has one other disadvantage. In most cases it only awards compensation to the individual. But, as Professor Ghidini will be showing later, consumers should be protected by preventive rather than compensatory measures

and they should be protected as a body rather than individually.

Even if a consumer manages to win his case against a dishonest vendor, this will not do much to improve the situation for consumers as a whole.

B. I am convinced that this situation is bad and I am sufficiently naïve to think that it can be changed. The main aim of our Symposium is precisely this - to study new judicial means which have been, or could be, introduced to improve consumer protection. The lawyers here today bring with them experience from different countries and, I hope, will be able to give us some encouragement for the future. Although I do not want to encroach on their own speeches, I would like to take the liberty of outlining a few lines of research.

One of the new legal schemes is to take up similar interests of several consumers in a single action. Misleading advertising for example, can affect thousands of people and, as I have already explained, these victims will not act individually. Joint action is far more practical, if only because the costs are shared. As Professor von Hippel will be explaining later, the United States has already shown the way by enabling consumers to start "class actions". Mr De Caluwé of Belgium and Professor Maury of France will be telling us about the similar but different schemes which have been worked out in their countries to achieve the same end - court actions which can now be brought by consumer associations.

But joint action cannot solve all problems. Every consumer must also be able to take legal action on his own account to protect his rights. This has given rise to the idea of setting up simplified proceedings when the sum at stake is below a specified limit or where there are no difficulties. We have all heard of the French system of injunctions to pay but it seems that this system is used mainly by vendors. The English small claims system goes much further and we shall be hearing about it from Mr Borrie. The idea here is to provide legal redress virtually free of charge stripped of all its red tape so that it is within reach - materially and psychologically - of the humblest claimant. Perhaps we should even consider barring lawyers from this kind of action? This is an extremely difficult question and will certainly be discussed later.

The ultimate step in our search for new judicial means, would perhaps be to set up specialized courts. In some countries, France for example, there are already special commercial courts made up of traders. Why not consumer courts with joint

consumer and trader representation? Mr Mangård of Sweden and Mr Wendler Pederson of Denmark will be giving us something to think about when they explain the Scandinavian system. Perhaps institutions like the Market Court or the Consumer Ombudsman could be made at home in the less northerly parts of Europe.

It is true that the Ombudsman is not a proper court and, this being so, we are now moving from judicial to quasi-judicial procedures, so I will now turn to :

II. Quasi-judicial means

As State courts, in their traditional form at least, are of little help to consumers, there is a great incentive to organize protection for them by other means. This explains the genesis of what, for want of a better term we have called "quasi-judicial" means. These are organized by the State or by private bodies and are all distinguished by the fact that they operate outside the legal system and outside the courts. These could perhaps be divided into three categories.

A. First of all we have legal advice for consumers, provided free or at a low cost. We are perfectly aware of this information need in all our countries and some interesting experiments have already been made on the subject. In France we have the National Consumer Institute, which is responsible among other things for meeting individual or collective information requirements. Owing to the excellence of its legal services it is able to do this very competently. It is obvious, however, that the Institute would be very quickly snowed under if it were the only body to advise 52 million French consumers.

Advice is also given, in all our countries, by consumer associations. These associations are based throughout the country thus bringing information to the consumer. I'm thinking here of all the information work done in France by the UROC, the regional federations of consumer groups. But as they do not have sufficient financial resources these associations are almost always unable to provide proper legal services.

There are certainly other ways of providing legal advice for consumers who need it and who cannot afford it. We will be discussing the American experiments with "neighbourhood consumer centers" and the English "law shops" where consumers can go, just as they would to a butcher or a grocer. The Young Lawyers' International Association I believe, is also working on some interesting projects which will be explained to us later on and which should give some food for thought.

B. But consumer protection organizations can do more than just give advice. They can also bring pressure to bear on traders and here we come to the second quasi-judicial means of action.

If, for example, a consumer association sends a letter to a trader pointing out that he is not observing a regulation on labelling and threatening legal action, the letter is bound to carry much more weight than one from an individual consumer and the trader will probably change his labelling without the need for a court case. The Alsace "Chamber of Consumer Affairs" is of interest here and its Chairman Mr Fischer will be telling us about it in due course.

Pressure on traders is even stronger if it comes from a public or semi-public body. In our various countries there are authorities responsible for uncovering and proceeding against infringements of an economic nature. France has its Service de la répression des fraudes (Department for the repression of fraudulent practices) and its Directorate of Competition and Prices. A dissatisfied consumer can approach one of these, they have ways of getting results and in most cases do not need to resort to legal action. Unfortunately, the consumer is never certain that his complaint will be properly followed up as the authorities obviously apply the government's economic policy which does not always correspond with the consumer's interests.

It would obviously be more satisfactory for consumers to appeal to semi-public bodies responsible for consumer protection, which are truly independent from the State and have effective ways of putting pressure on traders. Perhaps we should be working towards something like the National Consumer Institute. Perhaps it would be better to have just one man as an Ombudsman or a mediator. I think these questions will come up in our discussions.

C. To take things still further, the advice given to consumers and pressure put on traders may not be sufficient. There is one last quasi-judicial procedure which could perhaps be employed : settling disputes between consumers and traders. To settle them out of court through conciliation or arbitration in all probability requires joint bodies made up of consumers and traders. Professor Reich and Professor von Hippel will be telling us what has been worked out in Germany, particularly in connection with motor vehicle repairs. The delegates from Scandinavia will also be telling us of their experiments with Complaints Offices and Arbitration Commissions. It will then be up to us to decide whether these solutions could perhaps be adopted in our own countries.

Conclusion

I have asked a lot of questions. I am not sure whether I have anticipated them all, but I am sure that I have not answered any. Our distinguished delegates, from whom you will be hearing shortly, are much better qualified to do this than myself.

I therefore invite you to "tour Europe" with me now. From France we will move on to Italy after which we visit the Benelux and Scandinavian countries before returning via Germany and England. After each speech, there will be a discussion to exchange notes and to put forward solutions. Professor Perrot has kindly agreed to summarize our work.

Before handing over to the next speaker, I would like to remind you of one of the slogans which adorned the walls of Paris in May 1968 : "Power to the imagination". This slogan could serve as a motto for our Symposium, because imagination is what is most needed in our efforts to give the consumer his means of protection.

SUMMARY

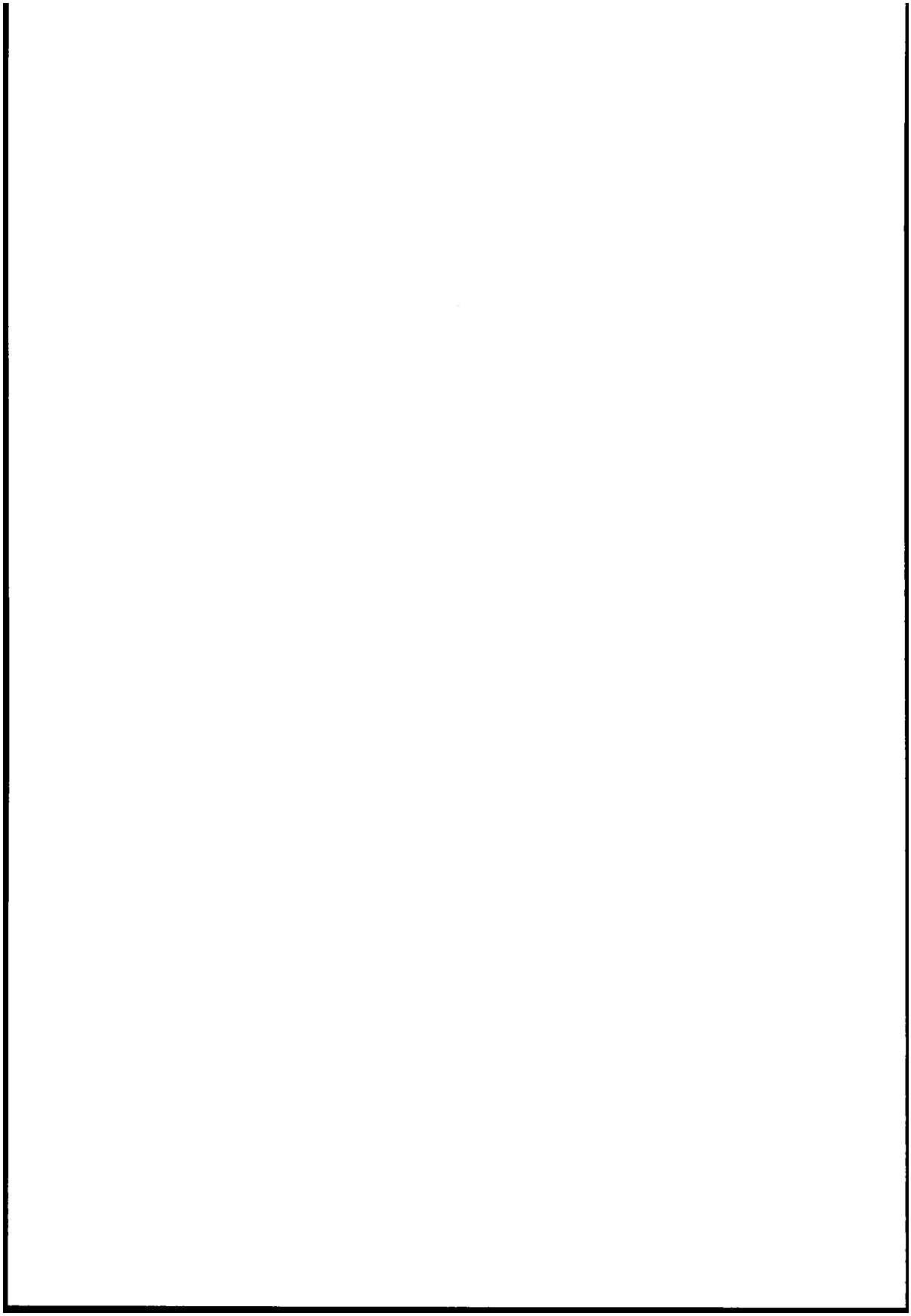
Maître Bihl, Advocate at the Paris Court of Appeal, gave the first account of how France is tackling consumer protection.
He described three typical examples of injury suffered by consumers to demonstrate that access to the courts is virtually barred to them because of the exorbitant legal costs, and the high fees charged by the auxiliary legal staff indispensable in all legal proceedings.

In view of this, what solutions may be contemplated for facilitating access to legal proceedings? An extension of the legal aid system may be considered, but this has many drawbacks; what is more, the Ministry of Finance is unlikely to agree to waive legal costs and pay the fees of advocates, experts and so on.

Suggestions have been made that cases involving small sums of money should be settled not in the courts but by arbitrators under a simplified procedure. But what will be the cost of such arbitration and to what extent will the plaintiffs gain satisfaction? Simplified legal procedures should be distrusted, as all too often they provide only limited guarantees.

A third solution would be insurance against legal proceedings. Although this meets with some favour when it covers civil liability, consumers are unlikely to welcome it to the same extent, unless it operates through the consumer protection associations and its cost is included in their membership fees.

Under present French law, the best means of consumer protection seems to be the consumer associations, which have been considerably helped by the Royer Law of 27 December 1973 : this law gives approved associations the right to defend the interests they represent before a court of law.



THE CONSUMER AND THE COST OF JUSTICE

by Maître Luc Bihl
Advocate at the Paris Court of Appeal

Every year there are more laws to protect the consumer, and yet the law reports still contain just as few decisions in the field of consumer law. The legislation exists and is beginning to be taught in certain law faculties, the everyday practical problems are increasing in number, but the courts remain unaware of these problems and there is no chance to apply the legislation.

Why then is consumer law not invoked, or invoked so seldom, in the courts? Through lack of information on the part of those concerned, in other words the consumers, through lack of training on the part of the lawyers, both judges and counsel, but mainly because between the consumer and justice there is a barrier which it is very difficult to surmount - that of money!

Let us take 3 examples. A young couple buy a second-hand Citroën for FF 8,000. After the first few kilometres this car turns out to have serious defects but the seller turns a deaf ear. The young couple then go to a lawyer, who asks them for a retaining fee of FF 500 and institutes summary proceedings before the commercial court, for which he asks FF 400 in costs. The presiding judge appoints an arbiter who asks for a retaining fee of FF 3,000. In other words, even before the case has really been opened the consumers will have spent FF 3,900, or half the price of the car. Now, in view of the brief period allowed for bringing proceedings in respect of warranty for hidden defects, when they came to see me I could only advise them to bring an action before the court immediately, which entailed paying the State a deposit of FF 590 plus FF 100 for a writ. And the case was only just starting. They preferred to give up...

A few days later I had a visit from a lady who had bought a washing machine for FF 1,200. Her machine, which was supposed to be new, had in fact seen a great deal of use as a demonstration model. After protesting in vain to the seller, she had gone to a consumers' organization which had advised her to see an expert who had asked her for FF 400.

Armed with the expert's report, she went back to see the trader, who laughed in her face saying the report was worthless, which was true. This lady wanted justice and when she left my office she was very disappointed, for I had tried everything to dissuade her from going to law. I saw her again a few weeks ago and she told me how much she regretted not having taken my advice. She had brought an action in the "tribunal d'instance" where right away she had had to pay FF 250 plus FF 100 in bailiff's fees. The court had called for an expert's report and she had had to advance another FF 500 for the expert. The expert found in her favour, she paid a further FF 100 in bailiff's fees to have the case brought back before the court and, since she was beginning to get rather worried, she asked a young lawyer to plead her case. He charged her FF 500 in fees and won the case. She still had to advance FF 200 to have the judgment carried out and was awarded... FF 200 in damages and interest. In other words, this consumer had to pay out FF 1,650 in order to get FF 200, and of these FF 1,650 only FF 1,150 will be refunded to her. She thus lost FF 300 and days of activity in order to obtain a judgment in her favour.

Simpler and more dramatic is the case of the woman abandoned by her husband together with her 3 children and from whom a credit company was demanding payment for furniture which the husband had had delivered to his mistress. In order to prevent the seizure of what little property she possessed she had to institute summary proceedings. Naturally, she did not have time to request legal aid and had to spend FF 205 in court expenses and FF 300 in lawyer's fees.

One could go on quoting examples for ever. There would be no point in that for it is already clear that the cost of justice is so high that small disputes, those involving less than FF 3,000, that is to say the vast majority of consumer problems, are prevented from coming before the courts.

But, it will be objected, there is legal aid. Yes, indeed, for some years now legal aid has replaced legal assistance and the same objection can be made to it on grounds of principle : assistance or aid, the idea of charity is not far away and access to justice should be a right and not a matter of charity. More prosaically, legal aid is confined to the most disadvantaged classes of society and it is necessary to have an income of less than FF 1,350 a month (plus FF 100 per dependant) in order to benefit from it. One also has not to be in a hurry, for the applicant will have to wait several months before knowing whether his application is accepted or not. Lastly, legal aid is usually left to the youngest lawyers. This is not without its advantages for the client, since enthusiasm takes the place

of experience, but it prevents the free choice of counsel, which is a very serious matter.

Although it reduces the evil in the most serious cases, legal aid does not deal with the fundamental problem and the cost of justice is such that access to it is practically denied to the individual consumer and even to consumers' associations.

I. The cost of justice is a major obstacle

Theoretical distinctions produce figures which are much lower than those I quoted in my examples. Moreover, the costs of proceedings will be borne at the conclusion of the case by the losing party. Therefore, it is often affirmed, justice is free. It is playing on words to make this distinction between the costs of proceedings and other costs. What interests the consumer are the sums he will have to pay in reality. These are of two kinds : the court expenses properly so called, and the costs and fees of the agents of justice.

1. Court expenses

Justice in France is the poor relation of the State. The budget of what was the third estate represents less than 1% of the total State budget. There is no need to stress that this lack of financial resources condemns justice to function in deplorable conditions, of which judges, counsel and clients are all the victims.

But, most serious of all, the National Justice Department is almost 50% self-financing. It is the litigants who, by means of fines and court expenses, pay, outside the budget, to keep this public service going. What if the parents of pupils were made to pay the salaries of teachers and for the upkeep of schools? What if soldiers were made to pay for their equipment and barracks, the pay of their sergeant-major? But this is what happens in the case of the law and nobody thinks of protesting.

Among all these court expenses there are two kinds which can really be described as scandalous : the clerks fee and the special levy. The clerks fee - FF 300 in the "tribunal de grande instance" and FF 220 in the "tribunal d'instance" is intended to pay for the services of the clerks of the court, who are officials of the State. The purpose of the special levy - FF 140 for two parties and FF 310 for three parties - is to reimburse to former "avoués" the price which they paid for their practice to the State, which kept the money and is causing its debt to be paid off by the

litigants. These two charges alone make up two-thirds of the deposit which must be paid in advance by any person who wishes to obtain justice in the courts.

I do not think it is necessary to say any more on this subject. If justice is a public service, then it must be free. If justice is to be made accessible to all, the clerks fee and the special levy, which are major defects of our system, must first be abolished.

To these sums which the litigant must advance as soon as his case is brought there will be added at the end of the proceedings the costs of the agents of justice, the bailiffs and lawyers, in other words the former costs of the "avoué". These costs, which are intended to pay for the proceedings, comprise essentially a fixed element and a proportional element which varies according to the amount of the sums involved and may thus reach several hundred thousand francs, whereas the work is identical in a case involving FF 10.000 and one involving FF 1 million. This is another obvious anachronism, for although "avoués" have been abolished their cost continues to be borne by the litigants.

2. The cost of the agents of justice

The costs mentioned above are those which the litigant may ascertain even before bringing proceedings. They are the only "court expenses" which he has to bear. But the litigant will also have to pay for the services of the agents of justice.

First of all there is the bailiff. Frequently the consumer, even before bringing proceedings, will ask him to make a verification. Cost : approximately FF 200, which will not be reimbursed. Then, if proceedings are to be brought they may be instituted only by a bailiff's summons, which will cost approximately FF 100. Instead of bailiff's summonses the social courts use registered letters requiring acknowledgement of receipt, which cost approximately one fiftieth of this and are none the worse for it...

But the bulk of the bill which the litigant will have to pay consists of the lawyer's fees. Although in theory it is compulsory to have a lawyer only in the "tribunal de grande instance", in fact a lawyer is necessary in all kinds of court because he is the only specialist able to act as an interpreter between the consumer and the courts. Justice without lawyers would perforce be cut-race justice... and

highly dangerous. The problem is not, therefore, how to do without a lawyer but, on the contrary, how to ensure that all litigants can benefit from the assistance of counsel.

But barristers are extremely expensive. This is the opinion widely held by the public which often goes to a legal adviser in order to avoid paying barrister's fees, without realizing that then it will have to pay both the legal adviser and then the barrister, since the latter is the only person who can plead in the courts.

The ancient principles of the Bar proclaim that "the fee is the spontaneous expression of the client's gratitude", which is sometimes true. Juniors who have a lot of legal aid cases are familiar with the avalanche of succulent plants and boxes of cigars. On 1 January each year I still receive a wonderful bottle of port for having defended a Portuguese worker ten years ago. But can one live on cacti, cigars and port? This explains why formerly the profession of barrister was reserved for those persons who, since they had an adequate personal fortune, could live without depending on fees. This dangerous concept, which made advocacy the preserve of a restricted social class, is now completely outdated.

A barrister is a worker who must be able to make a living from his profession, like an engineer, an architect, a teacher or a doctor. Starting his professional life at the age of about 24, after four or six years of higher studies at least, he can be compared to an executive and must therefore be able to count on the same earnings as a salaried executive of the same age, i.e. FF 3,000 for a beginner (in fact most first-year juniors get FF 500 or 1,000), FF 6,000 after ten years and FF 8,000 after fifteen years, for a doctor of law. It must also be taken into account that working hours are often longer and in particular that the social benefits are minimal.

All calculations show that, given the expenses (office rent, secretarial service, stationery, telephone, social insurance contributions, taxes and professional expenses), which represent between FF 60 and FF 80 an hour, and given the number of hours lost each day (travelling, calls, waiting) as a result of the completely outdated way in which justice is organized, a lawyer, who after ten years of practice and working fifty hours a week hopes to earn FF 6,000 a month, must charge his clients FF 200 an hour.

This is no more than a doctor or an architect charges per hour. On the contrary. But it is a great deal for the client, for the smallest consumer case in the "tribunal d'instance" will take a minimum of three or four hours. And this leads to the absurd situation where, for a dispute involving FF 600, the consumer will have to pay his lawyer FF 600 which will never be reimbursed to him.

In addition, there are lawyers who ask for scandalous fees and do not hesitate to demand several million francs for fairly simple cases which have involved ten or fifteen hours' work. But these are abuses which it should be possible to penalize and are not representative.

The problem can thus be stated simply : since a lawyer is indispensable and is entitled to fair payment for his work, between FF 150 and 250 an hour, how is it possible to ensure that clients can have the assistance of a lawyer despite the cost?

Nor should we forget the experts. In a society which is becoming more and more technical the problems raised in the courts increasingly require specialists to be called in. Judges cannot be expected to know, in addition to the law, about subjects as varied as the resistance of concrete, motor mechanics, washing machines, chemistry, etc... More and more frequently, therefore, the courts start by asking for an expert's report. Admittedly, there is perhaps a certain laxness on the part of some judges and calling for an expert's report is often an easy way out. I remember a judgment by a "tribunal d'instance" in the Paris region which called for an expert's report from a former bailiff whom it instructed to "state the law applicable to the case", which is going a bit far. But on the whole it must be admitted that the highly technical nature of our society itself often obliges the courts to call for an expert opinion. The cost per hour is almost the same as in the case of a lawyer, for the same reasons, and the shortest report will entail a minimum of three or four hours'work on the part of the expert. This means another FF 600, 800 or 1,000 to be paid by the person requiring it!

However, the expert is just as indispensable in many cases as the lawyer and neither can he afford to work for nothing. But should it be the litigant who has to pay for all this? Are there no solutions which would make it possible, not to reduce court expenses and the cost of the agents of justice, but to ensure that these are no longer borne by the litigants?

II. Possible solutions

The example of legal aid, where the State bears the costs, obviously springs to mind right away. If legal aid were extended and systematized its "charitable" aspect would disappear and the cost of justice would no longer be a problem. For this reason consumers' associations in France would generally like to see such an extension of legal aid.

However, it cannot be denied that this solution presents certain dangers and difficulties, in addition to being somewhat unrealistic at present, for it is hard to imagine the State forgoing its court expenses and in addition assuming responsibility for lawyers' and experts' fees.

The difficulties arise because legal aid is based on a "sacrifice" by the lawyers. They are paid between FF 400 and 600 a case, which scarcely covers their expenses. If legal aid were generalized, obviously the system could not be maintained, for the members of a profession cannot be expected to work all year without receiving a single centime in payment. The answer would be for the State to pay them a proper remuneration and this leads us to envisage another solution - nationalization of the legal profession. Moreover, the principle of legal aid is dangerous for the client in as much as he is assigned a lawyer automatically, and no function depends more on trust, and therefore on freedom of choice.

Some people, on the other hand, propose not that legal aid should be extended but that justice should be taken out of the courts. In other words, disputes, at least those involving small sums, would no longer be brought before judges but before arbitrators. The example of the commercial courts hardly recommends such a solution and the danger involved in thus making justice a private matter appears sufficiently great to constitute an insurmountable obstacle.

A third solution has been adopted in Germany. It is legal expenses insurance, where each citizen takes out a policy with an insurance company and pays a premium. In return, if he is engaged in legal proceedings either as plaintiff or as defendant the insurance company bears all the costs, including the fees of the lawyer whom the litigant is free to choose. Such insurance can even be collective. Thus the city of Bremen is said to be proposing to insure all its inhabitants, which would cost it DM 4 per person per year. At first sight, such a system is extremely advantageous for all concerned, particularly as it respects the principle of freedom of choice of counsel. There are, however, two major obstacles. Firstly, the present tendency to insure everything helps both to destroy the sense of

responsibility and to confer fantastic power on the insurance companies. Secondly, why should such a service be entrusted to private insurance companies, which are not philanthropists? This is the problem raised by social security, and we know the solution.

Then we come to the "public" solutions. The first stage (which is also necessary in the case of legal expenses insurance) is obviously the fixing of a scale of lawyers' fees. Whereas a few years ago the whole of the profession was opposed to this solution, today more and more lawyers accept it, more or less willingly. The example of doctors can be used as a model, and fees can be scaled, taking into account qualifications, reputation and specialization. In short, there is nothing utopian or unrealistic about the idea. In fact, it is already possible to envisage the conclusion of a collective agreement. Those lawyers who so wished would be free to accede to an agreement fixing their fees. A list of them would be displayed in all courts and town halls, and clients would be free to choose from among lawyers who were parties to the agreement and those who were not. But whether a scale of lawyers' fees is fixed by the authorities or freely negotiated by those concerned, it is certainly an essential condition for any solution to the problem of the cost of justice.

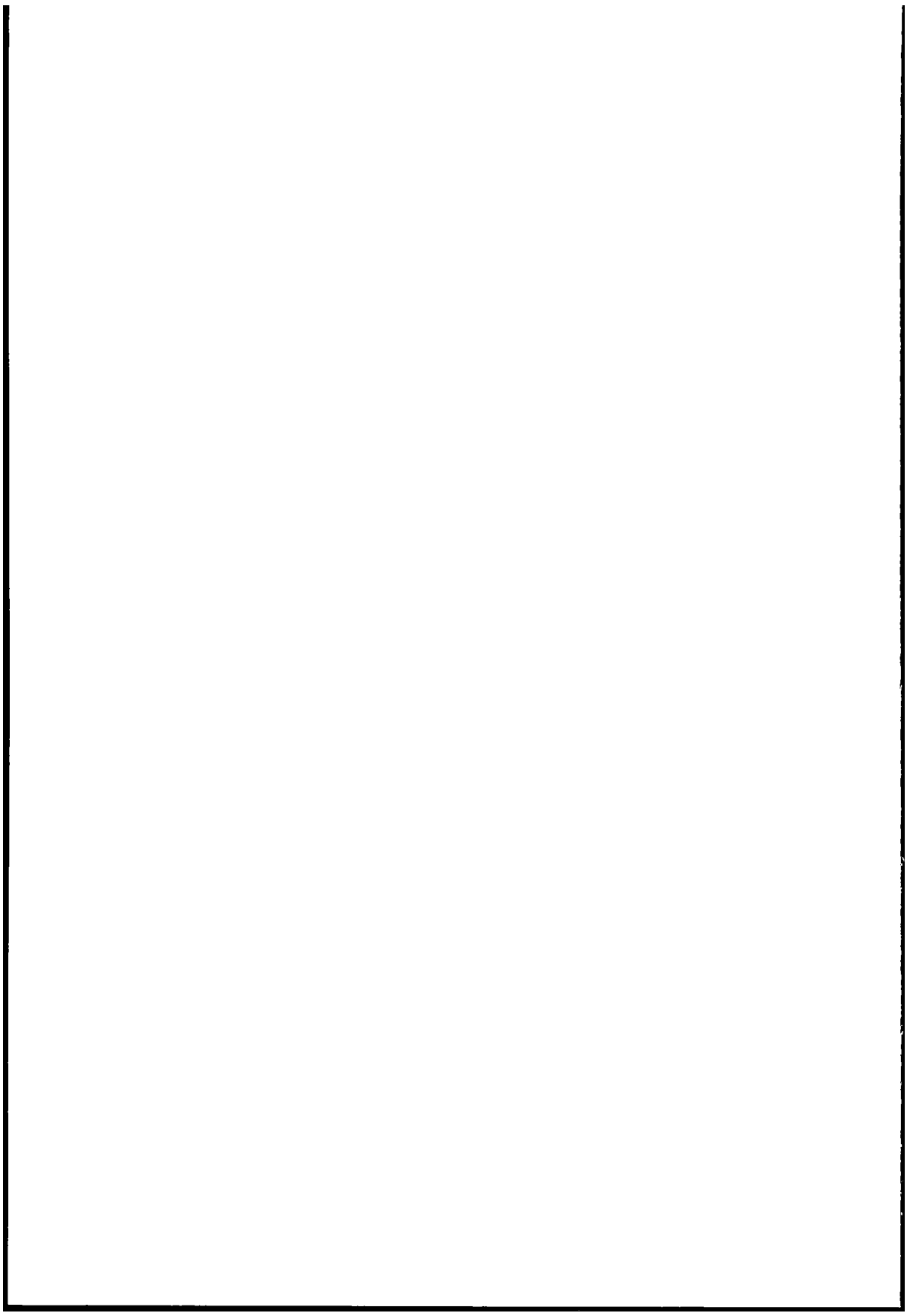
Then there is a choice between various systems which tend to collectivize the profession. The fundamental problem is how to regulate the cost of lawyers to their clients, while safeguarding the lawyers' independence.

One solution would simply be to nationalize the profession of barrister. There would be a single body of judge-barristers who would exercise the two functions alternately. This would give the judge the experience he lacks of direct actual contact with the client, and would familiarize the barrister with the judge's viewpoint. But what of the barrister's independence, it may be asked. But are not judges also independent? Is it not just as essential to have independent judges as to have independent counsel? And are barristers under the present system, who depend on their clients, really independent? Would they not be more independent under the control of the State, providing this control were properly organized, than depending economically on an insurance company? In England there are barristers who have become judges and nobody questions their independence. Things can work both ways. I think the danger resides more in the "bureaucratization" of the profession of barrister and in the loss of his sense of responsibility than in the loss of his independence.

But there is no need to nationalize in order to collectivize. Why should the barrister be made dependent on the State? There is no reason why he should not be paid by local or regional authorities. If the city of Bremen is ready to provide all its inhabitants with legal expenses cover could it not arrange for the defence itself instead of acting through the intermediary of an insurance company? There are many possible variations on this theme. In Quebec barristers are paid by the local authority (which pays them but does not employ them and placed at the disposal of consumers' organizations (which employ them but do not pay them, whereby they enjoy real independence). We could also take as an example the similar field of health and envisage adapting all the systems tried, from "justice funds" to a National Justice Service...

The solution is much simpler as regards the experts. Their role is in effect to supplement the judge in technical matters. I suppose nobody would think of making clients pay for their judges? It is simple logic, therefore, that since the expert forms an integral part of the judicial process, he should be paid by the State, either by means of a salary or by means of fees.

It is impossible to deal exhaustively with such a problem. I have sought only to present some aspects of it and to indicate possible solutions. At all events, these will call for a considerable effort on the part of the State and should be aimed at breaking down the barrier of money which at present prevents citizens from having free access to justice, which is a fundamental human need. Unless justice is truly accessible, consumer law will remain in the realms of pure theory.



SUMMARY

Mr Ghidini, Professor at the University of Modena, analysed consumer protection as he sees it, from the individual to the collective level.

Consumers' interests are at once individual and collective.

Although they belong to the collective level they must be settled basically at the individual level. A threat to these interests is rarely appreciable in terms of the injury suffered by any one individual.

Consumers' interests are permanently vulnerable because of their virtually complete technological reliance on the productive machine and because of their inherent conflict with producers' interests.

Protection must therefore be basically preventive, and it must be permanent.

By way of comparison, Professor Ghidini then sketched the present de facto legal situation.

CONSUMER PROTECTION AT INDIVIDUAL AND GROUP LEVEL

by Gustavo Ghidini (Italy)
Visiting Professor of Industrial Law, University of Modena.
Secretary of the Consumers' Protection Committee

One major defect in the numerous meetings and discussions relating to consumer (and environmental) protection is the failure to identify, for the purposes of legal protection, the interest to be protected.

In other words, the means of protection are usually studied without close attention first having been given to the special characteristics of the interest to be protected.

Is it a genuine failing or only an "ysteron proteron", a mere theoretical omission? I believe it to be a genuine failing prejudicial to the critical analysis of protective measures available under existing law (de lege lata) and, perhaps even more so, to satisfactory and genuinely suitable proposals for change and reform.

To demonstrate the point, one has only to examine the analyses and proposals, starting by identifying the special features of the interest of the consumer.

The interest of the consumer (including that of users of the environment) seems to be both an individual and a group interest. It is an individual interest, in that it is a combination of specific interests (emerging from time to time in definite situations) which are typically, indeed exclusively individualistic: health, hygiène, economic benefits, enjoyment of a decent and healthy place of residence. But it is also a group interest in the sense that it belongs to and is identical for everyone : it must be acknowledged and fully protected for everyone in the same manner, regardless of any division or arrangement of individuals into social groups or categories. It is a "group" interest, therefore, in quite a different sense from interests referred to broadly as "categorical": i.e., where the interest is that of a body as such which is the result of a combination of individual interests (organized or otherwise) with a particular common factor distinguishing and separating them from all other identifiable interests in the social order (e.g., the interests of champagne producers).

The phenomenon of interests which are fundamentally individual but also belong to everyone beyond any possible "corporate" (categorical) limits, is well known in law : the most typical example is the rights of the human person. But a reference to this category does not mean that the interest has been definitively identified as our intention. This is so not merely, and not even particularly, on account of the fact that the content of the interests involved is not the same (the rights of the human person are restricted to those of psychophysical integrity and reputation, whereas the interests of consumers also have purely economic features) but primarily because the rights of the human person are derived from liberal individualism and are conceived, structured and protected on an exclusively individual level : individual interest, injury inflicted on an individual, individual remedy.

Consumers' interests cannot, however, be fitted into this scheme. Let us begin by pointing out that often it is not possible to discern an "individual injury" in the usual sense (e.g., a specific physical injury such as a wound or a moral injury such as defamation) due to the fact that the injury does not amount to an injurious act concentrated in one coherent event which may be regarded legally as an injury (not even, it should be noted, on the level of a threat of danger). The harm that my individual right to health suffers or risks suffering (which is the same from the point of view of danger being wrongful) as a result of absorbing foodstuffs containing excessive colouring agents, or threats to my enjoyment of the environment caused by the high level of petrol fumes emitted by urban traffic, are often difficult to single out as an isolated injurious act. Threats to the interests in question may often be such as to establish a "recognizable" injury only after they have mounted up slowly (over a period of years even), without it being possible precisely to detect or "isolate" a particular injurious "act" which may be regarded as the cause of a particular injury or risk. In addition, however, (i.e., invariably) such attacks are entirely "impersonal" : they are directed at society, threaten everyone in the same way and by chance cause actual harm to some individuals rather than to others.

We are all exposed to certain dangers - some are visibly injured (even if not always immediately) - while others seem to escape unharmed, simply through chance, differences in the basic protective mechanisms. Accordingly, the interests in question must in the end be regarded as individual interests, but injury or threats to them are not always, and not even very often, capable of assessment on an individual level.

This imperfect individual aspect corresponds to the special (additional) group nature, referred to above, of the interests

concerned. The fact that the interests belong to everyone without discrimination, regardless of any division or amalgamation into categories, rules out per se the problem and the very purpose of "individualising" or specifying the interest to be protected. My interest as a consumer is identical with that of every other member of society. This gives rise to the apparent contradiction (in actual fact a dialectical inter-relationship between the individual and the group aspects, both of which characterize this type of interest) that while the harm to the interest is not often capable of assessment on an individual level (see above), an injury or threat to one person constitutes a threat to everyone simultaneously, and consequently the steps taken by an individual hold good for everyone else as well. It is precisely this imperfect individual aspect (imperfect by reason of its "group-egalitarian" nature) that gives the individual interest of consumers a significance and, insofar as protection is concerned, an external expansionary impetus, both of which are unknown to the traditional rights of the human person.

Our study is not complete. If, as is proper, we continue our study of consumers' interests beyond the functional level and investigate their content, we encounter an apparent contradiction.

The common interests in question contain a distinct element of social conflict : the conflict between the interests of producers (in short) and those (economic and metaeconomic) not normally associated with the ownership of the means of production, at least insofar as the interests of producers can be identified (and they are still identifiable, even in communist countries), with the maximization of the profits of an undertaking (disregarding for the moment the ultimate ownership of the profits)(1). There is no need to dwell on this conflict since it is there for all to see. It had to be mentioned, however, because a reference to the possible social conflict of the interests of producers and consumers helps focus attention on a further aspect of consumers' interests. This possibility of conflict, combined with the undoubted fact that citizens and consumers are constantly exposed in their daily life to sources of danger (at every moment of our life we are in contact with threats to our interests as consumers and as persons who derive benefit from the environment), makes it possible to say that consumers' interests have the further characteristic of being under permanent threat. This situation is unlike that of the majority of other interests, whether individual or corporate,

threats to which constitute interruptions in an otherwise normal situation of enjoyment. In our case this is not so. Interests are permanently exposed to danger which is diffused, so to speak, in both time and space (see above).

To summarize the results of the preceding study, consumers' interests :

a) are neither entirely (in the usual sense) individual nor entirely group interests;

b) may be classified basically as individual but belong to a group (consisting of all individuals);

c) experience threats which are seldom capable of assessment as threats of an individual nature; in any event the threat applies to everyone and the reaction of an individual to instances of danger is of significance simultaneously to all others sharing the same interest;

d) are constantly threatened by reason of the fact that they are almost exclusively technologically dependent on the productive apparatus and of their potential conflict with producers' interests.

If the above is true we can make some deductions as to the methods and types of protection most consistent with the nature of the interests concerned.

A) Protection must operate basically at a preventive level. It is only in this way that:

1) it is possible to protect everyone at the same time;

2) it is possible to deal with those threats to consumers' interests which cannot be identified as isolated instances of injury to individual parties (2).

B) Private protection will of necessity have to be established on a legal basis that can be defined as "broadly based". That is to say, on an individual legal basis quite separate from any injury (or threat of danger) considered to be personal to the plaintiff : though it will have to be established by demonstrating the threat of danger to the type of consumers' interest which by its very nature is (also) personal to the plaintiff (but at the same time personal to every other member of society). In other words, the legal right to protection must be granted to any person who can show that the interest is being injured objectively without any need to demonstrate (in the particular case) that he personally has suffered injury: the evidence is directed to the objective fact. It follows from this that it will not be possible to deny the legal right to protection to any group of consumers or users, no matter how it is organized or how many members it has, which can prove injury to that type of interest.

Since it is both an individual and a group interest (in the sense that it belongs to everyone), it escapes any effort to make it a corporate interest. Thus, the protection cannot in any way be measured by the standards applicable to situations where the interest itself is organized on a group basis, as in the case of trade union interests, using that term in a broad sense. The association, group or class (for example, in the case of class actions) has the same rights as the individuals concerned : such groupings are merely one possible means of expressing and giving effect to a reaction which the individual alone would be perfectly competent to express by bringing the matter before the courts. A fortiori, it is obvious that there must be no restrictions on the legal right to protection of groups or association by reason of the number of their members, representative nature, organization, etc., all of these requirements and conditions being based on a mistaken corporative idea of consumers' interests.

C) Protection must be permanent in view of the permanent threats to the consumers' interest : see above. This means that it must not be dependent upon the single remedy of a private action, even where access to such an action is unlimited, as suggested above. On the hypothesis that such an action is not commenced - and it is humanly impossible for this to be done on every occasion - it is essential that there should be in operation a permanent court or tribunal (public, of course) established to protect the interests in question.

We shall now compare briefly the guidance afforded by the above analysis of the interests with current rules in force. Obviously I will refer specifically to Italy, but in broad terms of "protective systems" and thus in terms which, I believe, are

easy to compare and are frequently interchangeable (apart from specific legal technicalities) with other legal systems, whether continental or common law.

We shall begin with (A) above : the need first of all for preventive measures.

The situation is this respect seems very unsatisfactory, if not negative. But a distinction must be drawn between private and public protection.

The trend of the former is fundamentally at variance with that adumbrated here.

The remedy for a civil wrong is the standard action for damages (linked exclusively to the interests of particular individuals) whilst the injunction is a sort of "dead remedy". Indeed, in the systems of "social insurance" a trend is discernable which decisively lessens the sense of responsibility and reduces everything to money, first by generalizing the actual liability, and then by superseding the very idea of civil liability. Whilst this certainly gives pride of place to the element of compensation, it sacrifices the idea of supervising undertakings, which is the essential aspect of preventive protection and of its main legal remedy, the injunction.

The range of public remedies is, apparently at least, more satisfactory. Various laws in particular areas provide measures to investigate, inspect and prevent cases of fraud, deception and harmful acts in general against consumers. A special section of the Carabinieri, the Nucleo Anti Sofisticazioni (NAS) (Anti-Fraud Unit) has been set up and entrusted with fairly wideranging duties and powers. The network of doctors in provincial public health laboratories has specific powers to carry out investigations and may also count on police assistance. But public surveillance services are, in our country, extremely badly equipped.

The number of State laboratories equipped to the same standard as those of the major undertakings may be counted on one hand - and a mutilated one at that. The NAS has less than one hundred staff for the whole of Italy! Consequently, in actual fact, there is no permanent preventive system, in spite of the existence of laws (certainly imperfect, but not negligible,) which thus remain a dead letter.

As regards (B) above and the need for a broadly based right of protection based on civil law (with the inferences and details set out above) the de jure condito situation seems in our country unfavourable. The basic rule governing the right to bring an

action (Article 100, CPC (Code of Civil Procedure)) is regarded unanimously as a purely procedural rule, which emphasizes the (plaintiff's) need to prove injury to an interest which is acknowledged on other grounds as being entitled to protection. That is to say, it seems to express the requirement that a person who institutes proceedings must show that he has an interest which is not only capable of legal evaluation, but also recognizable as belonging specifically to him, a concept based on a traditional individualistic viewpoint which needs no stressing, and which is clearly confirmed by the meticulous enumeration of the cases where one may institute proceedings concerning the interests of others. (Article 81, CPC).

This applies obviously both to individuals and to groups, who, if they take proceedings as "representatives", must overcome the even greater problem of establishing injury to the individuals whom they represent; if they take proceedings based on their own institutional interest not only will they inevitably have to undergo "structural" inspections (to verify their "corporate status") but they will have even greater difficulty on the level of actual right to bring an action, insofar as the type of interests acknowledged here belongs essentially to and is discernible in the sphere of the individual (health, hygiene, housing and environment, economic fraud against consumers).

Under this heading also, then, it seems that only the legislator is capable of producing a positive solution meeting the requirements of the broadly based legal right of protection outlined above.

With regard to (C), which requires that protection must be permanent and that civil law measures must therefore be accompanied by the existence and action of a public body devoted institutionally to protecting the interests of consumers, we must first mention the extremely inadequate "mechanisms" already referred to, of existing bodies for preventing and stamping out infringements of consumers' rights. Secondly, attention must be drawn to the absence of a special, centralized public body protecting the consumer. There are a number of centres which are for the most part poorly equipped, each of which has different powers and is under different authorities. This division per se further weakens protection. Such weakness is not at all compensated for by the existence of a public office (which decides whether certain indictments should be proceeded with), the Public Prosecutor, whose general powers in respect of all offences have until now hindered that essential specialization without which, faced with very sophisticated means and methods of fraud, protection, even when set in motion, remains somewhat theoretical. Finally, at least at national level, the Ombudsman remains a matter for consideration; he has been

appointed in one region only (Liguria) but with duties restricted to the relationship between citizens and the public authorities.

In such a situation, which may be described as primitive, the main task of any serious attempt to organize Italian consumers (the author has endeavoured to do this by means of the Consumers' Protection Committee (Comitato Difesa Consumatori) with immense and unresolved difficulty) is clear. The task is to lay the foundations before the individual battles begin. National awareness of the very serious problems involved in the protection of consumers' interests must be spread at all levels; every temptation to regard the movement as merely representing the corporate interests of its members must be resisted and efforts must instead be made to unite with the social forces promoting the interests of the people and with reforming bodies so that the necessary changes may be made to the legal system which will provide appropriate means for dealing with the difficult daily battles that individuals, associations and public bodies will have to wage in order to protect vital interests which are not the interests of any group, but of every citizen.

EXPLANATORY NOTES

(1) The contradiction between the general ownership of such interests and their conflicting content is merely apparent, or to put it better, it relates only to the fact such interests are owned also by individuals who also control the means of production. Consequently, it is a contradiction which is individual in type and character and does not affect the actual identification of the interest in question.

(2) Obviously, this does not hinder in any way the operation of the type of protection which may be given subsequently (civil law damages or criminal law penalties). But this is a possibility only (dependent on proven single cases of injury to particular parties) and is purely individual in that it is intended to protect the interests of particular individuals (my compensation is granted to me alone). Preventive protection, however, does not depend on a particular injury being identified as an individual act; as has been said, it would apply to everyone simultaneously, even where proceedings were taken by an individual in his own interest.

SUMMARY

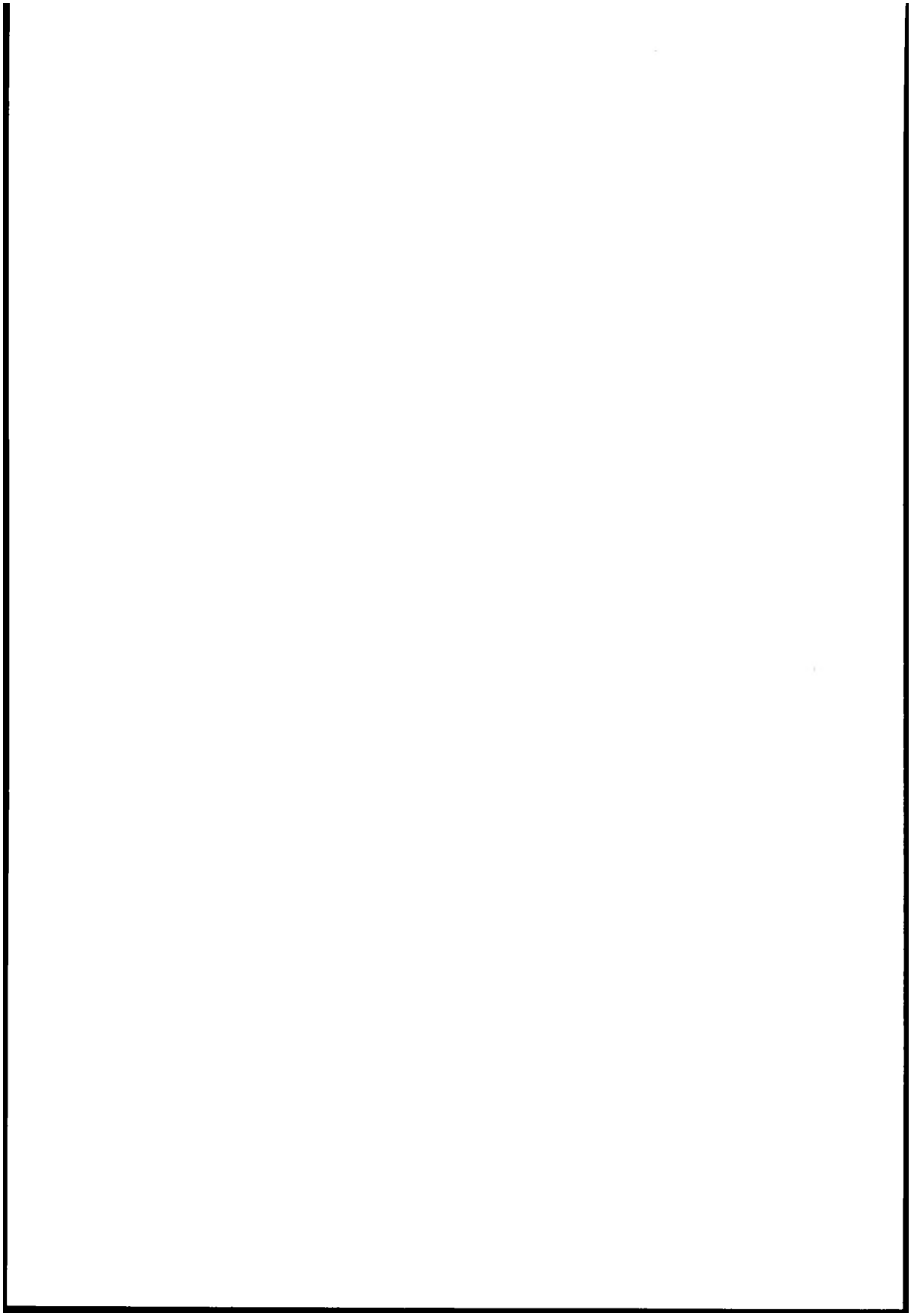
Professor Jean Maury of the Montpellier Faculty of Law analysed the Royer Law of 27 December 1973, the opportunities it offers and the results that can be gained from it.

While it is perfectly justified in criminal proceedings for the injured party to bring a civil action for redress, the admissibility of such an action is more contestable where the plaintiff is an association which has not itself suffered injury but is acting on behalf of its members or even on behalf of all the consumers likely to have suffered injury. However, the protection of the public at large is the responsibility of the Public Prosecutor, which is why the bringing of a civil action by consumer associations has often been declared inadmissible. To remedy this the Royer Law provides that duly registered associations whose constitution expressly states as their object the defence of the interests of consumers may, if they have been approved for that purpose, pursue before any court a civil claim in respect of acts which cause a direct or indirect prejudice to the collective interests of consumers.

Decree 74-491 of 17 May 1974 and an inter-ministerial order of the same date prescribe the conditions under which consumer associations can be authorized to take legal action. They are stringent, and concern membership in particular (10,000 for national associations), to ensure that the associations are broadly representative.

Authorization is granted to the national associations by joint decision of the Ministry of Justice and the Ministry of Economics and Finance. The power to grant authorization to local groups lies with the prefect of the department in which their headquarters are situated. Authorization is granted for five years and is renewable.

In addition to the approved consumer associations, the national federation and all the departmental federations of family associations may, under a law of 11 July 1975, bring before any court a civil action relating to events liable to prejudice the material or moral interests of families, without having to prove prior approval or authorization by the public authorities.



RECOURSE TO THE COURTS IN DEFENCE OF THE CONSUMER UNDER FRENCH LAW

by Jean Maury
Professor at the Montpellier
Faculty of Law and Economics

An individual consumer is virtually powerless faced with the majority of people whose activities are harmful to him. This is such an obvious remark that one almost hesitates to make it here. We are all fully aware that the effective protection of the rights of individuals requires action by a group having at its disposal the same means and powers as those who would otherwise encounter no barriers when carrying out their illegal acts. This is particularly clear where recourse to the courts seems necessary; obviously, there are occasions when the individual client of a property developer who builds in breach of the building regulations will not hesitate to bear the cost personally of taking proceedings since the financial loss he risks incurring makes it worthwhile in his case. Nevertheless, he alone must discover the unlawful acts. On the other hand, would it be conceivable to imagine consumers instituting proceedings, each on his own account, against the manufacturer of a domestic fuel supply which requires customers to sign a standard type contract containing an unreasonable condition or against a travel agency which at the last minute fails to produce the promised bookings, thereby depriving a number of people of the holidays they were looking forward to? In France, as elsewhere, protection of this kind would be obtained mainly by action taken by groups. On this point, however, France has lagged behind other countries, since it had to wait until the Law of 27 December 1973, known as the "Royer Law" (1), before specially approved consumers' associations were authorized to defend their members' interests in the courts.

This measure is going to have to fit into a legal system which, it will be recalled, confers jurisdiction on different types of courts, depending on the circumstances. Where claims are made against the State or public bodies, ordinary judges cannot as a rule deal with them, by virtue of a rule of separation laid down in the Law of 16-24 August 1790 : the claim has to be brought before an

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administrative tribunal, which alone is empowered to order the State authorities to compensate a party for the injury that he has suffered as a result of their actions, or to grant a plaintiff annulment of a regulation to which he objects (2). It is only in cases where the harm is caused by an individual or a group defending only his or its private interests that the ordinary courts or judges would be competent to adjudicate.

In the latter situation the plaintiff may very often bring his action by way of summary proceedings in what one is tempted to call courts of purely private law, in particular the civil courts known as "tribunaux d'instance" (district courts), "tribunaux de grande instance", (regional courts) or "tribunaux de commerce" (commercial courts). However, this possibility is frequently accompanied by another choice : where the acts that have caused him injury are also wrongful under the criminal law, the victim may, if he prefers, bring an action for damages or civil action in the criminal courts where the primary proceedings are instituted on behalf of the State by its representative, the Public Prosecutor (3). The accused is then faced with two opponents, pursuing different objectives on behalf of separate interests. This presence of the victim at the criminal proceedings is, of course, not peculiar to French law, but while it is unknown to some of our EEC partners (Anglo-Saxon law) and is permitted by others in a limited manner only (FRG), it should be remembered that for us it is a basic rule that is applied systematically. In a legal tradition of which evidence still remains in Articles 1 to 10 of the 1958 Code of Criminal Procedure which currently govern the subject, an action to compensate the victim, brought before a criminal court or a court of purely private law, is exactly the same : the subject of the action is the same, a wrongful act committed against the victim; it is based on the same legal provisions, Article 1382 et seq. of the Civil Code; its object is the same, complete compensation for the harm caused. In practice, on every possible occasion, that is to say each time that there is a criminally punishable offence, the party concerned will bring his civil action in the criminal court since its advantages are well known : criminal procedure is much speedier; proof of guilt need no longer be furnished by the civil party since the Public Prosecutor is responsible for so doing and has at his disposal means of making inquiries that are of necessity much more effective, finally, proceedings of this kind are generally much less expensive for the victim. A distinction must be drawn, however, on this latter point : where a civil action is joined to a prosecution in which proceedings have already commenced, the person bringing the civil action has practically no expenses, apart from his lawyer's fees, which will be taken into account in his application for damages; this is what happens when the Public Prosecutor is simply informed of the offence by means of a "complaint", which leaves him free to proceed or where a civil party is joined to a prosecution already in progress. As is well known, however, French law provides the

victim with the very remarkable power of instituting the criminal proceedings himself where the Public Prosecutor or the competent government departments fail to do so. By taking the initiative in bringing his civil action before the examining magistrate he starts at the same time the prosecution which is of assistance to him and obliges the magistrate to start a criminal investigation (4). In these circumstances and in order to check possible excesses, the admissibility of a "prosecution combined with a civil action" is subject to the payment of a deposit fixed by the senior examining magistrate which will be refunded to the plaintiff only in the event of his winning the case (5).

In view of these procedural peculiarities and above all because the proceedings to which such actions are joined are first and foremost of a criminal nature, the civil action in conjunction with a prosecution occupies a really independent place in our court practice compared with the standard liability action brought in the civil law courts. In fact it is tending more and more to become as much a punitive action, by associating the victim with the demand for penalties, as an action for compensation. This view has been questioned, even quite recently, for it is certainly contrary to the spirit of the Code of Criminal Procedure (6), it seems, however, to be the correct one. Thus, the French courts have always accepted that the victim may limit himself to asking for damages of the symbolic sum of one franc; the moderateness of such a request barely disguises the plaintiff's real motives which are that he should be made a party to the punishment. How else can current decisions of the Court of Cassation be explained which separate the right to institute a civil action in a criminal case from the right to obtain damages, by stating that the former prerogative remains even where facts applicable to the case in question prevent the latter from being exercised (7).

However, it is in the case of "disinterested" group actions (associations and groups) that this aspect of the civil action is perhaps most noticeable. Where an action is brought by an individual, its admissibility does not normally raise any serious difficulties. The person involved is, as a rule, the victim of the offence, i.e. the party contemplated by Article 2 of the Code of Criminal Procedure, which requires that the plaintiff must have suffered personal injury caused directly by the offence. On the other hand, an action brought by an association subject to the general rules of law has difficulty in meeting these requirements, and the reluctance felt by the French courts in allowing it is understandable; there is an alternative : either the group claims to defend the interests of one or more of its members as such and thus its own injury, unlike that of the victims, is only indirect, or it proposes to act in defence of more general principles affecting the entire nation, and in these circumstances the judges will certainly accuse the group of wishing to undermine the monopoly of the Public Prosecutor and

the objectives of prosecutions while at the same time declaring the application inadmissible.

But is it not precisely this broadly-based function, which to some extent overlays that of the Public Prosecutor, that consumers' associations will have to perform? It is obvious that to be effective they will have to be empowered to institute proceedings in defence of the general interest of consumers even if the actual victims of the disputed act are not in membership. This type of power, which is much wider than that normally acknowledged by the general law as being vested in "disinterested" groups constituted under private law, could not, of course, be exercised unless special measures were adopted by the legislator. This has now been done in the above-mentioned Law of 27 December 1973, Article 46 which provides :

"Notwithstanding the provisions of Article 3 of Decree No 56-149 of January 1956, duly registered associations whose statutes explicitly state that their object is the protection of consumers' interests may, if they have been approved for this purpose, bring a civil action in any court in respect of acts causing direct or indirect injury to the collective interest of consumers."

A decree shall lay down the conditions in which consumer protection associations shall be approved after the opinion of the Public Prosecutor has been obtained, taking into account the extent to which they are representative at national or local level.

Approval shall be granted only to associations which are independent of all forms of business activities. Associations connected with consumers' cooperative societies governed by the Law of 7 May 1917 and subsequent legislation shall, however, be approved if they meet the requirements to be fixed by the above decree.

It emerges, therefore, from this text and from decree No 74-491 of 17 May 1974 and an interdepartmental order of the same date that an association claiming to represent the rights of consumers in court cannot be given an immediate right to do so. It must first obtain consent from the authorities by proving that it fulfils the requirements laid down by law. It will then be able to institute proceedings in the appropriate court whenever an act committed by a defendant falls within the scope of the association's mandate. We propose having a look at this by examining in succession how competence to institute proceedings is obtained (I) and how it is used (II).

I. Competence to institute legal proceedings

In order to understand why the French law of 1973 requires that the wide powers of consumer groups to institute legal proceedings should be made subject to the prior conferment of competence on them, it must be remembered that under our legal system there is no initial

administrative check on associations when they are set up. The establishment of such associations requires only a simple statement by the founder members at the office of the préfet in the place in which their head office is situated. The Constitutional Council has decided that the point involved here is even a basic principle of our law, so that any law which interfered with it would be unconstitutional (8). The other side of this liberalism is that the majority of such groups are in no way qualified a priori to act on behalf of others. It is understandable that for the most part our courts are consistently opposed to actions of this kind (9).

French legislation is today inclined to discriminate between ordinary associations and those which seem to have highly worthwhile objectives and which must on that account be given a special right to institute proceedings, even though their status continues to be governed by private law. The attitude adopted towards consumers' associations is matched by that which is adopted towards each of the following in respect of the type of movements with which they are concerned : professional and trade associations (10), family associations (11), associations to combat alcoholism (12), racism or antisemitism (13) and prostitution (14). However, the requirements here for granting more extended rights are particularly stringent. The law states that all consumer groups claiming these rights must prepare a file testifying that they fulfil certain precise conditions before submitting it in support of their application to the administrative authorities. The conditions of competence (A) must therefore be studied before the order which confers it (B).

A. The Royer Law and the implementing Decree of 17 May laid down the conditions that have to be met by consumers' associations claiming authorization. From a reading of these various texts, the intention of the law appears to be that the new powers so granted should be exercised only by groups whose civil actions would not lead to misunderstandings because they are brought by bodies which are undoubtedly legal persons under private law (15) but which also prove to be permanent of importance and specialized in the area which they wish to protect.

   The first requirement is that the association must show that on the date on which it submits its application for approval it has been in existence for not less than one year from the date on which it was founded. The required period is therefore quite relative; it is not a question of restricting the civil action to groups which have already provided evidence over a long period that they are effective and representative. It is also well below the five years laid down by the Law of 1 July 1972 (Article 2 - 1 Code of Criminal Procedure (CPP)) as a requirement for the right to institute civil proceedings in a criminal case granted to associations combatting racism and antisemitism (by virtue of

which such associations can, it is true, bring an action without administrative approval). Obviously, it is merely a question here of eliminating temporary groups set up, dare one say, ab irato, to deal with a particular offence and which would disappear as soon as their objective was achieved.

Secondly, the law specifies that an association must be able to show that it has a sufficient number of members. Here again, it is a matter of eliminating bodies which are not altogether serious or representative. The criterion fixed in the decree of 17 May varies enormously, however, depending on the number of people involved in the movement concerned. In the case of national associations it is very precise : only associations with not less than ten thousand individually paid up members (16) on the date on which the application is submitted may claim approval. This requirement is perhaps too rigid since it has already been prejudicial to one organization whose representativeness did not seem, at first sight certainly, to be in any doubt, namely the Federal Union of Consumers, which on 1 January 1975 had perhaps only 5,100 members in its local branches but which publishes one of the two main consumer monthly magazines, "Que Choisir", with a circulation of more than 300,000 (17) and which belongs at international level to the IOCU (International Organization of Consumers' Unions) (18).

The requirement of ten thousand members is all the more exacting since there is an entirely different criterion for groups operating at regional or local level which is as flexible as the first is strict. Without going into greater detail the decree provides that the body "shall show that it has a sufficient number of individually paid up members, having regard to the territory in which its activities are carried out". Here, everything is left to the subjective assessment of the Government department responsible for examining the application for approval or the court or tribunal competent to deal with the appeal against a refusal (19). The apparent contradiction is even greater since in general it should be much easier, using subjective methods, to decide on the representative nature of national associations than on that of purely local bodies. It must be noted, however, that in practice it is quite easy to get round the law : national organizations unable to show a membership of ten thousand are generally represented at local level by groups which they need only ask to institute civil proceedings in criminal cases on their behalf. Nonetheless, it may be asked whether by laying down requirements that are a little too strict, the authors of the 1974 Decree have not confirmed the fears expressed by the Parliamentary Commission instructed to report to the National Assembly on the draft of what was to become the Royer Law when it wrote : "The legislator must be careful to avoid the risks of arbitrary discrimination lurking in a purely

administrative procedure whose detailed rules are left to be laid down by decree, and must beware of the consequences that a refusal or withdrawal of approval might have for the very existence of the associations thus excluded (20)."

The final requirement relates to the objective of the association, which must have taken upon itself the duty of protecting consumers. This objective must be genuine. The approving authorities must carry out a thorough investigation into the type of activities carried on by the various applicants so as to exclude groups (generally local groups) which use consumer protection as a screen while pursuing purely commercial objectives (21). The Royer Law had already required that associations applying for approval should be independent of all types of business or employment. The implementing decree was careful to specify, of course not exhaustively, a number of deciding factors : preparation and circulation of publications, holding of information meetings and maintaining rooms or offices open to the public....

The objective must be explicit. In a requirement which some might regard as too precise, Article 46 limits approval to groups "whose statutes explicitly state that their object is the protection of consumers' interests." The obvious consequence is that a number of bodies that were set up before the Law of 1973 and while pursuing the objective of protecting consumers, had not then referred to it in their statutes, will have to amend their statutes (22).

On the other hand this objective need not be exclusive. A group meeting the requirements laid down by the law may well have other objectives which, moreover, frequently overlap : a consumer whose health and financial interests are involved is the very person whose mental and cultural wellbeing must be protected. Bodies concerning themselves with both aspects are only to be encouraged.

Article 46 of the Royer Law provides that notwithstanding the principle that approval may be granted only to associations independent of all types of business or employment, those originating in consumers' cooperative societies could also be authorized, where appropriate, to bring proceedings. It was just such a group which was the first to make use of the new possibilities opened up by the Law. The National Federation of Consumers' Cooperatives was the first body to be granted approval and was also the first to test it in the courts (23). This organization, apart from having as its objective the protection of consumers, also controls, inter alia, a foodstuffs analysis laboratory (the cooperative laboratory), a credit organization (the Central Cooperative Bank) and a grocery production and retail chain (under the initials COOP).

These conditions, fulfilment of which is attested by the contents of the various documents that must be produced in support of an application (24), are therefore essential for obtaining the order conferring competence which we will now study. But they do not allow it to be demanded as of right.

B. The decision is in fact left to the initiative of the Government body, which varies according to the type of group involved : in the case of national associations the order consists of a joint decision of the Minister for Justice and the Minister of Economics and Finance. Local bodies are authorized by the "préfet" (prefect) of the department in which their head office is situated. To avoid too much arbitrariness and to protect the basis rights of legal persons, the Law has provided that prior to a decision being taken the file must be forwarded for an opinion to the judicial authority, i.e., the Public Prosecutor, at the court of appeal in whose jurisdiction the head office is situated; the opinion does not of course bind the Government department, no matter how important it actually is. In practice, the decisive role is played by the departmental administrative staff (local associations) or the Directorate-General for Trade and Prices, which receive the applications and examine the files.

An administrative decision of approval or refusal must be given within six months of the date of issue to the applicant of an acknowledgement of lodgement of the file; once this time limit has passed silence on the part of the authorities would be regarded as approval as is the rule under French law. A refusal must be accompanied by a statement of reasons so as to allow an appeal for annulment to be lodged in the administrative court in accordance with the general law. We should point out in this respect (without going into detail) that judges cannot as a rule decide on the appropriateness of a decision once it has been properly given but only on its legality, interpreted, it is true, very widely : a wrongful interpretation of the conditions laid down by the law would constitute grounds for annulment.

Refusal (or withdrawal) of approval leads to a somewhat contradictory situation. The courts are not totally opposed to actions being brought by ordinary associations and are tending to become even less so. This has been remarked upon by the legislator himself (25). When there was no provision enabling them to institute proceedings, consumers' associations, like other bodies with similar objectives (26), were permitted to institute civil proceedings in criminal cases, particularly by certain appeal courts. In future, where competence is not conferred on groups of this type it seems that they will be deprived of all rights to institute proceedings on behalf of the interests of consumers, even where the direct victim of the offence is one of their members.

The decision granting competence has a number of special characteristics : it is specialized, since the order merely extends the court action to the groups concerned but does not change their legal nature or constitution as would be the case with an acknowledgement of public service (27). It is temporary, even though the Law of 1973 does not seem to have envisaged the restriction introduced by Article 2(4) of the implementing Decree; which provided that authorization would lapse after five years but could be renewed in the same form. The purpose of this is to maintain a permanent check on bodies which might become inactive after a short time or cease to be representative, particularly by reason of the loss of a large number of members. Finally, the decision is always subject to alteration. Article 6 of the Decree provides that "approval may be withdrawn after advice has been obtained from the Public Prosecutor where the association no longer fulfils one of the conditions on the basis of which approval was granted". In this way the Government departments can keep an eye on groups whose activities might change considerably, for instance, because they become involved in business. Withdrawal of authorization must of course be made in the same manner in which it was granted and is subject to the same right of recourse as an initial refusal.

This procedure has been used right from the date of publication of the documents implementing the Royer Law. The list of approvals continues to grow, thereby proving that the legal provisions were awaited and corresponded to a genuine need. By 1 October 1975 approval had been granted to seven local organizations (28) and three national bodies, the Fédération nationale des coopératives de consommation, the Confédération syndicale des familles and the Confédération nationale des associations populaires familiales (29). Many more bodies could be listed since they must include the Union nationale and all the Unions départementales d'associations familiales (UDAF) which are very dynamic groups (as a rule there is one in each of our one hundred departments). The law has made a special provision for the latter by a Law of 11 July 1975 enabling them "to bring a civil action in respect of acts prejudicial to the physical and moral interests of the family in all courts, without having to prove that they have been granted prior approval or authorization by the public authorities and in particular the approval specified in Article 289(3) of the Criminal Code and Article 46 of Law No 73-1193 of 27 December 1973" (30).

The outcome of all this seems to be that in future legal actions by consumers' associations will be brought much more frequently. Everything leads us to believe that where applications have been submitted for the right of competence the intention of the recipients has been to make use of it. How will this right be exercised?

II. Exercise of the right to institute proceedings

An action by associations acting on behalf of the general interests of consumers is altogether different from an action brought by the actual victim of the act committed. The groups concerned do not have to ask the victims for authorization to institute proceedings nor can they act in their stead or on their behalf. The Law of 1973 confirmed this view by adopting a formula based on that which had already appeared in the Law of 11 March 1920 enabling professional and trade associations to protect the interests of the profession that they represent : proceedings may be instituted in respect of all acts "causing direct or indirect injury to the collective interest of consumers". Rather than draw a fine distinction between "direct" and "indirect" injury, the point to be considered here is the intention of the legislator to derogate from Article 2 of the Code of Criminal Procedure (which allows a civil action to be brought by the direct victim only). The institution of such an action seems to raise two questions. Which courts are competent to give a decision in such actions (A) and what sanctions may ensue (B)?

A. Although actions may be brought in other courts, there is no doubt from reading the preparatory work on the Law of 1973 that the action of consumers' associations was regarded mainly as a matter for the criminal courts alongside criminal proceedings. To be quite sure of this it should be enough to note that the expression "action civile" used by the legislator is very rarely used in French law apart from this particular situation. Furthermore, attention has been drawn above to the advantages offered to the plaintiff by this method of instituting proceedings, whenever it is possible. The essential condition for bringing a civil action in the criminal courts is, it should be remembered, that the facts must be regarded by the law as constituting a criminal offence. This is normally the case here since the majority of serious acts capable of causing injury to consumers are the subject of legislation making them a criminal offence. The main thing is that this legislation should in fact be applied, but unfortunately it is not always so. The authorization of associations to institute civil proceedings in criminal cases should lead to a number of somewhat forgotten provisions being reactivated, since the judge is obliged to start a criminal investigation (31).

The field of action thus opened up to consumer groups may be very wide. To take but a few examples, it includes building and town planning offences, offences connected with the manufacture of drugs, cosmetics and foodstuffs. It also covers the suppression of offences connected with false advertising, tuition in the home, various sales techniques, all of which are governed by regulations laid down fairly recently by French law (32).

However, consumers' associations would have been severely hampered in bringing a civil action if the previous legislation had not been amended in another connection. In France the basic rules governing purely economic offences (refusal to sell, infringements of price legislation, barriers to free competition, use of certain sales techniques, etc...) are contained in two orders of 30 June 1945, one of which bearing the number 45-1484 hitherto provided for a very restrictive system of proceedings, although subsequent reforms have made it a little more flexible (33) : before a criminal action could be brought by the Public Prosecutor the offence had to be established in a report drawn up by the fiscal authorities. In practice heavy penalties were frequently avoided by the authorities coming to an arrangement with the offender. If they intervened before a decision had been given the effect was to extinguish the criminal action and at the same time deprive the criminal courts of their jurisdiction to give judgment in such a case, and in the civil action connected with it. As a result the rights of a victim were severely restricted since he could neither initiate criminal proceedings nor claim to continue after the compromise had been reached (34).

Article 45 of the Royer Law changed these solutions by amending the former legislation on two main points. Apart from cases of offences involving cartels or abuse of a dominant position (35), henceforth a civil action may be brought "in accordance with the general law" which according to the intentions of the authors of the reform seems not only to allow civil proceedings to be instituted in a criminal case which has already begun, but also to allow the criminal proceedings to be set in motion by a complaint, with the victim being made a civil party to the proceedings. It would not be so simple in practice, since a prosecution and a civil action arising out of it presupposes proof of the existence of an offence. Only officials of the fiscal authorities may draw up the report which constitutes proof. Consequently the departments concerned maintain effective control over the courts in this matter. All that can be hoped for is that the victim is kept informed of the results of his application, particularly where the prosecution terminates abruptly as a result of a compromise.

Where this happens, the civil action continues to hold good. Article 45 of the Royer Law introduces a remarkable innovation in this respect, quite opposed to the general principles of our criminal procedure. "The compromise...amounts to acknowledgement of the offence. Even if the matter has not been brought before a criminal court prior to the compromise the court shall be competent to decide, where appropriate, on the civil interests involved." We are about to witness, therefore, a phenomenon which is virtually unique in our legal system : a criminal court

will be competent, as its primary concern and in accordance with its normal procedure, which is especially favourable to the victim, to give judgement in purely civil actions (36).

If it is extended in this way a civil action brought by a consumers' association should be particularly effective. It is still too early to know what fate the courts will reserve for it for, in the hands of a hostile court, there would be many ways of crippling it. A number of decisions are unfortunately giving grounds for fear. Proceedings instituted on the initiative of an association which uses the private prosecution procedure and institutes civil proceedings in a criminal case, are subject to payment of a deposit to cover the costs of the case; all that is required is to fix the deposit at a high enough figure to discourage the plaintiff from bringing the action. An entirely different approach would be to adopt an interpretation of the legislation which would not be new in this field (37), but which could cripple the opportunities opened up by the 1973 legislation. Thus, Article 45, which provides that proceedings shall be instituted "in accordance with the general law" could be seen as a reference to Article 2 of the Code of Criminal Procedure and interpreted, contrary to the undoubted intention of the legislator, in such a way that for the purpose of applying the 1945 order, consumers' associations would have to "have suffered personal injury caused directly by the infringement" which would of course never be the case and would result in the associations being nonsuited.

However plentiful the opportunities may be for consumers' associations in the sphere of criminal actions, they do have limitations. However, their ability to take legal proceedings will not stop there, and they can manage to bring an action in other courts.

First of all, proceedings may be taken before judges who are competent primarily to deal with purely civil matters, particularly "tribunaux d'instance", "tribunaux de grande instance" and "tribunaux de commerce". This would be the case particularly where a civil liability action could not be taken in the criminal courts because there was no offence or there was no longer one (on account of a general pardon, for example). A purely civil action is certainly slower than the institution of civil proceedings in criminal cases. The high cost involved is likely to deter consumer groups whose only funds often consist of members' subscriptions and income from their publications (so that the hope has been expressed on a number of occasions that the rules governing legal aid might be adapted to suit them).

In many cases, there is no alternative to an action in the civil courts. It is worthy of note, moreover, that it was there that

Article 46 of the Royer Law was first applied, in a case which even the general French press carried in detail (38), that of the "Guide to the most common medicines". The author of the work, Dr Pradal, examined the main patent medicines sold in France and described their virtues, effectiveness and occasional dangers. A manufacturing laboratory felt that it had been harmed by a misleading description of one of its products and made an application in chambers that the sale of the book be prohibited until such time as the offending passages were removed. The judge of first instance granted the application and the author and publisher lodged an appeal which the Paris Court began examining on 5 December 1974. Availing itself of the competence which had been bestowed on it only a few days earlier by the order of the previous 30 November, the National Federation of Consumers' Cooperatives intervened in the case on behalf of the consumers' right to information. In its judgement delivered on 20 December the Court had to allow the intervention on principle, but on the basic issue reversed the order insofar as it suppressed circulation and declared itself to be incompetent to award damages (39).

It can be seen in this case that the NFCC knew how to take advantage of the extremely speedy procedure in chambers (restricted to the granting of urgent temporary measures) in order to become a party to the proceedings. Its intervention obviously remained valid in respect of the main proceedings which were to take place on the same matter.

While actions by consumers' associations can be brought in the courts concerned with private law, they can also be brought in the administrative courts whenever the latter are competent : we are thinking in particular of cases where a statutory document which might be harmful to the interests of consumers could be annulled as being ultra vires. To take an example, in September 1974 supermarkets were authorized by a ministerial order to allow a discount of fifteen centimes on each litre of motor fuel sold. Petrol pump owners in the south of France reacted forcibly, the measure was revoked and the discount was reduced to five centimes for ordinary grade and six centimes for superior grade petrol. It goes without saying that if the second decision had appeared to be unlawful or to constitute a misuse of power, the interest of consumers would have required that it be annulled. Consequently, the groups concerned must be allowed considerable latitude in bringing an action in this type of case without emphasis being placed on the expression "civil action" used by the 1973 Law which, as has been said, referred to a contentious matter tried in the criminal courts. The action brought by consumers' associations remains a civil one in that it is modelled on the type of action which could be taken by any person enjoying a status governed by private law. Article 46 is careful, moreover,

to specify that it may be brought in "all courts".

B. Leaving aside the measures peculiar to litigation before the administrative courts, what sanctions should a civil action enable consumers' associations to obtain?

Some aim to satisfy the interests of the group itself. This consists essentially in awarding pecuniary damages. We have a firmly established principle in cases of this type that the plaintiff shall claim only one franc, to emphasize that he is acting from disinterested motives, namely to cooperate in punishing the offender. In our opinion it would be very much in the interests of consumers' associations to claim greater compensation since, if they obtain it, they will be better able to finance their campaigns and to make the deposits demanded of them by the examining magistrate when they institute criminal proceedings (40).

Apart from the award of pecuniary damages other penalties may be sought which would be directed more at satisfying the general interests of consumers : some of these sanctions are standard ones but they would achieve a new usefulness; thus, for example, orders issued to offenders prohibiting them from pursuing certain occupations, or closing establishments (41). In cases of this kind, where it is customary for the sake of appearances that the civil party leave it to the Public Prosecutor to demand the penalty (even where he is a party to it), the penalty itself may have a particularly significant preventive effect.

Nevertheless, it remains true that the standard penalty is relatively inappropriate here. The courts will undoubtedly have to endeavour to discover new sanctions more suited to the interests of consumers. Take the example of misleading advertising. The insertion in the newspapers at the expense of the convicted party of an excerpt from the judgment cannot have much effect, even though it is current practice to order it, nobody reads this type of literature. Alternatively, it would be possible to imagine the defeated party being obliged to bear all or part of the costs of a new campaign directed by the consumer group or to publish again the advertisement complained of accompanied by a statement pointing out its faults (42)...

By being adapted to the general protection of consumers the legal action is intended thus to serve a wide range of purposes, even though its effectiveness is restricted by the fact that it is of necessity punitive rather than preventive (43). It can only be hoped that the courts will look upon it as favourably as the legislator of 1973, from whom consumers' associations are genuine

collaborators of the Public Prosecutor in the pursuit and punishment of acts which are likely at one time or another to be prejudicial to the interests of all of us. For, do not let us delude ourselves, here we are at least as close to a prosecution as to the standard civil action brought by the victim under Articles 2 CCP and 1382 C. civ. (44). Suppression and prevention of harmful acts are sought after much more than compensation in the civil meaning of the word. That is the characteristic feature of actions taken by all "disinterested" groups where they set themselves up to protect their objectives. In general, this threat to the monopoly of the Public Prosecutor may give rise to reservation (45), but in this particular case it is otherwise. Precautions taken by the legislator in 1973 are such that here reservations cease and one can only express satisfaction at the mission entrusted to bodies which are struggling ultimately to protect each and every one of us.

EXPLANATORY NOTES

(1) So named after the Minister for Industry and Commerce who had it adopted by Parliament.

(2) It should be however, borne in mind that the person against whom proceedings are taken in the courts on the basis of a rule which he disputes may enter a plea of illegality of such rule.

(3) We are leaving aside those cases where certain government departments have the right to institute a prosecution jointly with the Public Prosecutor. See Bouzat and Pinatel, Traité de droit pénal et criminologie, t II, No 979 s.

(4) The victim is also entitled to summon his opponent directly before the police court or the criminal court, but this power is rarely used.

(5) The obligation to deposit a security has not been sufficient to check abuses of the right to institute a civil action in criminal proceedings which occur unavoidably as a result of the liberalism shown by the law when defining the rights of the victim. Examining magistrates are frequently asked to investigate acts which turn out not be punishable as a crime.

(6) It was particularly strongly criticized by Professor Robert Vouin ("L'unique action civile", D.73, Reports No 39). It has been the direct impetus, however, for a number of recent studies : Vidal "Observations sur la nature juridique de l'action civile," Crim. Sc. Rev.1963, 482 Larguier, "Remarques sur l'action civile exercée par un autre que la victime" Mél. Patin, 383, Boulan, "Le double visage de l'action civile exercée devant la juridiction répressive", JCP 73 - XI - 2563, etc...

(7) See in particular Crim 15 Oct 1970, D.70, 734, obs. Costa; Crim. 8 June 1971, D. 71, 594 and our note,Rev. trim. d. civ.71, 189, obs. Hébraud.

(8) Conseil constitutionnel, 16 July 1971, RDP 71, 1203.

(9) It must be noted, however, that prior to the adoption of the measure and whilst they were still subject to the general law the majority of the groups now authorized by the Law to institute

proceedings had often been permitted by certain courts to institute civil proceedings in a criminal case (such as consumers' associations - see Consommateurs actualités No 58 - and - "task forces fighting prostitution") and sometimes even by the Court Cassation (such as the ernational League against Racism and Antisemitism. See Crim.14 January 1971, D.71, 101).

(10) Law of 11 March 1920.

(11) Article 3, Family and Social Welfare Code (Code de la famille et de l'aide sociale).

(12) Article 96, Public House and Off Licence Code (Code des débits de boissons).

(13) Law of 1 July 1972.

(14) Law of 9 April 1975.

(15) The French Institut national de la consommation is a public administrative institution, directly subject to the Ministry of Economics and Finance. It cannot, therefore, by its nature claim to be able to bring a civil action. Nevertheless, since it was set up in 1966 it has taken a genuinely independent stance vis à vis its protecting ministry and plays an important role in protecting consumers : advisory services, radio and television broadcasts, publication of a number of periodicals including the widely circulated monthly "50 million consumers" etc... (50 millions de consommateurs)

(16) This is clearly to avoid the participation of whole families, not excluded in principle in this kind of groups.

(17) It should be noted that a reader of a magazine, even if he is a subscriber, cannot be regarded as a member of the publishing association. The executives of the FUC were the first to draw a distinction between the two categories, a member being of necessity much more militant than a mere reader. (Press Conference given on 22 October 1975 on the publication of the 100th issue of "Que Choisir")

(18) We wonder wether this latter item of information could not have enabled the FUC to be approved. Article 1(6) of Decree No 74-791 provides expressly: "Where an association is set up on a federal or confederal basis, account shall be taken of the total number of paying members of the associations that constitute it." It does not mean only French subscribers. Today the IOCU groups together consumers' associations from forty countries. The same applies to the ORGECO which, with the FUC, represents France

in this organization but cannot be approved yet since it has only 6.000 members. (See in connection with these different bodies, "Les organisations de consommateurs," "dossier ouvert", Ministry of Economics and Finance, National Consumers Committee, June 1975).

(19) National associations which "engage in research and scientific analysis..." do not have to prove that they have ten thousand members.

(20) Report No 640, IInd part, p 119, Nat. ass. Parl. doc. 1973

(21) See an example quoted in "50 million de consommateurs" of June 1975, p. 39 regarding a body entitled "Services Informations du Consommateur."

(22) This happened particularly in the case of a group which obviously falls within the scope of the Law, The Union féminine civique et sociale which could not be approved because consumer protection did not figure among the objects in its statutes. Amendment of the association documents must here be approved by decree since this body is recognized as a body of public interest.

(23) In the Pradal case. See part II.

(24) The interministerial order of 17 May 1974, to which the reader is referred, specifies the documents to be included in the file. See also on this point the booklet issued by the INC as a supplement to "Consommateurs-actualités" No 63, "Civil actions brought by consumers' associations" especially No 26 et seq.

(25) Above-mentioned report, p. 109.

(26) See footnote 9 above.

(27) The result of declaring an association a public service is to extend its financial capacity. For this reason the legislator finally rejected the idea of adopting it as a necessary and proper condition of the capacity of consumer groups to institute proceedings (see report No 640 above, p. 118).

(28) They were listed in "Consommateurs - actualités" No 81, p. 12.

(29) See in relation to these groups the above mentioned "Les organisations de consommateurs" pp. 14, 34 and 42.

(30) Article 3(4) of the Family and Social Welfare Code (Code de la famille et de l'aide sociale) amended by Article 3 of Law No 75-629 of 11 July 1975. Legislative measures were necessary to reverse decisions which held that the initial approval required by UDAF did not exempt them from claiming the ad hoc authorization provided for by the various laws allowing groups to bring a civil action. See Crim. 10 July 1973, D. 74, 242 and our note, Rev. trim. d. civ. 74, 211 obs. Durry.

(31) To quote an example given by the INC "in the case of alcoholic beverages, legislation prohibits all advertising in respect of beverages belonging to the fifth group (whisky, vodka...). The Ministry of Health has no special powers in this area and the legislation is applied in practice only where temperance leagues institute civil proceedings in criminal cases ..." (Civil actions brought by consumers' associations, p. 6).

(32) "Thus, the INC believes that apart from the now standard areas of consumer protection (advertising, fraud, labelling, door-to-door canvassing) other subjects should be investigated by the organizations : compliance with the rules protecting the purchasers of new buildings; after-sales service and guarantees; infringement of credit regulations (such as the failure to provide a scale of charges); the rule governing the cancellation of insurance; correspondence courses." (op. cit. p. 15). We regret not being able to provide in this study an exhaustive list of offences in respect of which consumers' associations could intervene.

(33) Some economic offences had been governed however by separate legislation and came under the general law: misleading advertising (Law of 2 July 1963), sales with free gifts (Law of 20 March 1951 amended by Law of 29 December 1972), door-to-door canvassing (Law of 22 December 1972).

(34) It is known, moreover, that it had been decided in some controversial cases that in the case of certain offences established as being of "general interest" a civil action was impossible since offences of this kind could not have victims (Crim. 19 November 1959; JCP 60-II-11448 obs. Chambon). This precedent will be maintained perhaps, but presumably it will no longer concern consumers' associations since the precise intention of the law of 1973 is to allow them to defend general interests.

(35) With regard to the retention in this connection of the special procedure laid down in the order of 28 September 1967, see the explanations of the National Assembly special committee (aforementioned report, p. 110).

(36) Article 91 of the CCP offers another possibility however. A criminal court may have jurisdiction to give judgement in a civil liability action brought after civil proceedings have been instituted improperly in a criminal action and have been dismissed.

(37) Comp. Crim. 19 November 1959 and 10 July 1973 referred to above.

(38) See "Le Monde", 7 December 1974.

(39) Paris, 4th ch., 20 December 1974; Gaz. Pal. 2 March 1975, concl. Franck, obs. Fourgoux. Another decision of the same date upheld the order in this case in which the judge in chambers had declared that he had no competence following an application from another laboratory.

(40) The courts will still have to find a chain of causation between the wrongful act committed and the harm alleged in support of the claim. A precedent causing us some concern is that of the fishing and hunting federations, which however have a quasi-official status. In poaching cases the Court of Cassation is inclined to prevent the federations from claiming reimbursement of the expenditure which they incur, particularly in respect of keepers' wages, where it is not proven that the offence committed was directly responsible for the additional expenditure involved. (See Crim. 1 July 1970, bull. crim. 70 p. 531; 20 January 1971, bull. crim. 71, p. 46).

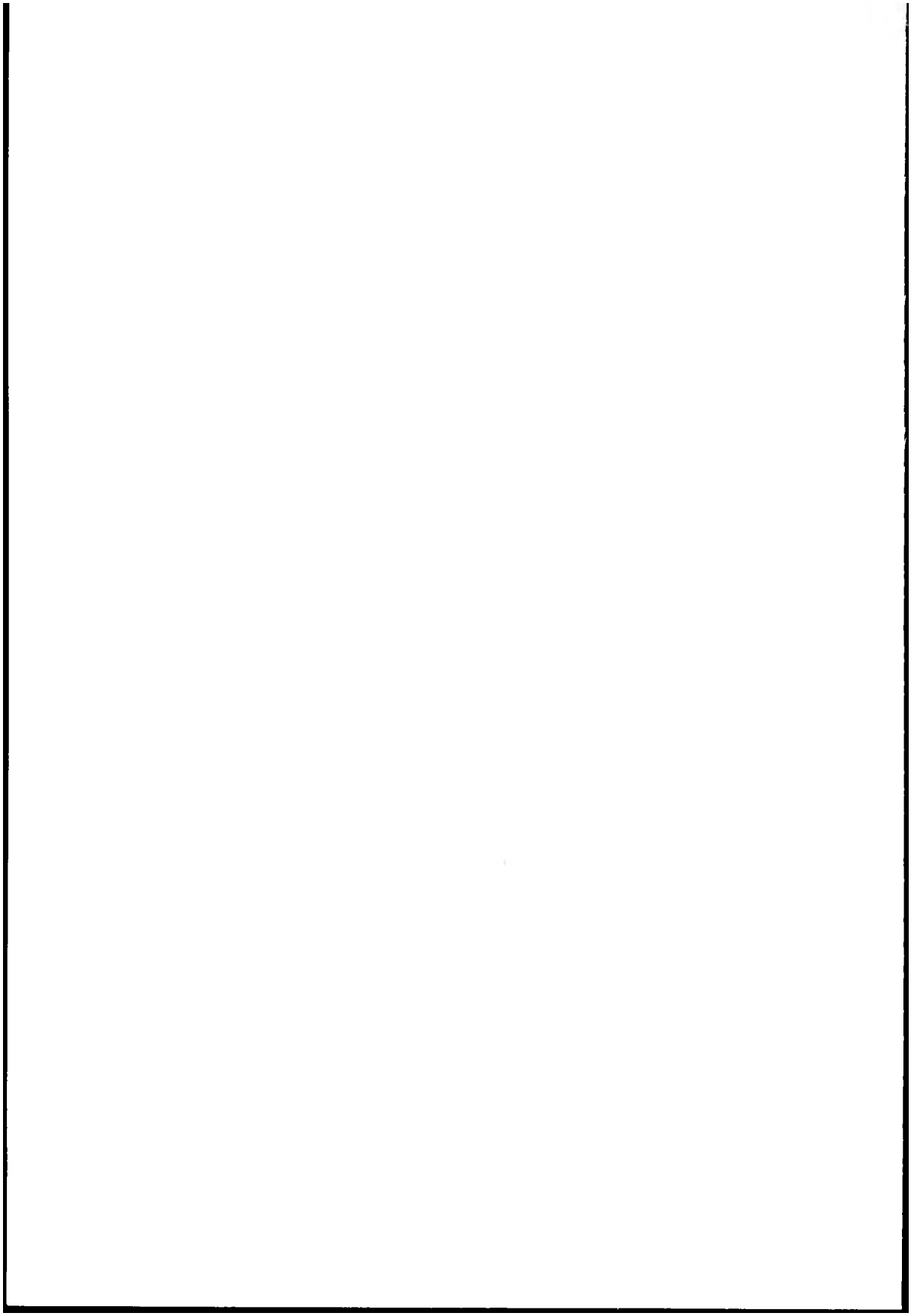
(41) The criminal courts, as is well known, have interpreted Article 99 C.P.P. (formerly Article 161 C.I.C.), which enables them to obtain "restitution", in a very broad sense so as to infer from it the possibility of making many orders for compensatory measures.

(42) The latter idea was proposed by Mrs Jaquot of the INC.

(43) In certain cases the fact that it is not sufficiently preventive may make it ineffectual. For example, where a group has a number of copies of unfair standard type contract signed, the rule of relativity of agreements makes annulment of the entire operation difficult. The solution seems rather to be negotiation with representatives of the profession of a new version of the standard type contract. Compare P. Viale's article in issue No 54 of "50 millions de consommateurs".

(44) This is the legislator's own view. See above-mentioned report p. 115.

(45) See the remarkable criticism of J. Granier in "Quelques réflexions sur l'action civile", JCP 1957-II-1386.



SUMMARY

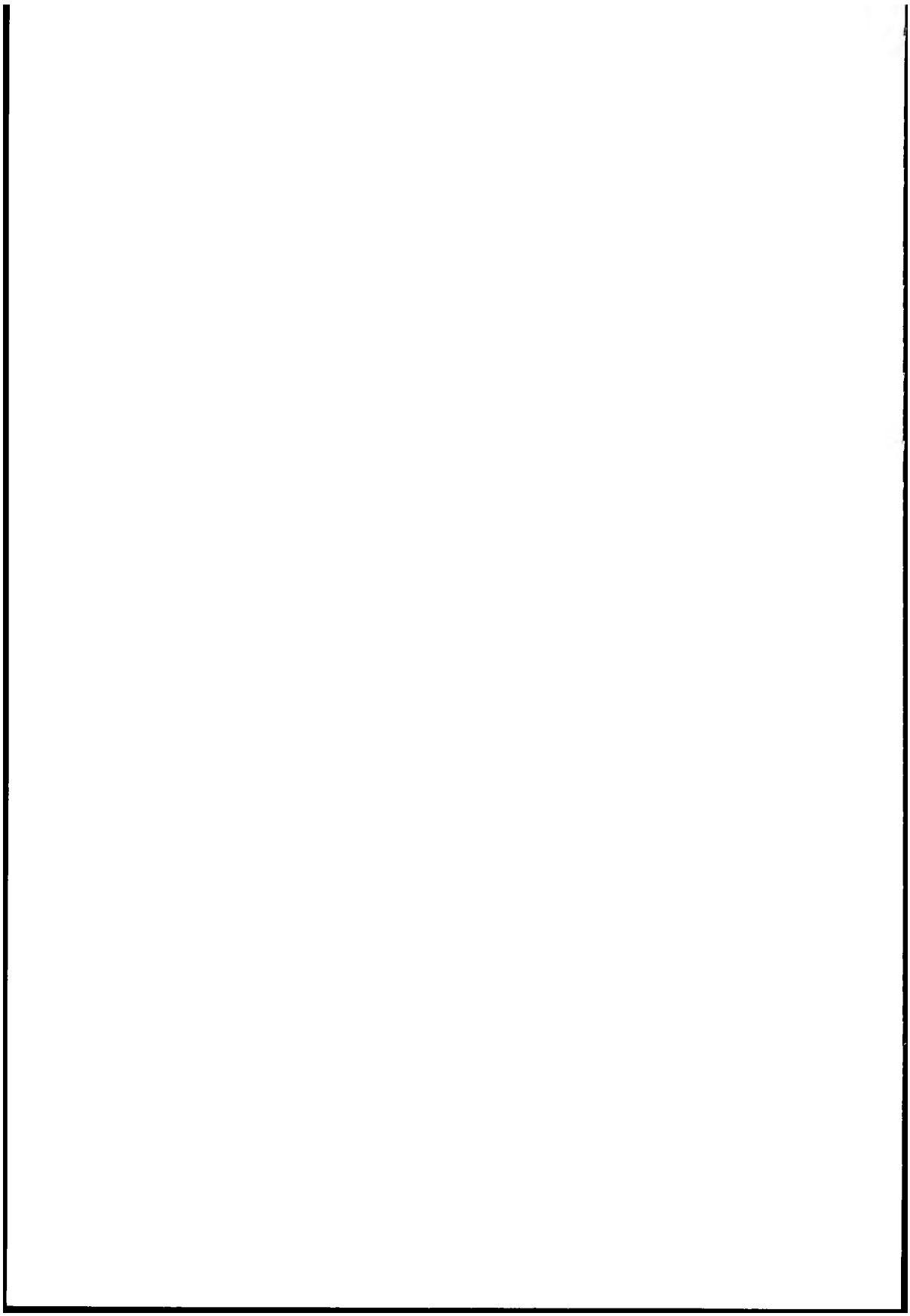
One of the most interesting pilot schemes now being conducted, in France, and which could serve as an example for action in the future by the public authorities, is certainly that of the Alsace Consumer Association.

It is really a sort of federation of groups involved in various ways with consumer protection. It acts in many ways. It seeks to provide its members with guidance and documentation, defends them in a court of law if the need arises and acts as mediator or arbitrator in many disputes. The moral authority it enjoys regionally allows it to achieve a fair settlement of disputes which would be harder to resolve in the courts.

As regards information, the Association publishes a periodical entitled "Le Consommateur" (The Consumer) and produces a weekly television programme dealing with current consumer problems. It also provides a legal counselling service where consumers can air their grievances and obtain useful advice about what to do. There is also a phone-in service. Where applicable, it advises the plaintiffs of the administrative department likely to be able to help them.

In cases of a general rather than an individual nature, the Association takes up the matter in dispute submitted to it and tries to settle it itself, either by referring it to the administrative departments involved (fraud squad, weights and measures authorities, competition and prices department, etc.), by contacting the person or firm involved with a view to reaching an amicable settlement or, finally, by taking legal action.

Attempts to reach an amicable settlement nearly always give satisfactory results in individual cases of lesser significance.



THE ALSACE CONSUMERS' CHAMBER

by M. Fischer
Chairman of the Alsace Consumers' Chamber

Background

The Consumers' Chamber is a body operating within the framework of commercial law alongside the Chamber of Commerce, the Chamber of Trade and the Chamber of Agriculture. It derives its income from parafiscal charges and protects the interests of consumers.

The Alsace Consumers' Chamber is no longer a dream but (now in 1975) the concrete result of twenty-three years of planning.

A Consumers' Association was set up in 1952. Its membership was able and dedicated, but numbered in tens. It showed the ability to produce excellent analyses and clearly define its aims, but conceptual planning is very different from practical execution and the Association proved unworkable in practice in the form in which it was conceived. After a few years the founders lost heart and the Association was disbanded as it proved impossible to develop beyond the original small nucleus.

A careful study of the situation locally would, however, have revealed awakening of interest of, and initiatives by, individual bodies :

- Works councils (Comités d'entreprises) have been actively involved in matters concerning distribution as they are concerned, through wage claims, with the concept of purchasing power.
- Family planning associations such as the Fédération APF, which have well-informed, active members prepared to take part in concrete projects, have been carrying out valuable work for some years past.
- Farmers' associations have been made aware of distribution problems through their own efforts to market their produce.
- Buying groups have been formed in various areas.
- Manufacturers and wholesalers, too, have made various offers to organizations and groups.

Although these were heterogeneous and isolated initiatives and reactions they did nevertheless provide, in some cases, a very important basis for action in depth. If consumers could coordinate such action they would succeed this time in going beyond pious hopes that wither on the branch. Numerous organizations were contacted throughout 1960 and early 1961 with a view to interesting them in consumer problems and distribution. A works council, for instance, is a legal entity which represents employees in matters concerning their firm. The employees thus represented by and, to an extent, grouped together in the works council, are also consumers. The same applies to local associations, family associations, farmers, civil servants, teachers, professional associations, etc. Finally, most consumers are members of, or represented in some way or other by an organization.

The idea behind these consultations was to interest organizations in consumer problems and involve them in action. It soon became clear that consumer problems were of little interest to individuals and organizations as long as they were confined to generalities. Only measures which directly affected the consumer or direct intervention in distribution would gain acceptance from those consulted.

There were several possible ways of meeting this requirement : either one could stick to existing tradesmen and dealers, or consumers could set up their own distribution channels. The former was the approach tried first : an agreement was proposed to various individual tradesmen under which they would keep to a definite pricing policy and specific checks in exchange for the endorsement (a "label") of the consumer organization and use of its disseminating media.

This failed because the trades' people consulted thought the suggested policy for margins was unworkable in the area.

This left the second approach : consumers setting up their own means of distribution. Two organizations were eventually created :

(1) a consumer association called ORCO (ORganisation de COnsommateurs),

(2) a cooperative called CODEF (Coopérative de consommation et d'équipement familial - Consumer and Family Cooperative).

There was, in principle, subordination of one body to the other : ORCO was the superior organization and CODEF no more than its instrument for direct action. The public, heads of groups and organizations and local trades' people were of course made more immediately aware of CODEF, but, without ORCO it would have been like a body without a mind.

ORCO had various aims, five of which deserve closer attention :

(1) bringing together groups and organizations rather than individuals;

(2) creating channels for communication and feedback between ORCO, CODEF and consumers belonging to associated organizations;

(3) organizing a network of district and village groups since women are responsible for 80% of expenditure on convenience goods;

(4) creating specialist committees on:

- information and education;
- protection and promotion;
- CODEF's customers;

(5) taking further the work of national bodies.

ORCO has done various things :

(1) collective protection;

(2) information : consumers' newsletter ("TELEX Consommateur") and radio programmes for housewives;

(3) education :

- training groups, briefings, discussions;
- Congress on 26 June 1967 on The Consumer in the Modern World;
- Symposium in Strasbourg in February 1969 on the Consumer Society and Consumer Power;
- surveys and analyses;

(4) representing consumers as an organized economic force on regional bodies. Practical action, first and foremost, impresses the consumer. He must be able to see and feel and judge. This prompted the founders of ORCO to go into distributive trade; and this led to the founding of CODEF.

CODEF had three lines of trade :

(1) electrical household appliances in 1961 (May);

(2) radio, television, photographic and ciné, in October 1961 (agreement with FNAC);

(3) sports and leisure goods, in 1965.

All its initial capital of FF 10,000 was subscribed by local works councils. The unique feature of CODEF was its structure : it was based on groups and organizations. Individual consumers were represented in CODEF by their organizations. CODEF was in constant touch with consumers via its Consumers Committee (Commission des usagers) and Governing Board (Conseil d'administration).

One of CODEF's objectives was to clean up the consumer-credit field. Its aim was to serve the consumer. Local trade'speople were at first opposed to CODEF but gradually aligned their prices and reformed their methods. ORCO's relations with trades' people varied from dialogue to out-and-out hostility. Manufacturers maintained a studied reserve.

The idea of a Consumers' Chamber gradually took shape. It was discussed, in particular, at the Strasbourg Symposium in 1969. In 1970 (January) ORCO put out a paper entitled "Chambres de consommation" (Consumers' Chambers) which outlined the basic principles of consumers' chambers. Why were they needed? Because the voice of the consumer, in theory the central character, is in practice not heard. The resources of an organization must be put at his disposal. Guilds are a "collective tool". Their functions would be :

- information and documentation;
- education / training;
- technology;
- protection;
- research and promotion;
- public relations.

They would be financed from parafiscal charges which would be assessed on consumer expenditure and therefore seem like a tax on consumption. Chambers would be regional.

CODEF went into liquidation, causing ORCO to disappear from the Haut-Rhin Department. ACOR was set up with subsidies, took over the aims of ORCO but with smaller resources. ACOR was not a consumer movement but a grouping, for action purposes, of consumer movements in the Haut-Rhin Department.

ORCO carried on in the Bas-Rhin Department but had no permanent paid staff. ACOR then set in train - together with the consumer movements of the region - the creation of an Alsace Consumers' Chamber. This was set up in 1971. It is a subsidized organization which has the following aims :

- information and documentation;
- education;
- protection;
- public relations.

The Consumers' Chamber is together with other regions actively investigating the possibility of creating regional Consumers' Chambers financed by a parafiscal charge.

Consumer protection

The Consumers' Chamber educates, informs and protects the consumer. Its principal function is that of a technical tool in the service of the associations which created it and of which it is composed. It is also an instrument which can be used by all consumers who do not feel they can stand up against the well-armed, powerful, and often remote, producer or distributor. It is then up to the Chamber to provide the ignorant and weak individual with the help he needs whether he is a member of one of the local associations or not, whether he comes from that region or not. The Guild has a two-tiered legal service. It can advise and refer consumers to the appropriate department or intervene directly in disputes itself.

1. The Chamber as an Enquiry Office

The Guild receives innumerable requests for information by letter, telephone or visit from the Bas- and Haut-Rhin Departments, and answers them all. Consumers hear of the Chamber through television broadcasts, "50 million consumers", by word of mouth, the local press or "Le Consommateur", (the Chamber's news magazine), their own dealings with the Guild and finally through departments such as the "Social Service for Foreign Workers" (Le Service social de la main d'oeuvre étrangère), the "Regional Directorate of Competition and Prices" (La Direction régionale de la concurrence et des prix), the Chamber of Commerce, trade unions, etc. Requests for information usually concern specific topics. The consumer usually asks for information on a particular point which is the subject of his dispute with a local trades' man.

The overwhelming majority of requests come from town'speople. These are often better informed, but, as must be borne in mind, distance is a factor.

2. The Chamber's Referral System

Whenever the situation allows or requires, the Consumers' Chamber refers the complainant direct to a Government department : the Fraud Prevention Department, Weights and Measures Department, the Regional Directorate of Competition and Prices, etc., or to any organization which specializes in his/her particular problem, e.g., the Tenants' Federation, Housing Advisory Service, etc.

3. The Guild takes on approximately 50% of the cases submitted to it

A file will be opened on these cases. The Guild undertakes to defend

the interests of those unable to fend for themselves (the aged, foreigners, etc.), if action by them has produced no results, if a problem is too complex or if it warrants group action. The Chamber may ring up, visit or write to the trades'man, depending on the action required by the problem, and possibly threaten further action (such as sending the file to the relevant Government department, laying a complaint with the Public Prosecutor, conducting a counter-publicity campaign, etc.), which if necessary it will do.

The Chamber takes three types of action :

- it may act on the basis of established legal procedures;
- it may act outside established legal procedures, hence "para-legal"action is taken;
- it may simply use its influence.

(a) Legal action

A body such as the Consumers' Chamber is of course required to adhere to the general principles of consumer law, e.g. the Law of 22 December 1972 on door-to-door selling, Article 1641 et seq. of the Civil Code on serious defects in a product sold or Article 1590 of the Code and the Law of 5 December 1951 on deposits. It should be pointed out here that we often meet problems specific to our region, e.g., with regard to insurance, Article 66 of the Law of 1 June 1924 stipulates that : "The local Law of 30 May 1908 on insurance contracts and Articles 3, 4 and 6 of the implementing Law thereof shall be maintained in force in the three Departments". In other words, unless there is agreement to the contrary, the Law of 1908 constitutes the common law in this field in the Departments of the Bas-Rhin, Haut-Rhin and Moselle. However, insurance companies usually refer to the Law of 1930 since the Law of 1908 favours the insured more than the Law of 1930. In fact the general rule has become the exception and vice versa. However, since the Law of 1972 came in, reforming the conditions under which contracts may be terminated (which amends only the Law of 1930) insurers have returned of their own accord to the local Law. This has, however, created a number of problems, some of which may be termed inter-provincial disputes.

Many more laws could, of course, be added to the list, but since it is our aim to develop a consumer protection policy as well as to do our best for individual consumers who turn to us for help, we cannot confine ourselves to written laws, which are too few, too imprecise and too terse. New problems need new solutions.

(b) Para-legal action

In the case of a latent defect when an animal was sold, normally covered by Article 1644 of the Civil Code and the Law of 22 September 1971 (in the case in point the dog had distemper) we went beyond the principle of a consultative service and sent the seller a claim for the total costs of treatment needed to cure the dog. Since the seller was a private person it would have been difficult to prove him at fault, in order to obtain damages.

In the case of the theft of a coat in a well-known, major restaurant in Strasbourg we sent a letter to the manager, an extract from which is given below :

"Undoubtedly the best solution is to be found in the judgment of the Paris (6th Arrondissement) district court of 6 December 1972 upholding the customer's claim and ordering the restaurant to reimburse the total value of the stolen coat on the basis of ... Article 1135 of the Civil Code. Customers of a reputable restaurant expect the cloakroom to be supervised to prevent the exchange or theft of articles. This decision which is undoubtedly unique is the answer to the problem. Your restaurant is, you will admit, one of the major restaurants of Strasbourg and its environs. The cloakroom was not "supervised" on the day Mrs X and Mr Y dined in your restaurant. Several witnesses are prepared to confirm this. Moreover, since someone is usually in attendance in the cloakroom, and especially as your restaurant has such a high reputation that your customers are justified in thinking their garments should be "safe" there, and, finally, as Mrs X is severely disabled and could not in the absence (for only a short while) of Mr Y keep an effective check on the articles left in the cloakroom, we consider liability to be entirely yours and would ask you to act on the letters to you from Mr Y, who claims x francs in damages (regardless of whether your insurance company accepts responsibility or not), etc."

This argument is not based on Article 1927 et seq. (necessary and voluntary deposit) but on Article 1135 according to which "Agreements impose not merely the obligations expressly set out in them, but also all the consequences which equity, custom or law attach to those obligations according to their nature". We have inferred the idea of "consistent quality" from Article 1135 (and Article 1604) in agreement with Denise Nguyen-Thanh (Thesis on legal techniques of consumer protection). Extensions of this kind are, moreover, often backed up by precedents which are beginning to build up.

In connection with the sale of electric household appliances

at the European Fair in Strasbourg we have picked out some of the principles of the law which will govern door-to-door selling in the future and which, of course, did not apply in the case in question, to point, mutatis mutandis that the salesman on two occasions had "buttonholed" two ladies of rather advanced years and had succeeded in selling them very expensive articles. One of the ladies hardly knew what had happened; she only knew the Alsace dialect like many old people in this region. The other lady was suffering from a nervous complaint and was under psychiatric treatment and would have signed anything. It is deplorable that the scope of the Law of 1972 on door-to-door selling is so limited. Why not extend it to street hawkers and salesmen at fairs? In both cases the customer often buys something without being able to make normal use of his powers of discrimination. We have maintained that the manager of a car-breaking yard was to be treated in the same way as a garage owner because he had guided and advised his customer and quoted him the price of an engine and fitting it even before work began, and the engine when fitted turned out to be unserviceable.

We have tried by means of these examples to show that so-called para-legal action is often based on the extension of existing principles, broad interpretations and reasoning by analogy. However, the Consumers' Chamber "also often acts as an arbitrator" and intervenes on the simple principles of fairness. When both parties are at fault we try to find a solution which will satisfy both of them. In the case of an impecunious foreign worker who purchased a second-hand television set and forced the programme selection knob so that it broke we refused to accept the seller's argument that the guarantee was not valid because of misuse. The set had, from the outset, faults which made the knob more difficult to operate. The customer forced the knob, but only because he was angry at his television not working properly. Where blame is shared so must the liability be. We asked the seller to pay at least half the cost of repairs.

Sometimes we have also appealed to a trades'man's better nature when his customer has found himself in such financial straits after placing an order that he could not meet the commitment he had undertaken.
We have also tried to adapt the penalty clauses stipulated by some distributors (particularly with regard to leasing) to the general structure of the contract, even before the law came into play.
Finally, we have even found ourselves in the role of an expert (at a very elementary level) providing a consumer with material to support his arguments...

Examples

1. Action taken against a "Health Club"

September 1968 : first appearance of adverts for a Health Club offering slimming courses.
The slimming course showed disturbing similarities to that of a Belgian clinic which had run into trouble with a consumer organization and the law.

October : ORCO, Mulhouse, sent a member of its staff to the clinic to assess at first hand the wonderful results claimed. The first complaints were lodged with the organization's legal department.

December : publication of a satirical article in "Le Consommateur"; 85,000 copies were printed and distributed in connection with an "open house" held by the Health Club in question. The impact was enormous and the Health Club's business declined.

The first three months of 1969 : 120 people went to ORCO's office to complain about the doings of Chery Louise.
The main complaints were described by the victims at a meeting which was attended by a lawyer, a doctor and a representative of the masseurs' and physiotherapists' union. The affair was reported in the local press and the large dailies. Letters flooded in from all parts of France (Paris and Marseilles) : such health clubs were springing up under other names.
In Mulhouse clients of the Health Club stopped the prescribed course and refused all further payment. The company tried unsuccessfully to make a come-back by heavy spending on advertising.

June : The clinic closed for its annual holiday. In fact the crooks had decamped. The police then made the usual investigations, leading to convictions.

2. Work at home advertised in the small ads

Many women replied to this advertisement. A representative from TEXECO then suggested to the women that they buy a knitting machine costing FF 3,500.
Credit agreements were signed in almost all cases. Orders for the work were supposed to be sent by a firm in Brussels. This turned out to be a box number. The fraud then came to light : some customers were paying on credit for a machine which had never been delivered while others received the machine but could not use it because they were not shown how; none received any work. Several private complaints were lodged. The various credit companies also complained at the same time.

ORCO undertook an investigation, via the press, and discovered an extensive swindle with ramifications in Normandy, the North(Department) and the Lyons area. The victims formed a protection group. The police also investigated and the crooks were arrested.
Some credit companies and consumer organizations negotiated the annulment of the contracts. The manager of TEXECO also made reimbursements.

Excursions organized for sales purposes

The Chamber has built up a file of some fifty pages on the malpractices of certain companies which use rather dubious methods of marketing their products.

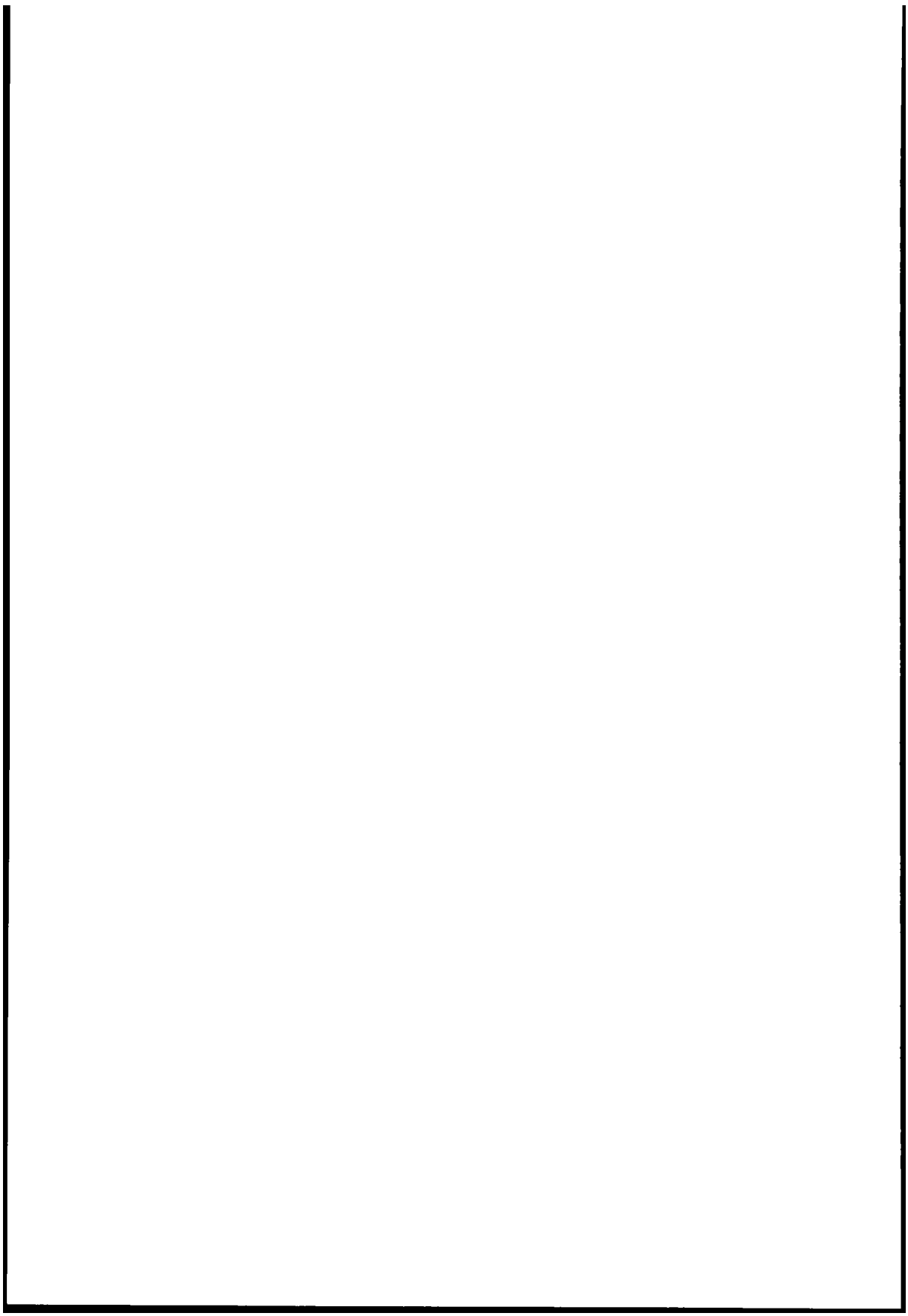
The Chamber's legal department, after being alerted by several families, investigated the selling methods used on excursions into Germany for Alsatians, organized by companies with registered offices in France or Germany. The business practice in question is only just within the law, very often operated across European frontiers and makes use of particularly clever methods of psychological pressure.

It all starts with a very attractive invitation to the general public to attend a meeting in a room in a restaurant or in a cinema or even go on an excursion abroad. These invitations hardly seem like publicity material - they simply list the numerous "goodies" offered free of charge to participants - and are distributed by hand or through the post or displayed in various public places (restaurants, banks, town halls, etc.).
The people who attend these meetings are first "softened up" by the atmosphere of casual gaiety created and then gradually brought around to the real aim of the meeting, i.e., the sale of products of varied value and usefulness from ironing machines and electric radiators, through electric blankets and heat pads, to tonics, curative and miracle products.
The representatives of the business concerned demonstrate and present the product and offer it for sale. A variety of psychological arguments are used to persuade any doubters, sometimes accompanied by small souvenir gifts to win over the few remaining sceptics.
The tourist angle which was only a bait to draw people is now completely ignored and the accent is put on the very good health properties which the products offered are supposed to have.
It should also be pointed out that this type of sales-oriented excursion abroad is very often directed at old people who actually do have health problems. Tempted by the prospect of a change from their routine and loneliness they are an easy prey to the high-powered tactics used on them.

At the request and on the initiative of the consumer organizations belonging to the Chamber, the legal department obtained the necessary evidence to present to the relevant Government departments (Fraud Prevention Department, Regional Directorate of Competition and Prices, Customs Department, and various bodies which represent commercial interests such as the Strasbourg Police Fraud Squad) which led to the arrest of an officer of one of the companies (who was released on bail three weeks later and has resumed his former activities). The complex nature of French and German law deters consumers who have been swindled from starting legal proceedings (this is costly, what is more) about a relatively important dispute. The Chamber has discovered by contacting Belgian and German consumer organizations that other companies used similar methods to sell their products.
Since products are rarely sold in the consumer's country of origin it is in practice almost impossible to take action. The opening-up of frontiers has enabled swindlers to dupe hundreds of consumers with some impunity.

The Consumers' Chamber would like to conclude with a proposal : a European agreement should be drawn up either to prohibit the sale of products in the course of a journey or excursion or, more simply, to use the provisions of the Law of 1972 (on commercial canvassing and door-to-door selling) as a basis on which to control these sales. In view of the fact that this type of sales practice has become widespread and that there are any number of victims in various regions, the Chamber intends to take various kinds of action in the very near future. It will continue, indeed step up its efforts to prevent such practices. It also envisages the following action : the large-scale distribution of leaflets, the participation of members of consumer organizations in trips, the purchase of the products and equipment offered for comparative testing, legal action to obtain damages, the large-scale distribution of a dossier, contacting consumer associations, public authorities and organizations in the Rhineland, Baden-Württemberg, Belgium and Holland in order to extend action already taken and promote the conclusion of a European Convention. This will be backed up by television broadcasts and our magazine "Le Consommateur".

The conclusions which can be drawn from this short report are obvious and not unique. We also have many other major projects in mind and some are currently under way. We hope to be able to extend and perfect our work at all levels. But our future - and that of the consumer movement in Alsace - will depend on the funds available.



SUMMARY

Mr De Caluwé, Advocate at the Bar of Brussels, gave an account of the current state of consumer law and the means of protection used or under consideration in Belgium.

Consumers used to be indirectly protected by the introduction in 1934 of the possibility (for competing firms only) of bringing an action for an injunction against any act contrary to fair trading practices.

However, for various reasons, little use was made of this and consumers were protected only insofar as they could sue for damages for injury suffered.

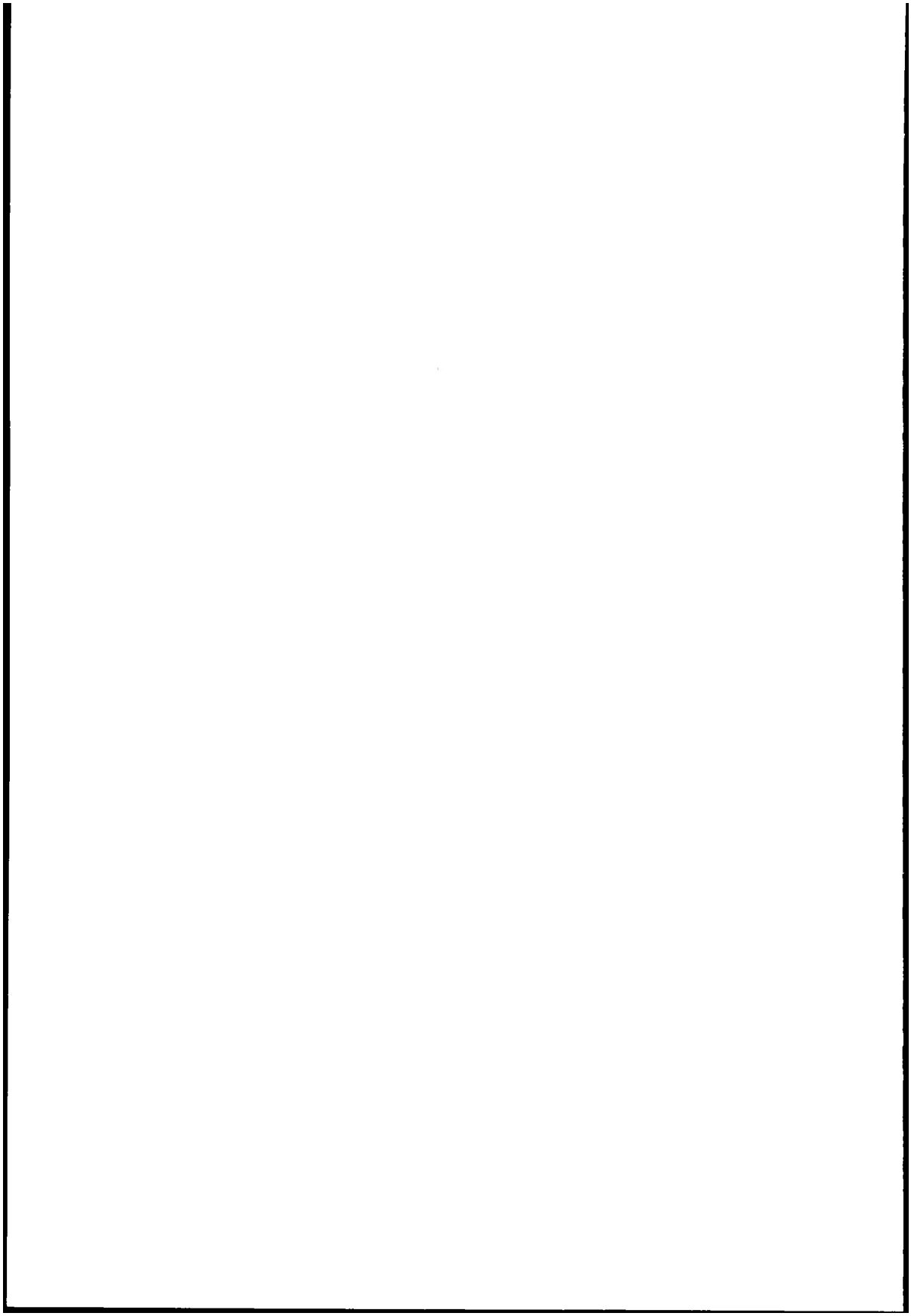
As in other countries, several protection organizations have been set up.

The State has granted these organizations consultative status within the Consumer Council established by Royal Decree of 20 February 1964.

The most important instrument, however, is the Law of 14 July 1971 on commercial practices, which lays down rules for price display and comparison, display of quantities, description and composition of products, indication of origin, misleading advertising, loss-leader selling, clearance sales and the like, premium offers, auctions, compulsory purchase, pyramid selling, sales by itinerant traders and unfair practices (the last category concerns competition only).

As a result of the Law of 14 July 1971, consumer organizations, like the Ministry of Economic Affairs, are able to bring an action for an injunction to stop unfair trading practices, including almost all likely sources of complaints from consumers, who may bring an action before the presiding judge of the commercial court for an injunction to stop any prohibited or criticised practice.

The same power is granted to the Minister for Economic Affairs, who may take direct action against the party at fault by issuing a recommendation or warning.



CONSUMER PROTECTION UNDER BELGIAN LAW

by A. De Caluwé
Advocate at the Bar of Brussels

I. The origins of consumerism

Concern for the consumer is a fairly recent phenomenon. In the past acts of all kinds that were injurious and wrongful certainly gave rise to a right of redress but this amounted to nothing more than the application of the general principle laid down in Article 1382 of the Civil Code. Clear cases of fraud were even subject to criminal law sanctions. The regulations of a criminal law nature governing certain special sales grouped together under the term "Commercial Regulations" must also be mentioned.

It seemed, however, that apart from this the common good and consequently that of the consumer too ought to result from the free play of competitive forces. The only limits placed on such freedom were fair and honest trading. Consequently, for more than a century and a half trading was governed firstly by the body of case law arising out of the system of unfair competition and secondly by the rule on fair trading introduced by Article 10(a) of the Hague version of the Paris Union Convention and incorporated in Belgian law by means of the Law of 23 May 1929 and Royal Decree ("arrêté royal") No 55 of 23 December 1934 introducing for the benefit of competing traders an action for an injunction to restrain the continuance of any act contrary to honest trading practice.

There was an implied understanding, therefore, that except where a consumer had suffered direct harm giving rise to a personal right to damages, the rights of the public would be protected by the balance of competition resulting from the policing of one another by the competing traders themselves.

Reality clearly did not measure up to these expectations. It quickly became apparent that a competing trader would act only if there was a serious threat to his immediate interests. Furthermore, it was occasionally in the interest of all competing

traders to maintain an illegal practice with the result that none of them considered having it prohibited.

These factors, a feeling that economic liberalism should be subject to certain restrictions and finally the fact that consumers had acquired a sense of awareness led to the development of a new protective mechanism.

This was sparked off by the advertising technique of the promotional offer used by some supermarkets. Other traders reacted so speedily that rules were drawn up almost immediately to control this practice. The people behind this demonstrated their initiative and swiftly extended the scope of their work to include a complete redraft of the provisions governing competition and the policing of traders.

In these circumstances they planned from the outset to look again at the rules from the fourfold perspective of the interest of the community as a whole, that is to say, of the State, the consumer, the trader and finally, trade in general. The very range of this approach gave rise to considerable drafting difficulties including several weak spots in the draft law owing to dissolutions of Parliament. This explains why the Law of 14 July 1971 took almost nine years to be implemented.

Apart from this new measure, a number of bodies were set up, just as in other countries, having as their aim the active defence of the consumer. To start with, this development, based on experience and observation, was left to private initiative but later it was so organized that the State granted consumers' associations a right of consultation within the Consumer Council. This latter was set up by the Royal Decree ("arrêté royal") of 20 February 1964 (amended by the RDs of 2 July 1964, 27 March 1969 and 30 November 1973).

The new law incorporated most of the rules on the policing of traders, which were based more on criminal law than on the law of unfair competition since some French cases had some time before laid down a very clear distinction between the two spheres of action (French Court of Cassation 19 November 1959, D. 1960, p. 463 and Memorandum G. Durry).

II. Brief reminder of the provisions protecting the consumer

Let us recall very quickly the provisions protecting the consumer.

1. Article 191 of the Penal Code :

   This covers misrepresentation of the name of the manufacturer of a product.

2. Articles 498 to 504 of the Penal Code :

These cover misrepresentation of the identity or origin of a product, deception as to quantities, adulteration of foodstuffs.

3. The provisions relating to designations of origin (in particular the Law of 18 April 1927).

4. The rules governing itinerant trade.

5. The provisions covering beverages (Law of 14 August 1933).

6. The provisions governing the inspection of foodstuffs or food substances and other products (Law of 20 June 1964).

7. The Law of 14 July 1971 on trade practices which governs :

- the indication and comparison of prices;
- the indication of quantities;
- the name and composition of products;
- designations of origin;
- deceptive, disparaging and misleading advertising;
- loss leaders;
- winding up sales;
- bargain sales;
- joint offers (sales with free gifts);
- auctions;
- forced sales;
- chain selling;
- itinerant sales;
- acts contrary to fair practice.

(It should be noted that the latter category concerns competition only and cannot be used as grounds for an action by a consumer).

III. Study of the means of protection

It is not enough to give consumers rights or to lay down measures prohibiting certain acts liable to cause them harm. It is also essential that the means exist for ensuring that these rights are respected and that damages are paid for any harm suffered. What are these means?

A. The traditional civil action

The operation of this action is sufficiently well known to make it unnecessary to dwell on the subject since it is based on Articles 1382 and 1383 of the Civil Code. Let us

simply recall that it is essential that the following three well known conditions be fulfilled :

- the disputed act must constitute a negligent act or omission on the part of the person responsible;
- it must have caused harm to the person who is the victim of it;
- there must be a chain of causation linking the negligent act or omission and the harm suffered.

It should be stressed that it matters little whether the act is wrongful under civil or criminal law provided it may be held legally to be wrongful.

If the three conditions are fulfilled the consumer has a cause of action before the courts an may receive compensation.

This remedy is rather illusory however, where the injury, even though repeated, is trivial in itself. Who will bring an action for the refund of the price of a tin of inferior quality peas? A systematic reduction of quality, albeit with the consequential loss of commercial repute of the person who practices it, may well provide the latter with an enviable and quick profit.

Finally, it should be noted that if the right to bring such actions for damages is given to consumers on an individual basis it will be difficult for consumers' associations to institute them.

In most cases it will be very difficult for them to prove that they themselves have suffered harm. They cannot bring actions for damages in respect of harm suffered by their members (Court of Cassation, 9 December 1957, RCJB, 1958, p. 247, Memorandum J. Dabin). Such actions would be possible only if the associations were in the legal form of "unions professionnelles" (Professional or trade groups) (Law of 31 March 1898) which in general is contrary to their objects.

B. Criminal action

Despite the fact that the Law of the 14 July 1971 endeavoured to remove from the criminal law sphere everything connected with the policing of traders and trade practices, there are still a number of wrongful and illegal acts which are subject to criminal law sanctions.

These include in particular, infringements of Articles 191

and 498 to 504 of the Penal Code, the law on itinerant trade, the law on designations of origin, inspection of foodstuffs and the provisions subject to criminal law sanctions of the Law of 14 July 1971, that is to say those concerning indications of prices and quantities, the name and composition of products and chain selling as well as mala fide acts, a category which we will study later.

A consumer who suffers as a result of an infringement of one of these provisions may of course be satisfied with bringing an ordinary civil action to obtain compensation for the harm he has suffered. He may also lodge a complaint with the Public Prosecutor ("procureur du Roi") and await the outcome of the preliminary investigation thus set in motion, and possibly take action as a plaintiff claiming damages at a summary hearing either by appearing as plaintiff through the examining magistrate or by directly summoning the person responsible for the infringement before the court of summary jurisdiction in order to obtain damages in respect of the harm suffered after the criminal law has been applied.

As in the case of a civil action, the consumer's diligence in ensuring that his interests are respected will depend on the extent of the harm that he has suffered. This will have to be serious to induce him to bring criminal proceedings himself. As for the ordinary complaint procedure we know quite well that this rarely comes to anything since the courts are already snowed under with work in connection with more serious infringements.

Do consumers' associations have the right to bring a similar action? The answer to this question seems to us to be of necessity the same as that already given in respect of an ordinary civil action. A civil action combined with a criminal action inevitably presupposes the existence of harm since Article 3 of the Code of Criminal Procedure limits entitlement to bring such an action to persons who have suffered harm as a result of the infringement. In this case, as in a civil case, a consumers' association is equally unable to shoulder itself the harm suffered by its members and for the same reasons will be denied the right to intervene. The very most it can do is to lodge a complaint and take action at administrative level. It may also, if the importance of the case justifies it, finance actions brought by its members. A draft De Groeve Law currently pending aims at authorizing the bringing of similar civil actions combined with criminal prosecutions.

C. The law governing trade practices

As already outlined above, an action for an injunction to restrain continuance of acts contrary to fair practice is not a new concept in Belgian law. After being proposed in a draft Law drawn up in 1912 which was not adopted, it was introduced in 1934 but only in respect of competing traders who were victims of an illegal act or who were likely to be harmed by such an act.

The Law of 14 July 1971 retained the action for an injunction as a means of stopping illegal acts but considerably extended the opportunities for using it. This extension operates in three main directions :

1. An action for an injunction to restrain the continuance of an act contrary to fair trading practice is no longer restricted to the injured competitor but may be brought by all traders, whether or not they are in competition, who have an interest in putting a stop to the disputed act.

2. The scope of an action for an injunction originally available only to restrain the continuance of acts contrary to fair trading or industrial practices is extended to include many other infringements, including those subject to criminal law sanctions, relating to designations of origin, advertising, loss leaders, bargain sales, winding-up sales or reduced price sales, joint or combined offers (sales with free gifts), auctions, forced sales and itinerant sales.

3. Previously, an injunction could be sought only by traders or a professional or trade association representing the interests harmed but now they may also be instituted by consumers' associations and by the Ministry for Economic Affairs.

Within the context of this report we must pay special attention to the latter two areas which affect consumers in particular.

At present consumers' associations may apply to the presiding judge of the commercial court for an injunction to restrain the continuance of trade practices that are forbidden or complained about. In this way, the importance of the associations is acknowledged and at the same time they are given a direct means of defending their members.

The same power is also given to the Minister for Economic Affairs. He has at his disposal a number of other means of taking action ranging from advice to warnings and threats.

Thus, when the Government departments are notified of a prohibited practice, they often merely send the party concerned a warning letter which is sufficient in the majority of cases. Over a period of slightly more than three years they have sent almost two thousand such warning letters. The same departments also publish an information booklet explaining the extent of the law to those concerned. Likewise, when in doubt as to the legality of an act, many traders make enquiries first to the departments concerned. Lastly, the Minister has an inspection department which he may entrust with the task of carrying out an investigation of the precise facts and which is thus capable of supplying him with a wide range of relevant information without prejudice to the right of this department to draw up a report and institute proceedings where the criminal law applies. The Minister also has access to information from another source. The Law of 14 July 1971 provides that all judgments given in actions for injunctions must be notified to him, thereby virtually creating a business register where the names of less honest traders are progressively recorded. Sectors or individuals requiring particular surveillance may thus be easily located.

For all that, consumers' associations and the Minister for Economic Affairs are limited in their power to take action. They cannot do so in the case of infringements of an exclusively competitive nature, that is to say infringements of Article 54 of the Law prohibiting unfair commercial and industrial practices but are limited to actions in respect of the infringements we mentioned when summarizing the second area to which actions for injunctions were extended by the Law on trade practices.

This field of action which covers practically everything concerning consumers is nevertheless vast since matters relating to advertising now constitute a trade practice governed by separate rules, whereas under the 1934 legislation the only rule was the general clause on the observance of fair practice. It must be admitted, of course, that it is mainly in the sincerity of the advertising that the interests of the consumer are most at risk.

Does the right to bring an action for an injunction also vest in a consumer acting individually? The text of the Law makes no reference to this. As drafted, it does not exclude such an extension of the right since an action may be brought by any interested party.

Can this difficulty be passed over, therefore, and the claim be made that he has been given the right to take action? A study of the historical development of the action for an injunction

shows that originally the right to bring such an action was available only to competing traders and their professional or trade associations. It was only with the introduction of the Law of 14 July 1971 that it was extended to consumers' associations and the Minister for Economic Affairs. The logical conclusion therefore is that the bringing of an action by an individual consumer would be possible only if the right were further expressly extended.

This is a problem which does not appear to have been foreseen by the legislator and only a brief section in the preparatory documents gives weak support to the theory that the right to bring such an action should be restricted.

On the other hand, the text of the Law itself supports clearly and without further interpretation the theory that it should be extended to individuals. It seems to us personally that since the text allows it, this solution should be adopted. Case law alone will decide which of the two views is to be followed. The first case is pending at present and this will enable the matter to be settled. The objection will probably be made and rightly, that the consumer does not need to be able to bring an action for an injunction since he can already bring a claim for damages. The important point, however, is that transfer of cases of this type to the presiding judge of the commercial court has rendered the latter highly specialized in matters of business ethics with the result that there is great advantage in bringing such matters before this court.

What is one to think, therefore, of the power thus conferred on the Minister for Economic Affairs and on consumers' associations?

Undeniably it represents progress but up to now too little use has been made of it. Consumers' associations point to the cost of legal actions and quickly recall that one of the actions brought was extremely expensive. This argument seems surprising, unless these associations do not have the resources to match their ambitions, since it is the standard practice of many professional and trade associations, and not just the largest, to bring a large number of actions for injunctions without the cost being prohibitive. What is possible for a professional or trade association should also be possible for a consumers' association.

Much more serious would appear to be the discouragement felt by consumers' associations when they consider the general plethora of laws, that is to say their weakness when confronted by argument in court and attacked by litigants. All lawyers

are aware of this problem and know that it is the price that must be paid for our system of freedom and of protection of the rights of individuals. Of course, it is sometimes disappointing to be convinced that one is right but to fail nevertheless on account of some nicety of interpretation.

But here we are faced with an even more basic choice between safeguarding the rights of defendants and the arbitrary nature of swift justice which may be highly desirable but equally highly undesirable.

The Department of Economic Affairs also seems to have reduced somewhat the rate at which it institutes proceedings. Having already suffered a number of defeats it is primarily a victim of the kind of shortsightedness which believes that a policy is expensive once it results in the payment of properly justified lawyers' fees while ignoring the fact that a team of civil servants entrusted with the same work would most likely cost more.

Apart from this criticism, it seems to us for all that, that the Minister should be able to bring proceedings in a manner other than the traditional one, namely by the issue of a summons to appear before the presiding judge of the commercial court. It is very easy to imagine the creation of the office of business prosecutor, possibly under the auspices of the council for economic disputes ("conseil du contentieux économique") who would be responsible for detecting and instituting proceedings against infringements of this kind and would be in a position to defend the view of the Minister along the lines of a procedure based on the rules governing prosecutions under Anglo-Saxon law.

This solution would be more expensive perhaps but the cost would no longer be based on individual actions but on more general financing arrangements. It would also have the advantage of lending prestige to the person fulfilling such an office.

D. Criminal proceedings based on the Law of 14 July 1971

This Law provides for three types of criminal proceedings :

a) an action covering certain specific acts such as the indication and comparison of prices, the indication of quantities, misrepresentation of the composition or name of products, the unauthorized issue of coupons or stamps in the case of sales with free gifts, illegal interference

by a member of the legal profession in an auction;

b) an action directed against the repetition of practices already prohibited by virtue of an injunction which has become *res judicata*;

c) an action directed against an unlawful practice committed *mala fide*.

The first type of action has already been described above. (See B. The traditional criminal action).

Two other types of procedure remain to be studied.

1. *Repetition of the offence*

Where a judgment or an order has been issued to an offender to discontinue a particular practice and the offender fails to comply therewith he may be fined up to Bfrs 200,000.

Since injunctions are enforceable as provisional judgments it may be deduced that the penalty may be imposed even if the judgment not complied with is the subject of an appeal.

This is still a debatable point due to the fact that during the preparatory work an amendment with precisely this point was thrown out by the Senate.

We believe personally that the text of the Law is sufficiently clear in itself to justify the imposition of a penalty even if the decision not complied with has not become *res judicata*.

2. *An act carried out mala fide*

Some people felt that actions for injunctions were not a sufficient guarantee of the suppression of certain unlawful activities. For this reason they would have favoured continuance of the criminal law sanctions which were usual in relation to the policing of traders. Experience had shown, however, that the courts had become much less stringent in their attitude in this respect. So, in order to maintain the civil system rather than the criminal, while at the same time ensuring that stricter measures would be taken in certain cases, the idea was put forward of distinguishing between *bona fide* and *mala fide* acts. Criminal law sanctions could be imposed in respect of the second category.

Article 61 of the Law provides that if the same action is to be tried by a judge in an action for an injunction, the criminal court judge must suspend judgment until after the decision has been given in the action for the injunction.

This is a reversal of the common saying that the criminal law binds the civil, except as regards consideration of whether an act is mala fide, the criminal judge will be bound by the decision of the judge in the commercial court. There is an identical procedure under French law in the case of an infringement of patents.

To our knowledge, this type of procedure has been used once only, in the case of a mail order sale where threats were regularly made to defiant consumers. So far judgment has not yet been given in this case.

IV. Conclusions

In our opinion a veritable arsenal of laws has been introduced to enable consumers to be effectively protected and yet there are still complaints about insufficient protection.

The basis of the complaints seems to us to be purely financial. As soon as the persons concerned have to institute proceedings themselves they immediately feel the cost. Consequently, there is a tendency to wish to transfer this burden to the community by resorting to the Public Prosecutor and thus to deal with infringements by criminal law sanctions. As though having the authorities taken responsibility for this task would reduce the cost. We all know that this would not be so. If the Public Prosecutor were to intervene again, there would again be the fear of laxity already condemned in the past.

We believe, as we have already indicated above, that the solution is to create an office of business prosecutor acting either under the auspices of the Ministry for Economic Affairs or the ordinary courts who would be able to refer cases directly to the presiding judge of the commercial court, represent the executive at the hearing, make submissions and act as plaintiff. Since he already appears before the commercial court in bankruptcy cases this new task for the Public Prosecutor should not cause too much of a stir. This is not of course a solution operating through economic measures, although certain people think so, but it would have the advantage of transferring the protection of consumers' interests to the community while avoiding an objectionable and pointless return to the imposition of criminal law sanctions in this field.

SUMMARY

Mr E.H. Hondius, Assistant Lecturer at the University of Leyden, described the situation in the Netherlands.

Consumers in the Netherlands have long been able to invoke two types of legal proceedings :

- civil;
- criminal.

Civil proceedings are not a useful means of consumer protection because of the dearth of information and the inadequacy of the legal aid available to consumers, the high costs and certain psychological factors which discourage them. Added to all these disadvantages is the slowness of the procedures.

Criminal proceedings in the Netherlands are confined to a few areas such as the composition and preparation of foodstuffs, the safety of dangerous products, electrical appliances and prices. Furthermore, many disputes between consumers and suppliers or manufacturers do not lend themselves to such proceedings.

In view of the problems which the two conventional methods raise for the consumer, business circles have considered it necessary to lay down extra-judicial rules and draw up codes of fair practice to be enforced by disciplinary boards.

Unfortunately, the disciplinary boards have no powers of investigation, nor can they impose adequate penalties and, above all, the parties are not bound to submit to an examination by them (except advocates and doctors). Faced with these difficulties, trade and consumer organizations have set up arbitration boards, which vary greatly as regards both the form of their decisions (arbitration, mediation, binding opinions, opinions) and their composition, location, public relations, costs of proceedings, and so on.

In view of all the disadvantages of current consumer protection methods in the Netherlands, Mr Hondius advanced a large number of reforms, concerning in particular civil proceedings and the operation of the arbitration boards.

In conclusion, he made a few general comments, concerning the protection of consumers and the protection of all citizens, and protection nationally and internationally.

JUDICIAL AND PARAJUDICIAL MEANS OF CONSUMER PROTECTION IN THE NETHERLANDS*

by Ewoud H. Hondius**

1. Introduction

It is generally acknowledged that one of the basic problems of consumer protection law is how to apply the rules (1). The best rules of substantive law are of no value if they are not applied. On the other hand, a perfect procedure for supervising the observance of nonexistent rules is pointless.

The different mechanisms which may apply the rules of substantive law can be classified in accordance with the three classical divisions of government into judicial, administrative and legislative means of control. This paper will be confined to the aspect of judicial control. It should, however, not be forgotten that administrative controls may appear side by side, whereas certain new consumer protection mechanisms, as we shall see later, may lie on the boundary of these two aspects of Government.

Legislative control of the application of the provisions of substantive law affording consumer protection generally applies only if the need for action is widespread (2). However, both administrative and judicial controls may only operate when sanctioned by the legislator.

This is not true of parajudicial control, which has developed independently of the legislator - although it may be tolerated by him. However, this independence of government appears to be weakening owing to the growing need for financial support from government.

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** Assistant Lecturer, University of Leyden (in 1975/76, Fellow, Netherlands Institute for the Advanced Study in the Humanities and Social Sciences). The author wishes to thank Mr E. André de la Porte of the University of Leyden, Mrs E. Hondius-Schoots and Mrs C.L. de Vries-Hess and Mr J.W. Weck of the Ministry of Economic Affairs for their critical remarks.

The development of consumer protection law is a recent phenomenon. In the relationship between supplier and consumer, the supplier has enjoyed protection for a long time, e.g., through penal sanctions against shoplifting and - in the application of the rules of substantive law - the simplified procedure for the collection of small debts (3). These rules protecting the supplier, and the means of defence open to the consumer, are well known and will therefore not be discussed below. It should merely be remembered that they exist.

2. Aims of judicial and parajudicial protection

What is the aim of judicial and parajudicial protection of the consumer? If a consumer defends himself against an action by a supplier before a court or klachtenkommissie (disputes commission), he will do so in order to obtain justice - or to receive what belongs to him. The judgment or arbitration award resolves this individual conflict. If, however, the Public Prosecutor or other administrative body takes the supplier to court, the aim is a more general one : prevention of other infringements by the supplier, or prevention of similar infringements by other suppliers. These aims will be reflected in the judgment.

That is the theory. The practice is different. Judgments in criminal cases make only a very slight contribution to general prevention, as we shall see later. On the other hand, judgments in civil cases are making an increasing contribution to prevention in general, and, in a wider context, to the formation of law. It is remarkable that, whilst this idea has only recently become public (4), there is already a clear trend towards distinguishing this contribution to general prevention and to the formation of law from the judicial or parajudicial solution of actual cases, especially in fields concerning mass phenomena, such as misleading advertising and standard contracts.

A study of the fields just mentioned shows that originally control was purely administrative - if, indeed, there was any control at all! An example is the control over misleading advertising exercised by the American Federal Trade Commission since 1938 (5). During the 1960's, administrative control began to have civil effects. For instance, the standard contract approved by the Board of Restrictive Trade Practices under the Israeli law on standard contracts has been placed out of the reach of judicial control (6).

The Swedes go still further, by calling the body which supervises the application of the legislation on misleading advertising and standard contracts (7) a "court", although this body exercises this supervision only at the request of an administrative body : the konsumentenombudsman - although it may in exceptional circumstances act at the request of private organizations (8). What counts as an exception in Sweden is the rule in the recent German proposals for the mechanisms of control of standard contracts : in addition to the Verbraucherschutzbehörden, which are administrative bodies, private organizations will have the right to institute proceedings (9). Furthermore, control is no longer exercised by a special court, but by an ordinary court, having a higher status than normal (10).

The ideas developed in the Netherlands on the control of standard contracts follow the same trend : it is proposed that control be made the responsibility of a single gerechtshof (Court of Appeal) (11). In contrast to the German proposals, control would be exercised only at the request of private organizations. The institution of an administrative body like the konsumentenombudsman has not yet been considered in the Netherlands (12). The circuit is now closed : a purely administrative control has finally led to a purely judicial control, although abstract, i.e., abstracted from concrete disputes between consumer and supplier.

This process of detachment of abstract control from the settlement of concrete disputes, which has hardly occurred in the field of parajudicial protection, gives rise to new problems. The question is how to guarantee the lines of communication between abstract control and the settlement of concrete disputes; this question also arises in connection with the problem of communication between the judge and the administrative bodies.

Apart from abstract control, whether or not made the responsibility of a special body, it is still necessary for actual disputes to be settled.

This applies, in particular, in cases where there is no question of a large-scale infringement of the rights of a group of consumers. The remainder of my report will be devoted to this individual control, not because abstract control is unimportant, but - on the contrary - precisely because it is so relevant that it would occupy too much space in the report.

A. CURRENT SITUATION

3. The four models of control

There is a clear and long-established distinction between two models of judicial control for consumer protection : civil proceedings and criminal proceedings. In civil proceedings, it is the consumer who resorts to law. In criminal proceedings, the Public Prosecutor brings the supplier or manufacturer before the arrondissementsrechtbank (district court). In some countries, a distinction is made between civil proceedings heard before a civil court and those dealt with by a commercial court. The Netherlands has no special commercial courts.

In addition to these two models of judicial control, a range of parajudicial procedures has developed, mostly stemming from a trend by industry towards voluntary control. I cannot resist the temptation of symmetry by dividing these procedures into two groups. Industry's disciplinary councils are the counterpart of criminal proceedings; the klachtenkommissies (disputes commissions) are the main institution corresponding to civil proceedings. A schematization of this kind does not completely do justice to the great variety of parajudicial procedures, but it harmonizes well with the legal tradition of the host country of this Symposium.

4. Civil proceedings

In the application of his protection against the suppliers and producers of goods and services, the consumer in the Netherlands has traditionally been left to his own resources. He must himself institute proceedings or defend himself before the law. Civil procedure in the Netherlands is broadly similar to the French procedure, on which it was modelled in the Napoleonic era. Certain changes have taken place since, but there are nevertheless no fundamental differences from the new French Code of Civil Procedure, published in the "Journal officiel" of 9 December 1975, except as regards the powers of the French judge to speed up the proceedings. The organization of the Netherlands judicial system is also virtually the same as that of France. There is a hierarchy of four courts and a system of two or three instances, the last of which deals only with questions of law (cassation) (13).

An action by or against a consumer is normally decided by the kantongerecht (cantonal court). This court has jurisdiction in all cases involving sums up to 1500 guilders, and, in addition, in all matters concerning labour contracts, the renting of buildings, and instalment selling. The arrondissementsrechtbank (district court) has jurisdiction in all other matters. Furthermore, an appeal against any decision by the cantonal court can be lodged with the district court, provided that the sum involved is not less than 500 guilders. Appeals against district court decisions may be made to the gerechtshof (Court of Appeal). Finally, there is always the possibility of cassation. Legal aid is not compulsory in the cantonal court, but it is in the other courts. The losing party is required to pay his opponent's costs. The poor are entitled to free legal aid.

It will come as no surprise to learn that this system is not very effective in protecting the consumer. The reasons are mainly the same as those applicable in other countries. Of the many factors involved, I would refer particularly to the following five : (a) the consumer's ignorance of the law, (b) the inadequacy of legal aid, (c) the amount of the costs of the action, (d) psychological factors militating against recourse to the court, and (e) the passivity of the judge.

(a) Ignorance of the law

Netherlands consumers can often be heard to say : "I can do nothing against the supplier of this defective article, because he did not give me a guarantee certificate " or "because the guarantee has expired". Usually this is nonsense. Of course the consumer is protected by law -although not yet sufficiently- but he is ignorant of this protection (14). This is partly the fault of the suppliers and manyfacturers, who, in their standard contracts and guarantee certificates respectively continue to claim that the consumer has no rights other than those specified in these documents.

During the "Journées du droit de la consommation", organized by the "Institut national de la consommation" in Paris last year (15), a discussion arose between university teachers on the one hand and counsellors of consumer organizations on the other. "Just look at our law. How perfect it is! How well it protects the consumer!" said the academics. "But look at the onerous clauses in the standard contracts ", replied the counsellors. "All void", was the reply from the university side. "That may be, but that has not disposed of them", answered the consumers. This discussion illustrates the danger of clauses - void though they may be - which are likely to be taken at face value by the consumer simply because they are in print.

The effect of ignorance of the law, encouraged by suppliers and manufacturers, is that many consumers do not even get as far as the stage of legal aid.

(b) Inadequacy of legal aid

Even if the consumer is aware of such rights as he may have, this does not mean that he will know how to exercise them. For this purpose he requires legal assistance. The system of legal assistance does not work well. There are various reasons for this. Official assistance from a lawyer is considered to be too expensive. From the lawyer's point of view, it is also not a worthwhile financial proposition. The Netherlands, of course, has a system of free legal aid in civil matters for the poor, but this system has been branded by a committee of experts of the Netherlands bar as "discriminatory as regards clients, parasitic as regards lawyers and process-servers, ineffective, and insufficiently directed towards extrajudicial aid" (16). A recent study by the Institute of the sociology of law at the Catholic University of Nijmegen (17) confirmed the assumption that those who have to pay their own legal costs - or even a part of them - or who live just above the social aid level are even less likely to enlist the help of a lawyer (18).

Today (19), this gap in the legal aid system has been highlighted by students (20). Students have also shown that their criticism was well-founded, by means of their "wetswinkels" (law shops).

(c) The amount of costs of the action

The arrondissementsrechtbank of The Hague recently handed down an interesting judgment concerning a disclaimer contained in the receipt form used by a municipal bicycle park (21). The municipality was ordered, both in the court of first instance and on appeal, to pay compensation for the value of a moped stolen from the park, estimated at 500 guilders. The municipality was also ordered to pay the plaintiff's legal costs, estimated at 855 guilders. Assuming that the municipality would have to pay the same amount for its own legal costs, we arrive at a total of 1700 guilders for the costs of the action, on a case worth 500 guilders. This is an illustration of the disproportion between the value of the case and the procedural costs in consumer matters. Of course, in the case described above, the appeal added to the costs; however, a costly expert's report was not necessary.

(d) Psychological factors

Apart from purely economic factors, recourse to law is also impeded by a number of psychological factors, some of which - and these also apply to the situation in the Netherlands - were mentioned some years ago by Ison in the Modern Law Review (22). Ison mentions, for example, the use of professional legal jargon (23), the fact that the court sits during the supplier's office hours and not during the consumer's free time, and the fact that what is merely routine for the supplier is more likely to be a nerve-racking experience for the consumer (24).

(e) The passivity of the judge

Finally, there is the passivity of the judge, one of the mainstays of civil procedure in the Netherlands, which stands in the way of a satisfactory outcome from the consumer's viewpoint. In cases where the consumer does not himself appear, the application of this principle almost always leads to a ruling against him by default. If the consumer appears, he often does so without legal representation, so that he is unable to produce the necessary defences.

5. Penal proceedings

It is clear from the foregoing that the application of the rules aimed at protecting the consumer by civil proceedings is seriously hampered by a number of factors : ignorance of the law, the inadequacy of legal aid, the amount of the costs of the action, psychological factors, and the passivity of the judge. None of these factors applies to the Public Prosecutor. All these problems solve themselves in criminal proceedings instituted by the Public Prosecutor against suppliers and manufacturers.

In the Netherlands, this criminal model is important only in a few fields, such as the composition and preparation of foods, the safety of dangerous articles such as medicines and electrical appliances, and prices (25). Why has criminal law not come to be used more widely? Some of the factors which may have contributed to this are (a) the link between the criminal court and specific legislation, (b) the inertia of the legislator, (c) the problem of reference to a criminal court, (d) the lack of specialized bodies to institute proceedings, and (e) the difficulties of detection.

(a) Link between the criminal court and specific legislation

Inherent in the criminal law in any legal system is the principle that no act is an offence other than by virtue of a prior legal sanction (26) : nulla poena sine praevia lege poenali. Whereas the classical offences - e.g., against life, morals, property, etc. - change little over a period of centuries, a distinctive feature of the action of suppliers and manufacturers is that it is capable of rapid change. The criminal law is less qualified to respond to these changes than private law with these Generalklauseln (general clauses).

(b) Inertia of the legislator

A criminal law response to the changes mentioned above calls for intervention by the legislator. In practice, the legislator in the Netherlands has until recently taken virtually no interest in protection of the consumer by criminal law. The response to social changes may be said to be effective only in the fields in which legislation concerning standards has been delegated - as, for instance, with regard to the Law concerning merchandise. The inertia of the Netherlands legislator in the field of consumer protection, has also been revealed in private law, but, as we have seen above, in this case the tasks of the legislator have been assumed by jurisprudence. What is necessary is for the judge to react. If he does not deliver judgment, action can be taken against him on the grounds of refusal of justice (27). For the legislator, such compulsion does not exist : there is no counterpart in the Netherlands, for example, to the German system of a constitutional court which can force the legislator to put an end to a situation considered to be unconstitutional (28).

(c) The problem of reference to a criminal court

Many disputes between consumers and suppliers/producers do not lend themselves to reference to a criminal court : for example, cases of error without fraud, the incidental supply of defective goods or services, etc. - cases in which it may be said that there was no fault on the part of the supplier. Criminalization of these cases would have no substantial effect, and would not be easily reconcilable with the current trend towards decriminalization in the Netherlands.

(d) Lack of specialized bodies to institute proceedings

The institution of proceedings in the case of violation of the few existing penal provisions aimed at consumer protection is not concentrated in a specialized body. There are, however, exceptions : supervision by the Keuringsdiensten van waren and the vleeskeuringsdiensten under the terms of the Warenwet (food law) and the Vleeskeuringswet (meat inspection law) (29), and the control exercised by the Economische controledienst over prices, selling with free gifts, door-to-door selling, and instalment selling. Even in the office of the Public Prosecutor, there is little specialization (30). It is therefore hardly surprising that the office of the Public Prosecutor in the Netherlands, which works on the "opportunity principle", takes little interest in consumer protection.

(e) Difficulties of detection

Some violations by suppliers or manufacturers are amongst the easiest offences to detect : few offences leave as many traces as a national advertising campaign. However, there are also many violations, such as the supply of defective goods, which require a complaint to the Public Prosecutor in order to be detected. It is not the task of the Public Prosecutor's office to stimulate such complaints. The fact that, under Netherlands law, the consumer can take civil proceedings only for a limited sum - not exceeding 200 guilders in actions heard before the kantongerecht and 500 guilders in the case of the arrondissementsrechtbank - does not encourage the lodging of complaints with the Public Prosecutor (31).

The above factors can be illustrated by the case of misleading advertising. Since 1915, the Netherlands Penal Code has included a provision penalizing such misconduct. The wording of this provision (32) poses such problems of proof that it has hitherto remained a dead letter. This provision also shows that originally misleading advertising was regarded as an offence against which it was necessary to protect competitors. The same situation is evident in civil law : here, misleading advertising was also regarded as an abuse against competitors rather than against the consumer. It is only since 1963 that it has been realized that it is primarily the consumer who is deceived by misleading advertising (33). Owing to the immobility of the criminal law, it has not been possible for this trend to become established also in criminal prosecutions against misleading advertising (34).

6. Industry's disciplinary councils

This gap in the control of misleading advertising - due to shortcomings in the penal law and the law of competition - has led industry to establish extralegal rules, codes of fair practice, and to form disciplinary councils to apply these codes. These councils include the Reclamecodecommissie, which supervises the application of the Netherlands advertising code. A striking feature of the composition of this council is that the consumer organizations are represented on it. The council opens an inquiry at the request of a consumer or other person - any person who considers himself to have suffered damage by reason of an advertisement may complain to the council - and it may make recommendations to the advertiser in question, which, if the advertisement is repeated, may be made public. This leads us to the weak points in this voluntary control of industry :

(a) the lack of adequate sanctions; but even if the organizations which drew up the code had introduced real sanctions, there would be the problem that

(b) suppliers and manufacturers are not obliged to submit to a control system based on private law (35);

(c) the disciplinary council is an extremely vague entity; lacking a research structure, it can merely respond to complaints by competitors and consumers. However, the latter have no material interest in lodging a complaint, but only an ideal interest (and not even that, if the decisions of the disciplinary council are not communicated to them, as was until recently the practice in professional medical discipline).

As regards misleading advertising, there are also certain specific additional problems, chief among which is the fact that neither the council nor the code are well known to the public, as is evidenced by the small number of complaints lodged (36).

The great variety of disciplinary councils has the consequence that the disadvantages mentioned above cannot be generalized. Discipline within a profession or sector seems to have the best chances in well organized sectors or trades (36a).

7. Disputes commissions

Voluntary control by industry, as we have seen, has the disadvantage that the individual consumer has no material interest in lodging a complaint. However, there are also a number of disputes commissions set up at the initiative of trade

organizations and of consumer organizations, particularly in recent years, to provide remedies for individual consumers who have been cheated. A list of the principal disputes commissions is to be found in the Netherlands reply to a Council of Europe questionnaire, published last year (37), to which the reader may refer (see appendix to this report).

From the legal point of view, these disputes commissions display considerable variety (38). There are commissions which give their rulings in the form of arbitration or amicable settlements (39), in the form of a bindend advies (a Netherlands concept, unknown in French law, which resembles arbitration but is of a contractual nature (40)), or in the form of a non-binding opinion (41).

There are also considerable material differences in the composition of these commissions, regional structures, publicity aimed at the public, right of appeal, costs, etc. It should be remembered that these disputes commissions deal not only with disputes between suppliers and consumers but also - and sometimes chiefly - between the providers of goods and services themselves. Courts of arbitration have a respectable tradition in the Netherlands (42), where they perform the function which is attributed in France and Belgium to the commercial courts.

In addition to their advantage over sector or trade discipline, the disputes commissions have advantages compared with proceedings before a professional judge : greater speed, less formality, and a single instance. Consequently, there is less of a psychological barrier for the consumer in submitting to such a procedure. Another advantage cited is that expensive experts' reports are unnecessary because of the specialized competence of the commission. Again, professional judges are paid from public funds, whereas the costs of the disputes commissions are met by the parties themselves.

The disadvantages of the disputes commissions are as follows :

(a) there are fewer legal guarantees of an impartial decision (43);

(b) in many cases there is only one centralized place for hearing;

(c) the "creaming off" of state jurisprudence has the effect of still further reducing the contribution of the latter to the development of consumer law.

B. PROPOSALS FOR REFORM

8. Reform of civil procedure

May I first draw your attention to the reform of civil procedure. How can the five obstacles to a satisfactory procedure be overcome? With regard to the consumer's ignorance of his rights, there are no concrete projects in the Netherlands. There are three possibilites here: (a) general information, (b) more detailed information on specific products through consumer organizations, and (c) consumer information provided by the supplier or manufacturer on the product package or in the contractual document.

(a) General information

Within the context of consumer information and education in general, the aspect of consumer rights and obligations should not be neglected. The Commissie voor consumentenaangelegenheden (Consumer Affairs Commission) of the Sociaal-Economische Raad (Economic and Social Council) is at present preparing an opinion on this subject (44). This Economic and Social Council is a consultative body to which economic and social plans are submitted for its opinion. It is a tripartite body with representatives of labour, the employers, and the community. To enable the voice of the consumer to make itself more readily heard, the Consumer Affairs Commission (CCA) was set up in 1964 (45).

Television and the press can, of course, play an important part in the field of consumer information and education. I personally doubt whether there is a need for a quarterly magazine specializing in informing the consumer of his legal position, as exists in Belgium (46). However, there is, of course, a market for a journal providing up-to-date information for consumers' (legal) advisers (47).

(b) Specific product information

In some countries consumer organizations concern themselves with detailed information on consumer rights in connection with specific products. Informative literature may be published not only on specific products but also, in some cases, on economic or legal phenomena such as door-to-door selling. The information leaflets published by the 'Institut national de la consommation' in France are a good example (48). In the Netherlands, a number of information leaflets have been issued on the renting of property by the Ministry of Public Housing. There is, however, a lack of such information

in the consumer goods sphere.

However, three recent initiatives may be mentioned. Firstly, the Ministry of Justice has begun to issue informative literature, with a note on procedure at the kantongerecht (cantonal court).

Secondly, the wetswinkel (law shop) at Leyden intends to issue informative literature on the legal position of the consumer; this project is, however, still at the preparatory stage (49).

Finally, the Ministry of Economic Affairs is also preparing informative literature of this kind in cooperation with the consumer organizations.

(c) Information provided by the supplier/producer

Lastly, mention may be made of a trend to compel the supplier or producer legally to provide specific information to the consumer. Normally, such information concerns the composition, use, and dangers of the product, etc. It would appear easy to add some legal information to these items - for example, mention could be made of the law on door-to-door selling, which came fully into force on 1 November last; this law, like its counterparts in other countries, stipulates the use of a specific form, in which the consumer is advised of the seven-day "cooling-off" period in which he may withdraw from the contract (50).

The second obstacle to a satisfactory procedure is the inadequacy of the legal aid system. All that can be said on this point is that the matter is at present being actively discussed in the Netherlands. The direction which legal aid will take cannot yet be foreseen. Among current developments, the great success of the wetswinkels (law shops) may be mentioned. Barely six years after the opening of the first wetswinkel (law shop) at Tilburg, there are already 89 (51), mostly manned by law students and young lawyers, and they accounted for 6% of all legal assistance according to the Nijmegen study mentioned earlier (52). A more recent initiative, the foundation of legal aid bureaux - starting in Amsterdam in 1974 - may be regarded as a counter-offensive by the bar. For the future, there are proposals for the reform of the bar committee of experts, mentioned earlier, mostly borrowed from the British legal aid system (53). There are also proposals for social insurance (54), for "nationalization" of legal aid on the Swedish pattern (55), and for division of the bar

into a "social bar" and a "commercial bar" (56).

It should be added that these developments and proposals do not concern only legal aid to the consumer, but relate to assistance to all. Regarding specific consumer aid, mention may be made of the legal assistance offered by the Consumentenbond (the main Netherlands consumer association) since 1969 (57).

Important obstacles to recourse to the courts are the economic and psychological factors mentioned earlier (no. 5). It must be admitted that little is being done to remove these obstacles in the Netherlands. The legal aid of the Consumentenbond, to which I have just referred, is all very well, but it is granted in very few cases only (58). Nevertheless, proposals for reform abound. First of all, there are plans to renew the legislation concerning the organization of the judicial system. In 1971, the Minister of Justice set up a committee of experts to advise him on the composition and terms of reference of the state commission to be established. At the end of 1972, this committee of experts published its report, which includes not only ideas as to the composition and terms of reference of the state commission but also an enumeration of the wishes expressed concerning the future judicial organization (59). Some of these wishes relate to a rapid procedure for consumers (60). It is curious to note that, three years after publication of the report, the State commission has still not been set up. Since the Minister has himself already said that he expects a period of 6-10 years to elapse before the commission issues its final report (61), the consumer can expect nothing from this project in the short term.

Fortunately, there is a chance that the consumer need not wait for the proposals of this commission. The consumer affairs commission of the Economic and Social Council recently issued an opinion on civil procedure (62). This opinion includes proposals for simplification of civil procedure and the establishment of a judicial research centre. It also suggests that the legal assistance system be improved by regional and local consultation facilities, and that the cost of going to law - which is already quite low - be reduced still further. The Government has announced that it will issue its opinion on this matter by 1 April 1977 (63). I wish to discuss two aspects of this opinion : (a) simplification of civil procedure and (b) the establishment of a judicial research centre.

(a) Simplification of civil procedure (64)

The commission proposes reforms in procedure at the kantongerecht (cantonal court) along the following lines :

- the consumers of goods or services not intended for their business can claim a remedy at law;
- the simplified procedure is limited to actions not exceeding a value of 1500 guilders;
- proceedings are instituted by a petition; in other respects, the normal rules of legal disputes apply;
- the hearings will centre on the oral proceedings;
- simplified rules of evidence will apply;
- the judge will endeavour to bring about an amicable settlement between the parties;
- a reference to the normal channels of legal procedure is excluded.

The proposals display remarkable similarity to the Lag om rättegången i tvistemål om mindre värden (the Swedish law on civil proceedings involving small sums) of 1 July 1974 (65), although it is clear from the comparative summary in the appendix to the opinion that the commission did not study this law. The Netherlands proposals are less radical than the Swedish law in regard to (1) the passivity of the judge, (2) the competence of the judge, and (3) the right of appeal.

(1) Passivity of the judge

Whereas Article 6 of the Swedish law provides that the judge shall play an extremely active part in the proceedings, the Netherlands proposals are silent on this point. Some members of the Consumer Affairs Commission were opposed to help afforded by the staff of the office of the clerk of the court to consumers in completing their petition forms (66).

(2) Competence of the judge

If a consumer is a party to a legal dispute, he can always apply to the court of his domicile in pursuance of Article 11 of the Swedish Law. This exception to normal jurisdiction is not to be found in the Netherlands proposal. However, it should be mentioned that since 1966

the Netherlands Code of Civil Procedure has included a provision that the legal rules of competence of the kantongerecht cannot be waived (67). This provision is intended to rob clauses concerning this competence, included in standard contracts, of their validity.

(3) Right of appeal

Finally, the Netherlands proposals allow appeals without reservation; in this respect they again differ from the Swedish Law, which provides that the permission of the hovrätt (Court of Appeal) is required, and this will only be forthcoming by the means set out in the exhaustive enumeration of Articles 21 and 22. Because of the "frightening" force of the appeal, some members of the CCA were opposed to this possibility.

Apart from this law, which seems to work very well in practice, the Netherlands Government could also copy the Swedish judges' attitude towards consumers, expressed in their informal dress, evening sessions, venue for hearings, etc. - psychological factors referred to earlier.

(b) Judicial research centre (68)

Some consumer complaints call for an expert's report. To help solve the problem of costs, the CCA has proposed the setting up of a judicial research centre where complaints could be studied free of charge at the request of the judge. In considering such a request, in the opinion of the CCA, the judge should weigh the importance of the case against the probable research costs, taking account of the nature of the article as well as of the financial situation of the complainant. This possibility is also to be found in the Swedish Law (Article 10).

9. Disputes commissions

Pending the implementation of the proposals for simplification of the civil procedure described above, the disputes commissions will fill a gap. However, even after this implementation, the commissions will be a useful complement to the Government courts, according to an interim report by the CCA published in 1973 (69). For this reason, the development of disputes commissions should be encouraged; this could be done by granting subsidies to Government-approved disputes commissions. Government approval could be accorded

to any disputes commission :

(a) able to prove that it is representative (an important part of the industry concerned - important in the opinion of the Ministers of Justice and Economic Affairs - would have to submit to it);

(b) having an effective procedure and making impartial decisions;

(c) granting the consumer freedom of choice between the ordinary judge and the disputes commission (70). Regulations for approval in pursuance of this report have just been issued by the government (71).

These projects do not overcome all the disadvantages attached to the disputes commissions. Firstly, whereas disputes commissions wishing to take advantage of ministerial approval and Government subsidies will have to comply with the rules to be stipulated, if any sector of industry shows no interest, there is nothing to prevent it from continuing in the same way. One may therefore wonder whether this system of bonuses - the opposite to a system of sanctions - will have the desired effect.
Secondly, the report offers no solution to the problem of centralized sessions, nor to the problem that the efficacy of the disputes commissions depends on the cooperation of the suppliers.

The final objection that could be levelled against the CCA report is that the problem is tackled piecemeal. A concentration of all parajudicial consumer protection procedures, as has been achieved in Sweden (72), is not yet envisaged.

It could be answered that the organization of parajudicial procedures is first and foremost a matter for industry and the consumer organizations, and that government intervention should be limited.

10. Disciplinary councils and penal law

After all the proposals for reform concerning the application of civil law in consumer protection - through judicial or parajudicial channels - the resources of the criminal law need not be considered, for the simple reason that there are hardly any reform projects in this field.

The existing disciplinary councils can continue as they are without impediment or encouragement from the Government. This is very apparent as regards misleading advertising.

Although the Council of Europe recommended Member States to encourage cooperation between government and the voluntary disciplinary bodies (73), the recent draft law on this subject contains no measures to this effect. Protection through the criminal law is also retained, and no interesting developments appear to be on the horizon (74). Mention should, however, be made of the recent proposals of Konsumenten Kontakt for the drafting of an outline law on unfair commercial practices, similar to the British Fair Trading Act 1973.

SOME GENERAL CONSIDERATIONS

11. Consumer protection or citizen protection?

The substantive law which is important to the consumer is important to a varying extent. Older legislation is directed more to protection of competitors than that of consumers (75). Some recent laws, such as the Wet op het consumptief geldkrediet (law on consumer credit) (76) and the Colportagewet (law on door-to-door selling) (77), are aimed solely at consumer protection. This raises problems of definition. What is a consumer? What is a supplier? What is a consumer transaction? (78). A legal system such as that of the Netherlands no longer has as its starting point the concept of the trader - abolished in 1934 (79) - as the legislations of Germany, Belgium and France have (80). These problems arise in both procedural and substantive law.

The problems of definition are universal. We are constantly faced with the question of where to draw the line in the field of application of the new laws. Does the hirer of a projector, the customer of a bank, the man who takes out an insurance policy have the same need for protection as the purchaser of a refrigerator and the man who has his suit dry-cleaned? Should the purchase of a used car by a seller who is not in the trade be controlled? The purchase of a building? Or the use of public utilities, such as water, gas or electricity? What about international contracts? The field of application could be extended even further - in particular, as regards legal aid and the simplification of civil procedures - right down to every small contractor, employee or trader, to persons with legal problems involving individuals or the family, and even to all citizens.

12. National or international protection

Comparison of legal consumer protection in the European countries shows ever increasing diversity, particularly in the field of procedure. This is not serious, for two reasons. Firstly, most relations between the consumer and the supplier or producer can be situated in a single country. Secondly, it seems useful for different models to be applied in practice, as the advantages and disadvantages of each are thereby demonstrated.

Nevertheless, problems arise in this sphere. It is clear that international relations between consumers and suppliers/producers will be increasing. The growing mobility of travellers and workers is significant today. Manufacturers' liability has already posed international problems. Suppliers and producers are faced with a diversity of laws which entails the falsification of competition. The multinational corporation is confronted with problems in adapting its products, advertising and standard contracts to national requirements. For the "international consumer" the problems - especially procedural problems (81) - are even more serious. What legal system governs such relations? This question cannot easily be answered in the light of the directly applicable rules which make their appearance here (82). Which court has jurisdiction, and which disputes commission is competent? What is the value of a decision by a disputes commission if, for example, it has been delivered in the form of a bindend advies - a form which is hardly, if at all, recognized abroad (83)?

Even more complicated are the problems of collective consumer protection. With the multinational corporation, it can already be seen that staff have difficulty in organizing also at multinational level. Such cooperation would be all the more difficult for consumers who are represented by private organizations in one country and by administrative bodies in another. Clearly, the harmonization of these rules will be an important task for the international organizations such as the Council of Europe and the European Community (84).

13. Subsidies to consumer organizations as a political instrument

Finally, a note on what may be a specifically Netherlands contribution to consumer protection. The existence of powerful consumer organizations permits a policy which is

practised in the Netherlands in many fields, such as public health, child welfare, culture, social assistance, sport and recreation : the granting of subsidies to private organizations. In the first instance, the government endeavours to achieve its aim by subsidizing a private organization. If such a policy does not succeed, the government acts itself. Hitherto, the consumer organizations in the Netherlands have not received government subsidies. Subsidization of the disputes commissions, in which the consumer organizations participate and to whose costs they contribute, now appears to be imminent.

Compensation in the control of onerous standard contracts and misleading advertising cannot fail to be granted. In this connection, the government must realize that a political failure will entail the adoption of another solution : the establishment of a costly body like the Federal Trade Commission, the konsumentenombudsman, or the Director-General of Fair Trading.

EXPLANATORY NOTES

(1) See, for example, T.L. Eovaldi and J.E. Gestrin, "Justice for consumers : the mechanisms of redress", 66 Northwestern University Law Review 281 (1971) : "Recently enacted federal and state legislation, as well as court decisions, have enunciated new substantive legal rules for the conduct of consumer transactions. Yet, this focusing of attention on the creation of new doctrines and laws has tended to obscure the need for a thorough examination of the adequacy of the mechanisms through which these new rights are to be made effective." Or L. Bihl, "Vers un droit de la consommation", Gazette du palais 1974 nos 256/257, p. 13 :"Il ne suffit pas que l'on parvienne à édifier un système législatif cohérent pour qu'il soit efficace. Les meilleurs textes, s'ils sont inutilisés, peuvent à la rigueur permettre de savantes dissertations ou de beaux discours, ils n'assureront en rien la protection réelle du consommateur." Or the Zweiter Teilbericht der Arbeitsgruppe beim Bundesminister der Justiz, Vorschläge zur Verbesserung des Schutzes der Verbraucher gegenüber Allgemeinen Geschäftsbedingungen, Bonn 1975, p. 13 : "Ein hinreichender Schutz des Rechts - und Wirtschaftsverkehrs gegenüber unangemessenen Allgemeinen Geschäftsbedingungen ist ohne ein leistungsfähiges und wirksames Kontrollverfahren nicht möglich."

(2) That is, traditional legislative control. Delegated legislation - which is not without danger for a democracy - apart, there are nevertheless new methods of reacting quickly to abuses which come to the attention of an administrative or judicial body. Examples in the field of consumer protection include the rapid legislative procedure at the instigation of the Director-General of Fair Trading under section 22 of the British Fair Trading Act 1973, and its equivalent in section 24 of the Entwurf eines Gesetzes über Allgemeine Geschäftsbedingungen of the German Opposition, which reads : "Der Bundesminister der Justiz wird ermächtigt, nach Anhörung von Verbänden der Verbraucher und der Unternehmer durch Rechtsverordnung mit Zustimmung des Bundesrates weitere Bestimmungen in Allgemeinen Geschäftsbedingungen für unwirksam zu erklären, sofern ihre Unzulässigkeit wegen Unvereinbarkeit mit par. 7 (Generalklausel) nach den Inkrafttreten dieses Gesetzes durch Urteil eines Oberlandesgerichts oder eines Gerichts höheren Ranges festgestellt worden ist."

(3) Besluit inning kleine geldvorderingen dated 15 October 1942, Staatsblad 1942 no. 210, incorporated in 1965 in the Wetboek van burgerlijke rechtsvordering (Code of Civil Procedure), Articles 126k-125v.

(4) See J. Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts/Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre, Tübingen 1956 and, in the Netherlands, already P. Scholten, Algemeen deel in C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, Zwolle 1931; French translation under the title "Traité de droit civil néerlandais"/ Partie générale par B.E. Wielenga, Zwolle/ Paris 1954.

(5) V. Campbell and Phears, "Federal trade commission : developments in advertising regulation and antitrust policies", 41 George Washington Law Review 880 e.s. (1973). Regarding the competence of the FTC concerning guarantee certificates, see the Magnuson-Moss warranty-Federal trade commission improvement act of 4 January 1975, Public law 93-637; 88 Stat. 2183, US Code/ Congressional and administrative news 93rd Congress, second session 7200 e.s. et 8762 e.s. (1975).

(6) Articles 10 and 13 Standard contracts law 1964, on which A.L. Diamond, 14 International and comparative law quarterly 1410-1416 (1965); A. Genovese, Rivista di diritto civile 1965, 480; note, 66 Columbia law review 1340-1350 (1966) and mostly A. Bin-Nun, The Israel law on standard contracts, in : Comparative law of Israel and the Middle East, Washington 1971, 457-465.

(7) Article 1 on the Law of the market court of 29 June 1970 (Lag om marknadsråd, Svensk Författningssamling 1970 no. 417). The court was originally called "marknadsråd", as the title of the law indicates. To avoid confusion among consumers, and perhaps also to strengthen its position, the name was changed to marknadsdomstol (market court) by the law of 15 December 1972 : Svensk författningssamling 1972 no. 732. See J.E. Sheldon, "Consumer protection and standard contracts : the Swedish experiment in administrative control" 22 American Journal of comparative law, 17, 25 note 38 (1974). The translation of marknadsdomstol as "tribunal de commerce" (commercial court) in the Swedish replies to the questionnaires of the Council of Europe (compare bibliography to Appendix) seems to me to be misleading.

(8) See Article 3 of the Law of 30 April 1971 prohibiting improper contractual clauses (Lag om förbud mot otillbörliga avtalsvillkor, Svensk författningssamling 1971 no. 112) : "The appropriateness of a formal notification can only be considered on request.

This request is lodged by the konsumentenombudsman. If the latter decides, in a given case, not to apply for a formal notification, a request may be submitted by an association of suppliers, consumers or wage-earners."

(9) Thesis 4 of the Zweiter Teilbericht mentioned in note 1 : "Zur Erhebung der Klage sind befugt : a) Verbraucherverbände; b) Wirtschaftsverbände; c) eine Bundesbehörde; d) Landesbehörden, die für Verbraucherschutz zuständig sind."

(10) Thesis 8 of the Zweiter Teilbericht mentioned in note 1 : "Für die AGB-Prüfungsverfahren sind besondere Senate der Oberlandesgerichte ausschliesslich zuständig. Die Länder können die Zuständigkeit auf bestimmte Oberlandesgerichte konzentrieren..."

(11) See the proposal that the supervision of standard contracts be entrusted to an organized body such as the chamber of companies of the Gerechtshof (court of appeal) of Amsterdam, formulated by H.J. Sluyter, Standaardcontracten/De grenzen van de particuliere wetgever, Studiekring "Prof. Mr J. Offerhaus", reeks handelsrecht no 9, Deventer 1972, p. 19. A draft law instituting rules on civil law protection against misleading advertising, dated 18 September 1975 (Tweede Kamer, zitting 1975-1976, no. 13 611) would allow action against misleading advertising by consumer organizations. Article 1416c (2) of the burgerlijk wetboek (civil code), according to this draft, would read as follows : "Vorderingen als in het vorige lid bedoeld komen mede toe aan rechtspersonen met volledige rechtsbevoegdheid, die ten doel hebben de behartiging van belangen van ondernemers of van eindgebruikers van niet voor een beroep of een bedrijf bestemde goederen of diensten, indien deze belangen door het openbaar maken van de mededeling zijn of dreigen te worden aangetast." The government does not therefore reserve the right to approve consumer associations, as is contained in the"Loi d'orientation du commerce et de l'artisanat"of 27 December 1973 (the Royer Law) in France. J. Calais-Auloy, D. 1974 Chronique p. 91, 92 writes of this : "... some people will not fail to call attention to the risk of arbitrariness involved in such a choice". In this connection, see the French Decree no. 74-491 of 17 May 1974, which, among other requirements for a national organization, demands one year of existence, effective activity, and at least 10,000 members.

(12) The need for administrative bodies is less in the Netherlands than elsewhere owing to the strong position of the consumer organizations. The Consumentenbond has over 400,000 members. The three large workers' federations NVV, NKV and CNV, among others, are affiliated to Konsumenten Kontakt.

(13) See E.H. Hondius, Judicial organization, in : D.C. Fokkema et al. (ed), Introduction to Dutch law, Deventer 1976 (in the press).

(14) See also Ison, 35 Modern law review 18, 21 (1972) : "Many (if not most) buyers never become aware that they have any rights against a seller. For example, even where a buyer is alleging fraud for defective goods, he has often been so conditioned to accept a state of helplessness in the legal system that he still believes he has a legal obligation to pay the contract price."

(15) Institut national de la consommation, Journées du droit de la consommation, 20 et 21 septembre 1974, commission garantie des vices cachés et garanties contractuelles (rapport of J. Ghestin).

(16) De kosteloze rechtsbijstand in Nederland/verslag van de studie-commissie rechtsbijstand aan on- en minvermogenden (interim report of the Boekman commission), The Hague 1972, p. 129.

(17) K. Schuyt, K. Groenendijk and B. Sloot, Legal problems as private troubles/the distribution of legal services in the Netherlands, report presented at the Rechtshilfe-Tagung, Zentrum für interdiziplinarische Forschung, Bielefeld University, Federal Republic of Germany, 9-11 October 1973 (duplicata report)

(18) Schuyt et al. 1975, p. 17, in which the following explanation is given : "The lower frequencies of legal contacts among the middle incomes might be explained by the fact that many of them think they are not eligible. Or they are reluctant to undergo the necessary financial investigations. Reluctance to these kinds of social and economic investigation in general is higher among the rising groups than at the bottom of society, where investigation is as normal as powerlessness."

(19) Schuyt et al.1975, p. 1, pointed out that the subject of legal aid was also a focus of attention in the Netherlands in 1903-14, 1924-30 and 1949-57. The last period of discussion culminated in the adoption of the present Wet rechtsbijstand aan on- en minvermogenden (Law on legal aid to the poor) of 4 July 1957, Staatsblad 1957 no. 233.

(20) See Th.M.A. Claessens, M.I. 't Hooft, J.I.M. Jacops, J. Keereweer and Pia Sassen, "De balie : een leemte in de rechtshulp?", Ars Aequi 1970, 225-313 (known as "the black issue of Ars Aequi" -because of the colour of its cover - and perhaps also because of its contents).

(21) Rechtbank 's-Gravenhage 28 April 1975 Praktijkgids 1975 no. 000 (in the press).

(22) T.G. Ison, "Small claims", 35 Modern law review 18-37 (1972).

(23) The process-servers are the main offenders in violating the Dutch language.

(24) Ison, op. cit., p. 19.

(25) Penal provisions can be found in a number of special laws, such as the Wet op het afbetalingsstelsel (Law on the system of payment by instalments) of 13 July 1961 - Staatsblad 1961 no. 218, the Waterleidingwet (water supply Law) of 6 April 1957 - Staatsblad 1957 no. 150, the Wet beperking cadeaustelsel (Law on selling with free gifts) of 13 July 1955 - Staatsblad 1955 no. 345, the Landbouwkwaliteitswet (Law on the quality of agricultural produce) of 8 April 1971 - Staatsblad 1971 no. 371. the Wet economische delicten (Law on economic offences) of 22 May 1950, Staatsblad 1950 K 258, serves as the link between the specialized laws, stipulating rules as to penalties and other measures to be taken against companies found to be infringing the economic laws. Compare A. Mulder, "Commentaar op de Wet economische delicten", second edition, Zwolle 1970, and A. Mulder and R.A.A. Duk, "Schets van het sociaal-economisch recht in Nederland", Zwolle 1972, 138-141. Of the countermeasures laid down in the Wet economische delicten, confiscation of the estimated profit derived from the offence, and commitment to a penal workshop, are noted as less practical. Financial sanctions are regarded as the best means. See P.A. Huidekoper, "Hantering van het economisch strafrecht in Nederland", thesis, Groningen, Deventer 1975, p. 44.

(26) Art. 1 Wetboek van Strafrecht (Penal Code). Compare Art. 4 of the French Penal Code.

(27) Articles 844-852 Wetboek van burgerlijke rechtsvordering (code of civil procedure).

(28) In Germany, F. Roscher, Vertragsfreiheit als Verfassungsproblem, Berlin 1974, 108, maintained that "(d)ie Ausforderung der Selbstbestimmung als Vertragsfreiheit erweist sich heute zumindest im Bereich der AGB (=Allgemeine Geschäftsbedingungen, (general conditions, EH) als nicht mit dem Verfassungsprinzip der Selbstbestimmung im wirtschaftlichen Bereich vereinbar".

(29) See CCJ, Answers by governments etc., Strasbourg 1974, p. 25 (appendix to this report).

(30) There are a number of magistrates specializing in economic law. In 1972 there were 20 : see P.A. Huidekoper, Hantering van het economisch strafrecht in Nederland, thesis, Groningen, Deventer 1975, p. 18.

(31) Articles 44 and 56 Wet op de rechterlijke organisatie (Law on judicial organization) of 18 April 1827 - Staatsblad 1827 no. 20.

(32) Art. 328 bis of the Wetboek van Strafrecht (Penal Code) : "Hij, die, om het handels- of bedrijfsdebiet van zichzelven of van een ander te vestigen, te behouden of uit te breiden, eenige bedriegelijke handeling pleegt tot misleiding van het publiek of van een bepaald persoon, wordt, indien daaruit eenig nadeel voor concurrenten van hem of van dien ander kan ontstaan, als schuldig aan oneerlijke mededinging, gestraft met gevangenisstraf van ten hoogste een jaar, of geldboete van ten hoogste achttienhonderd gulden".

(33) See W.J. Slagter, "Handelingen Nederlandse Juristen-Vereniging" 1963, p. 4 and 119 et.seq.

(34) See J.C. Houtappel and J.C.N.B. Kaal, "Bescherming van de consument door de rechter," in : E.H. Hondius et al., "Consument en recht", Amsterdam 1972, pp. 18-24, who refer to the lack of a rapid penal law procedure like the summary procedure in civil law.

(35) Exceptions : control of certain professions, such as the law and medicine.

(36) In 1972 the number of complaints was 47, rising already in 1973 to 80. "Jaarverslag 1973 Nederlandse code voor het reclamewezen," p. 4.

(36a) As, for example, life insurance. In this sector there has been an ombudsman since 1971. He is appointed by a sector organization, the "Nederlandse vereniging ter bevordering van het levensverzekeringswezen (NVBL)". In the period 16 August 1974 to 25 August 1975, the ombudsman received 559 new complaints. See "Vijfde verslag van de werkzaamheden ombudsman levensverzekering" The Hague 1975, p. 1.

(37) European Committee of Juridical Cooperation (CCJ), "Réponses des gouvernements aux questionnaires relatifs aux systèmes judiciaires ou parajudiciaires pour la sauvegarde des droits des consommateurs...", Strasbourg (Council of Europe) 1974 - 25-34 (see appendix to this report). In November 1975, the 15 largest mail order firms (with an annual turnover of 500 million guilders per year) announced that they would be setting up a joint disputes commission : NRC Handelsblad of 28 November 1975, p. 16.

(38) E.H. Hondius et al., "Consumentenkoop, chapter Branchegeschillen-commissies", Utrecht 1976 (in the press). Regarding the terminology of parajudicial measures, see P. Schlosser, "Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 1. Systematische

Darstellung", Tübingen 1975, pp. 15-28.

(39) As, for example, arbitration by the Raad van arbitrage voor de bouwbedrijven in Nederland (arbitration council for construction firms in the Netherlands), Arbitrage-instituut bouwkunst (architectural arbitration institute) and Nederlands arbitrage-instituut (Netherlands arbitration institute). See appendix.

(40) As, for example, the inspections with a view to an amicable settlement carried out by the Bond van automobiel-, garage- en aanverwante bedrijven (association of motor factors, garages and related undertakings) and by the Vereniging Nederlands kwaliteitsmerk meubelen (Netherlands furniture quality mark organization). See appendix.

(41) As, for example, mediation by the Stichting bontwaarborg (fur guarantee organization), the Federatie van meubileringsbonden (federation of furnishers' associations), Stichting centraal tapijtbureau (central carpets bureau). See appendix.

(42) Netherlands law has never known the oppressive restrictions on arbitration featuring, for example, in French and Italian law.

(43) See the CCA report mentioned in the bibliography.

(44) Articles 1 foll. Wet op de bedrijfsorganisatie (Law on the organization of industry) of 27 January 1950, Staatsblad 1950 no. K 22.

(45) See the speech by the Minister of Economic Affairs, Mr J.M. den Uyl, on the occasion of the first meeting of the CCA. On page 6, he remarks : "Het verheugt mij daarom, dat in deze bijzondere commissie van de S.E.R., die kan fungeren als een soort Raad voor Consumentenzaken, door de samenstelling van het orgaan, de basis is geschapen voor een mogelijk open overleg over die vraagstukken welke de consument van vandaag beroeren. Evenals mijn ambtsvoorganger verwacht ik van dit overleg zeer veel, omdat de gedifferentieerdheid van de moderne samenleving bij de bestudering van vele specifieke vraagstukken een veelzijdige benadering vraagt. Hoe zou dit beter kunnen dan wanneer alle belanghebbende en geïnteresseerde partijen om één tafel zitten? Ik zie hierin een goed Nederlandse gewoonte." The Economic and Social Council now has only one member from the consumer organizations (out of about 45 members in all). Compare, on consumer representation on the French Conseil économique et social, Denise Nguyen-Thanh, "Techniques juridiques de protection des consommateurs", thesis Caen 1969, Paris 1970, no. 983.

(46) Test uw recht, published by the Verbruikersunie, Brussels.

(47) I proposed the foundation of such a journal in the Netherlands a few years ago, but in vain. However, it must be admitted that the general law journals, and, in particular, the Nederlands Juristenblad, devote considerable space to legal protection of the consumer.

(48) Compare, for example, the legal information notes on door-to-door selling, the installation of television aerials, removals, extrajudicial inspection reports, correspondence courses, etc., and also the legal information given in general publications such as the"Guide pratique du logement"and the'Guide pratique de l'automobile"et des "2 roues". In the United States, the Federal Trade Commission publishes the FTC Buyer's Guides, such as no 2 Unordered merchandise (1975), no 7 Fair credit reporting act (1975), etc.

(49) Before such literature could be compiled, a preliminary study of the legal position of the consumer was necessary. This study is now in the press : E.H. Hondius et al., Consumentenkoop, Utrecht 1976.

(50) Article 24 (1) Colportagewet (Law of 7 September 1973, Staatsblad 1973 no. 438). The Ministerial Decree which established the form of the instrument was published in Staatsblad 1975 no. 397. Concerning the other European laws on door-to-door selling, see J. Struyk, "Agressieve verkoopmethoden"("een rechtsvergelijkende studie in verband met de bescherming van de consument tegen onbehoorlijke beïnvloeding"), thesis, Louvain 1975.

(51) Schuyt et al. 1975, p. 2.

(52) Schuyt et al. 1975, p. 15. In the title of his article "Rechtswinkels helpen 60.000 mensen per jaar", Intermediair 1975 no. 47 (21 November), F.F. Langemeijer mentions a figure of 60,000 clients per year, but does not mention the sources of this information.

(53) Nederlandse orde van advocaten, Van kosteloze rechtsbijstand naar gefinancierde rechtshulp/Verslag van de studiecommissie rechtsbijstand aan on- en minvermogenden (the Boekman commission) The Hague 1975.

(54) Proposed by W.F.C. Stevens in B.A. Wille and W.F.C. Stevens, Recht op rechtsbijstand?, Deventer 1972, pp. 63-78.

(55) See inter alia the legal aid law (Rättehjälpslag, Svensk författningssamling 1972, no. 429). Proposals in this direction are maintained chiefly by the "law shops".

(56) See the black issue of Ars Aequi, mentioned in note 20 above.

(57) There is also legal aid by the trades unions and other private organizations.

(58) The number of new files amounted to 80 in 1973 and 65 in 1974 : Jaarverslag van de Kommissie rechtsbijstand over het jaar 1974, p. 3.

(59) Gedachten over de toekomst van de rechtspleging/rapport van de werkgroep herziening rechterlijke organisatie ingesteld bij beschikking van de minister van justitie van 23 December 1971, The Hague 1972.

(60) See the ideas formulated by the Consumentenbond on pages 48-49 of the report on the establishment of small claims courts on the analogy of those of the United States. These ideas are opposed by J.C.M. Leyten, Handelingen Nederlandse Juristen-Vereniging 1975, p. 101, 161, who quotes from the American report Law and order reconsidered/a staff report to the national commission on the causes and preventions of violence, 1970, pp. 35-36 : "The small claims court stands as a prime example. Created to help the poor creditor collect his claims without fuss or fanfare, it has been perverted into a mass collection agency for stores and business against the poor... By dispensing with "legal technicalities" and emphasizing "settlement" small claims courts pit unskilled and inexperienced debtors against the paid agents of companies who handle such claims by the thousands. The poor do not collect in small claims courts; they are only collected from. In Philadelphia, the dockets of the Magistrates Courts do not even have a form in which to record a judgment for the defendant, court clerks there cannot recall such a happening in 20 years..."

(61) "Voorbereiding grote herziening rechterlijke organisatie", Nederlandse staatscourant of 29 December 1971, no. 253 (also published as Appendix 1 of the report of the Wiersma commission).

(62) "Sociaal-Economische Raad, Advies inzake methoden ter verbetering van de behandeling van consumentenklachten, uitgebracht door de commissie voor consumentenaangelegenheden aan de minister van economische zaken", The Hague 1975.

(63) "Jaarrapport overheidsbeleid consumentenaangelegenheden/uitgebracht door de Interdepartementale commissie voor consumentenzaken" (annual report of the interdepartmental commission for consumer affairs), The Hague 1975, p. 40.

(64) Opinion of the CCA 1975 (mentioned in note 61 above), Chapter V.

(65) Svensk författningssamling 1974 no. 8. I have used the Dutch translation of this law in an unpublished degree thesis by J.D. van Vliet in Leyden.

(66) Opinion of the CCA 1975 (mentioned in note 61 above), p. 62.

(67) Article 98a Wetboek van burgerlijke rechtsvordering (Code of Civil Procedure) incorporated by the Law of 2 December 1965, no. 527 : "1. Elk beding waarbij van de wettelijke regelen omtrent de betrekkelijke bevoegdheid van de kantonrechter wordt afgeweken, is nietig. 2. ..."

(68) Opinion of the CCA 1975 (mentioned in note 61 above), p. 49.

(69) Opinion of the CCA 1975 (mentioned in note 61 above), pp. 43-45.

(70) "Sociaal-Economische Raad, Advies inzake de behandeling van consumentenklachten door branchegeschillencommissies, uitgebracht door de commissie voor consumentenaangelegenheden aan de minister van economische zaken". The Hague 1973, pp. 11-12. As Mrs Jones rightly noted : "We must urgently press for the development of a wide variety of complaint-handling mechanisms which will be available to deal with the broad spectrum of consumer dissatisfactions which arise so frequently in the largely depersonalized and complex marketplace in which consumers must transact their daily business. These mechanisms must be flexible enough to deal with the broad spectrum of consumer grievances and not confine themselves exclusively to those situations in which consumers legal rights have been violated." (M.G. Jones, "Wanted : a new system for solving consumer grievances", 25 Arbitration journal 234, 236 (1970)).

(71) Staatscourant dated 27 November 1975, no. 230.

(72) The Allmänna reklamationsnämnd began operation in 1968; since 1973 it has been working under the auspices of the Konsumentverk, which groups together the former Statens konsument råd, Statens institut för konsumentfrågor and Varudeklarationsnämnd.

(73) Council of Europe, Resolution (72) 8.

(74) Only the provisions concerning the civil part are being studied by a committee of experts.

(75) See E.H. Hondius, Inventarisatie van het consumentenrecht, in : E.H. Hondius et al., Consument en Recht, Amsterdam 1972, p. 1, 6.

(76) Law of 5 July 1972, Staatsblad 1972 no. 399, on consumer credit.

(77) See note 50 above. This new law has been criticized by P.J.P. Verburgh, "De Colportagewet : voer voor maatschappij-critici en civilisten", Nederlands Juristenblad 1975, 1237-1245.

(78) The 1976 meeting of the Nederlandse vereniging voor rechtsvergelijking (Netherlands comparative law association) will be devoted to such questions.

(79) See H. Drion, "L'unité du droit privé aux Pays-Bas", in : M. Rotondi, "Inchieste di diritto comparato", 3. "L'unité du droit des obligations", Padova 1974, pp. 55-62 and A. Pitlo, "Posto del diritto commerciale nel diritto olandese", same edition pp. 447-461.

(80) See J.G. Sauveplanne, Rechtsstelsels in vogelvlucht/Een inleiding tot de privaatrechtsvergelijking, Deventer 1975, pp. 29,44,61.

(81) In his Esprit, "Origine et progrès des institutions judiciaires des principaux pays de l'Europe", The Hague 1818, Volume I, Introduction, p. XXVIII, J.D. Meyer wrote : "The vast majority of civil and commercial laws affects only those who have in their transactions abandoned their rights to the disposition of these laws; the Penal Code concerns only the person who has exposed himself to public prosecution. The situation is quite different with the legislative provisions relating to the civil and criminal procedure, which are much more intimately connected with the situation of society as a whole. In any proceedings, at least one of the parties, compelled against his will and obliged to submit to the courts the right which he claims, finds himself forced to follow imperative forms solely at the instigation of his opponent. It is no longer a small proportion of the citizens which is exposed to resorting to these laws; it is no longer by virtue of an individual's own acts, or of his negligence, that the law becomes applicable to him, but everyone can be summoned every day before the courts or compelled to summon before them the man who refuses to comply with his obligations : the rich man and the pauper, the honest man and the rogue, the wise man and the fool, the great and the small, can be summoned before the courts for obligations which he has not contracted, accused of crimes which he has not committed, ...".

(82) See section 10 of the "Entwurf eines Gesetzes zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Drucksache 360/75)": "Unterliegt ein Vertrag ausländischem Recht oder dem Recht der Deutschen Demokratischem Republik, so sind die Vorschriften deses Gesetzes gleichwohl zu berücksichtigen, wenn 1. der Vertrag auf Grund eines öffentlichen Angebots, einer öffentlichen Werbung oder einer ähnlichen im Geltungsbereich dieses Gesetzes entfalteten geschäftliche Tätigkeit des Verwenders zustande

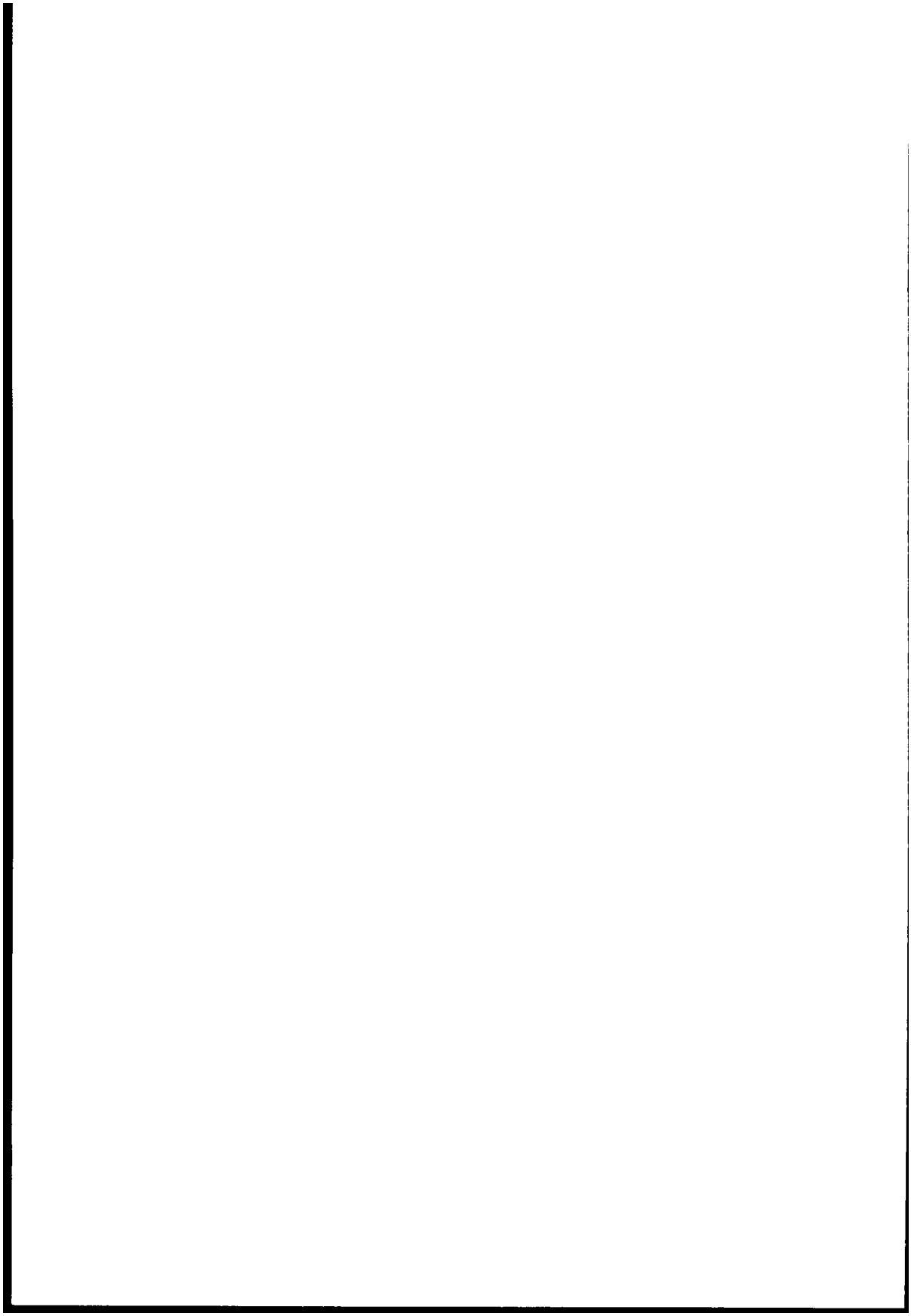
kommt und 2. der andere Vertragstail bei Abgabe seiner auf den Vertragsschluss gerichteten Erklärung seinen Wohnsitz oder gewöhnlichen Aufenthalt im Geltungsbereich dieses Gesetzes hat und seine Willenserklärung im Geltungsbereich dieses Gesetzes abgibt."

(83) See the magnum opus of P. Schlosser, mentioned in note 38 above.

(84) Note that Unidroit has also placed membership contracts (contrats d'adhésion) on the agenda of its congress in September 1976. Two special reports will be compiled on the subject "Contrats d'adhésion et protection de la partie économiquement plus faible dans les relations commerciales internationales". See Bulletin d'informations d'Unidroit no. 26/27, July/October 1975.

APPENDIX

LIST OF PARAJUDICIAL MEANS OF LEGAL CONSUMER PROTECTION IN THE NETHERLANDS



APPENDIX

LIST OF PARAJUDICIAL MEANS OF LEGAL CONSUMER PROTECTION
IN THE NETHERLANDS

(This list, prepared by the Secretary-General of the CCA, Mr P.H. van Rij, was originally published as Appendix IV to the Advies inzake de behandeling van consumentenklachten door branchegeschillencommissies mentioned in the bibliography. The French translation (on which this English version is based) is taken from the "Réponses des gouvernements aux questionnaires du comité européen de coopération juridique", also mentioned in the bibliography.)

A. ORDINARY CONSUMER GOODS
(e.g., food products, toiletries, cosmetics and detergents)

Examination of complaints by the consumer products and meat inspection bodies

Complaints concerning the quality or composition of these articles, or their labelling (indication of composition, quantity or storage life) can be directed to the supervisory bodies entrusted with monitoring the application of the law on food and other products ("Warenwet").

Although this law covers mainly the range of articles sold in food shops and drugstores, it also extends to quite different articles, such as wallpaper, toys and stuffed products (e.g., bedding and dolls). Complaints about these classes of articles can therefore also be made to the supervisory bodies.

B. VARIOUS FORMS OF SERVICES

1. Supply of milk
Local commissions for stabilization of the milk market

The order of the public law sector group for the retail trade

in milk and milk products ("Bedrijfschap voor de detailhandel in melk en melk- en zuivelprodukten"), which lays down the conditions for regulations for stabilization of the milk market, also provides for the setting up of local commissions. The latter must be composed of a majority of consumers resident in the region to which the regulations apply. They must not be involved directly or indirectly in the retail milk trade. The postal adress of the commission must be published at least once per year so that interested consumers can take note of it.

It must be possible for disputes between one or more consumers, on the one hand, and one or more milk merchants, on the other, which cannot be settled by mutual agreement, to be submitted without any restriction by whichever party applies first to the local commission. The commission must at least be empowered to advise the parties in the case of a dispute. If the local commission and the regulations commission (i.e., the commission made up of local milk suppliers and entrusted with the application of the stabilization regulations) do not agree, the rationalization commission of the sector group mentioned above offers its good offices for the settlement of the dispute. This rationalization commission, made up of members of the trade, in these cases enlists the assistance of a consultative body formed by three representatives of consumer associations. In some places, the regulations commission is required, under the terms of the local regulations for stabilization of the milk market, to comply with the decisions of the local commission.

2. Cleaning of furnishing fabrics, clothing, etc.

a. Dry cleaning disputes commission

This disputes commission comprises an equal number of representatives of the dry cleaning firms and of the Consumer Union ("Consumentenbond"), as well as an impartial chairman. It examines all complaints by consumers concerning the dry cleaning of clothing, curtains, carpets, etc. The complaint must be submitted in writing, after which the complainant receives a questionnaire which he must return duly completed, within thirty days, accompanied by the object of the complaint.

In the case of complaints concerning a firm affiliated to the association of dry cleaning and dyeing employers ("Vereniging van werkgevers in de chemische wasserijen en ververijen"VCW), this firm is required to attend when the complaint is examined. The complaint may also be introduced in the case of a dispute with a non-member firm. The latter must then promise to abide by the decision taken. The opinion

delivered by the commission is binding on both parties.

b. Disputes commission for laundry

This commission is also composed of an equal number of representatives of the Consumer Union and of the laundry industry, with an impartial chairman.

All firms affiliated to the Netherlands association of laundries and related undertakings ("Nederlandse vereniging van wasserijen en aanverwante bedrijven") are required to attend when complaints are examined.

Decisions are taken in the form of an opinion which is binding on both parties.

C. DOMESTIC ARTICLES AND HEATING APPLIANCES

Examination of disputes by the Netherlands association of heating and household articles dealers ("Nederlandse vereniging van handelaren in verwarmings- en huishoudelijke artikelen"VHVH)

This association gives firms specializing in the domestic sector and satisfying certain conditions the right to issue to their customers a Cedibed (*) guarantee certificate for purchases exceeding a certain amount. The seller then offers an additional guarantee and additional maintenance, in addition to the manufacturer's guarantee, within the limits of what may be regarded as reasonable.

Anyone who is not satisfied with the application of the guarantee provisions can approach the association, submitting the Cedibed certificate. If necessary, an inspector will institute an inquiry in order to arrive at a solution acceptable to the consumer. This action is free of charge to the consumer.

D. CLOTHING

Disputes commission for the fur guarantee organization ("Stichting Bontwaarborg")

The members of this organization have undertaken to sell fur coats

(*) Cedibed : European Committee for the Specialized Distribution of Domestic Equipment.

under guarantee. The guarantee certificates issued stipulate that in the case of complaint the coats will be submitted to expert examination to determine whether they conform to the quality standards for both the skins and makeup. The tests carried out are free to the consumer. The arbitration commission is managed by a lawyer of the royal Netherlands retailers' association ("Koninklijke Nederlandse Middenstandsbond"); the other members are two sworn experts specializing in furs, and a representative of the consumer. Members must abide by decisions of the commission, under penalty of expulsion from the organization.

E. MEDICAL SECTOR

1. Royal Netherlands Society of Medicine ("Koninklijke Nederlandse Maatschappij tot Bevordering der Geneeskunst")

In the event of a dispute between a doctor and a patient, the latter may lodge a complaint against the doctor with regard to either the actual care or financial matters, e.g., the amount of fees. Twenty district councils are empowered to rule on questions of medical ethics (first case) or on disputes concerning fees (second case). These councils are legal bodies completely independent of the administrative departments of the society.

In matters of medical ethics, the council may settle the dispute by taking certain measures against the doctor concerned within the framework of the society. In the case of a dispute, it may take decisions having the status of binding recommendations. Third parties (e.g., insurance companies) can also, under certain conditions, resort to this procedure for the settlement of disputes.

The district councils hold official meetings after conducting a kind of inquiry. Each council includes a lawyer who acts as permanent assistant secretary. Appeals may be made against district council decisions to an appeal commission, which has a larger number of lawyers among its members.

The complainant and the doctor cited may both be summoned to appear. All doctors who are members of the society (about 90% of all practitioners belong to it) are required to answer such a summons.

The complainant may enlist the services of a lawyer, at his own expense. The district councils render their services free, but, at the time of settlement of the dispute, they may decide that the costs incurred shall be charged, within such limit as they may lay down, to the parties or to one of them. This is the case, in particular, where it is found that the statements of the complainant were baseless.

It should, however, be added that the abovementioned procedures do not affect the possibility of lodging a complaint against a doctor with one of the councils of the Order of Doctors, set up under the law on the exercise of medicine (disciplinary matters). These councils are State disciplinary bodies, empowered to rule on serious deficiencies in the exercise of medicine.

2. Dentists' fees assessment commissions ("Honorariumbeoordelingscommissies van de tandartsen")

In each of the 17 districts covered by the Netherlands society of dental surgeons ("Nederlandse Maatschappij tot Bevordering der Tandheelkunde") there is an assessment commission for fees charged by dentists. In the event of complaints by patients in this connection, these commissions hold an inquiry and act as mediators. Usually they are separate bodies, composed of three dentists; exceptionally, a district commission may act as fee assessment commission. When a complaint is lodged with it, the assessment commission communicates, if necessary, with the patient and the dentist concerned and notifies both of its opinion.

In addition, there are "district councils", whose members are also dentists, empowered to formulate compulsory recommendations, where the two parties so desire, in disputes between patients and dentists. This procedure may involve costs which cannot be determined in advance.

3. Examination of disputes concerning medicines supplied by pharmacists
Royal Netherlands Pharmaceutical Society ("Koninklijke Nederlandse Maatschappij ter Bevordering der Pharmacie")

This society investigates complaints about the supply of medicines by pharmacists. It may call in various specialized commissions, depending on the nature of the complaint. If necessary, an examination on the spot may take place. Investigation of complaints is free to the consumer.

F. REAL PROPERTY (purchase, construction and maintenance)

1. Examination of disputes concerning estate agents' charges and conditions

Consultative committee for contracts of the Netherlands association of estate agents ("Nederlandse Bond van Makelaars in Onroerende Goederen" - NBM)

Where one of the clauses of NBM contracts, e.g., on fees, gives rise to a dispute between an estate agent who is a member of the association and a third party, the latter by himself, or the two parties together, may submit the dispute to this committee, which then issues a binding recommendation on the matter.

The committee has established a set of rules of procedure. It may make a charge for its services in the matter and demand up to 250 guilders from each party.

Normally, however, the committee merely asks the complainants for a prior deposit of 25 guilders, in order to discourage frivolous complaints. The actual costs incurred by the committee - amounting to a much higher sum - are met by the NBM.

Of course, disputes involving estate agents who do not belong to the association cannot be dealt with by the committee unless the agent concerned expressly agrees to this procedure.

The committee is made up of three members (and three deputies), including an estate agent who is a member of the NBM.

2. Arbitration concerning architects' fees

Architectural arbitration institute ("Stichting Arbitrage Instituut Bouwkunst")

The Netherlands association of architects ("Koninklijke Maatschappij ter Bevordering der Bouwkunst", "Bond van Nederlandse Architecten" - BNA) has drawn up model regulations for simplifying the drafting of contracts between employers and architects. These are general regulations concerning the amount of fees to be charged by the architect and certain legal relations between the two parties. BNA members accept work only under the conditions specified by this model contract, and many architects who are not members of the association do the same. The regulations contain an arbitration clause by which the parties undertake to submit disputes arising concerning certain works to the architectural arbitration institute. The council of the institute ("curatorium") has drawn up a list of at least 45

arbitrators, made up of an equal number of employers and architects, as well as other persons having the necessary qualifications to settle disputes in an appropriate manner.

The members of the court of arbitration are chosen from the persons included in this list; in general, the court consists of a single arbitrator only, unless the parties prefer to submit their dispute to a court made up of three persons.

The regulations of the institute of arbitration contain detailed provisions as to the procedure to be followed (exchange of documents, hearing of the parties, etc.).

The total cost of the services of the court of arbitration averages 850 guilders if the matter is settled by a single arbitrator and 1500 guilders where the parties require three arbitrators. However, these costs vary widely from case to case, partly depending on the number of sessions required to settle the dispute. The above amounts do not include personal expenses incurred by the parties (e.g., for legal representation).

The complainant pays a deposit which covers the legal costs; in its decision, the court states which party is ordered to pay the costs. The costs may be charged entirely to one of the parties, or they may be apportioned, either equally or unequally, between the two parties. In other words, if the complainant wins his case, it is stipulated in the court's decision that the defendant must pay the complainant the arbitration costs corresponding to the sum deposited by the latter.

The court of arbitration may either bring about an amicable settlement, or make an arbitration award, or formulate a binding recommendation. Arbitration awards for which an enforcement order has been obtained are enforceable in the same way as the judgment of an ordinary court; binding recommendations, on the other hand, have the status of an agreement only. Should the other party not submit voluntarily, a court decision must be obtained to compel the recalcitrant party to respect the agreement. Annulment of an arbitration award can only be requested if it is not cast in the due form, is based on erroneous information, or leads to contradictory conclusions; however, a binding recommendation may be challenged for other reasons too, e.g., if it contains unreasonable provisions. It is the parties who decide in advance by mutual agreement on the form which the arbitration court's decision shall take - arbitration award or binding recommendation.

3. Arbitration council for construction firms in the Netherlands ("Raad van Arbitrage voor de Bouwbedrijven in Nederland")

The function of this council is to settle disputes between contract-awarding customers and contractors for works, including contract-awarding purchasers and contractor-sellers, concerning provisional purchase and works contracts. Judgment of these disputes is entrusted to expert arbitrators. They do not judge by strict legal rules, but on the basis of fairness with a view to bringing about an amicable settlement.

The council has 52 ordinary members, mostly appointed by the associations of engineers, architects and contractors; the others are appointed by the management on the proposal of these associations.

Disputes are submitted to a court of arbitration consisting of a single member if the dispute relates only to a sum less than 12,000 guilders, unless the chairman decides that, owing to the fundamental nature of the dispute, judgment must be pronounced by three arbitrators. All other disputes are settled by three arbitrators.

The parties are, however, empowered to agree that the dispute shall be settled by a single arbitrator.

Each court of arbitration is assisted by a legal secretary. In addition to the ordinary members, the council includes ten extraordinary members, called jurist members, appointed on the proposal of the Netherlands association of jurists ("Nederlandse Juristen Vereniging"). All appointments must be approved by the Minister of Transport and Public Works.

The arbitration council is empowered to make a ruling only if the parties so agree. They may do so by a clause in the works contract (by stipulating the applicability of the 1968 general provisions concerning the execution of construction works, laid down by the Minister of Housing and National Development).

The arbitrators decide which of the two parties shall pay the arbitration costs, and in what proportion, etc., generally on the basis of the prejudice sustained on either side. It is possible to include in these costs a contribution to the legal aid costs of a party qualifying for the benefit of such a measure.

4. Examination of disputes by the public-law sector association of painters and decorators ("Bedrijfschap voor het Schildersbedrijf")

The specialists of the sector association may offer their mediation in disputes as to price, quality and other aspects of work carried out by glaziers, painters and/or decorators.

For this purpose, the parties must send a letter signed by them to the secretary of the sector association requesting him to appoint an expert. At the same time they must state the points at issue. In addition, the two parties must declare that they will accept the decision of the expert appointed as binding. After submission of the request, the parties are invited to a meeting with the expert, usually on the spot; the expert then examines the object of the dispute. After two or three weeks, or, in special cases, a longer period, the expert delivers his judgment in the form of a binding opinion.

The mediation of the expert is free to both parties.

5. Investigation of disputes under the general conditions of supply of installation contractors "entreprises d'installations" ("Algemene Leveringsvoorwaarden Installerende Bedrijven" - ALIB)

If these general conditions are stated to be applicable to a contract, all disputes (including ones regarded as such by only one of the parties) will be settled in conformity with the provisions of the regulations of the Netherlands arbitration institute.

The decision is taken in the form of an arbitration judgment, unless the parties have agreed to a decision in the form of a binding opinion.

However, notwithstanding the above, the installer "installateur" is entitled to submit the dispute for consideration by the competent ordinary judge.

G. TRANSPORT AND TOURISM

1. Purchase and maintenance of motor vehicles, motor cycles, scooters, mopeds and replacement engines
Arbitration council of BOVAG (*)

(*) "Bond van Automobiel-, Garage- en Aanverwante Bedrijven" - Association of motor vehicle factors, garages and similar undertakings.

In the case of a dispute between the owner of a motor vehicle and a member firm of BOVAG concerning repair or maintenance work on the vehicle, the customer may approach the arbitration council for all purely technical matters. The request must be submitted within the three-month period during which the work is guaranteed in pursuance of the BOVAG terms of delivery and payment. The customer must submit his request for arbitration in writing, stating his reasons and, where appropriate, attaching available documentary evidence.

If the arbitration council rules in favour of the complaining customer, the 10-guilder deposit paid by him on submitting his application is refunded to him. The recommendations of the council are notified to the parties in writing.

Where the provisions contained in the recommendation are not applied within a reasonable period, or should one of the parties not accept them, the matter, on submission of an application in which the grounds are stated by the parties, may be heard by a disputes commission.

This commission examines the recommendations, and, where appropriate, amends them.

Should a company belonging to the motor vehicle section of BOVAG persist in refusing to follow the recommendations of the commission, after the latter has given its ruling on a dispute between the company and the customer, BOVAG must determine whether, by this refusal, the company is acting contrary to accepted commercial ethics and in a manner prejudicial to the interests of the motor vehicle industry. If it decides that this is the case, it will endeavour to expel the company in question, after the competent commission of the association has suspended its membership on the grounds of negligence or reprehensible conduct towards the association or the public, in pursuance of the relevant provisions of the statutes of BOVAG.

2. Tourism

a. Examination by the Royal Touring Club of the Netherlands (ANWB) of disputes concerning the hire of caravans and pleasure boats

The ANWB issues binding opinions in disputes concerning the renting under model contracts of caravans or pleasure boats by firms affiliated to it and with which it has concluded a contract.

No maximum has been fixed for the costs of these binding opinions, but they are always very low.

b. Tourism disputes commission

This commission was set up jointly by the consumer union ("Consumentenbond") and the general Netherlands association of travel agencies ("Algemene Nederlandse Vereniging van Reisbureaus" - ANVR). The commission makes its rulings in the form of binding opinions. The members of the association are required to submit to this manner of settling disputes. The commission may also examine disputes with third parties, if the latter agree.

The complaint must be lodged with the travel agency within four weeks of the end of the tour (or within four weeks of the date fixed for departure in the case of a tour which could not be made) and the agency must have settled the matter within six weeks of the lodging of the complaint. If it has not done so, or if the proposed settlement does not satisfy the customer, the latter can approach the disputes commission within the next two weeks. The complainant may put his case personally, and may enlist the aid of witnesses and/or experts. The relevant costs are chargeable to him. One week before examination of his complaint, he must state the names and addresses of the persons who will accompany him.

H. INSURANCE

1. Life insurance ombudsman

The Netherlands association of life insurance companies ("Nederlandse Vereniging ter Bevordering van het Levensverzekeringswezen"), to which most life insurers belong, set up the institution of an ombudsman on 15 September 1971.

In examining the cases submitted to him, the ombudsman does not adhere strictly to the letter of legal provisions, but also considers the human factor. Complainants do not have to pay fees, and, where appropriate, may obtain a refund of their travelling expenses.

The ombudsman acts in a consultative capacity only, and insurers are not obliged to follow his recommendations. Every six months, he publishes a report on the matters submitted to him.

2. Insurance companies supervision commission

("Raad van Toezicht op het Schadeverzekeringsbedrijf")

This commission, set up in 1964 by the Netherlands union of insurers ("Nederlandse Unie van Schadeverzekeraars"), comprises the following six chambers :

first chamber : general third party insurance;
second chamber: fire insurance;
third chamber : motor insurance;
fourth chamber: accident, sickness and disability insurance;
fifth chamber : transport insurance;
sixth chamber : miscellaneous insurances not falling within any of the above categories.

The members of the commission must not be employed in the insurance sector; the chairman and vice-chairman of each chamber must be lawyers.

The supervision commission cannot replace the competent court or arbitration body specifically mentioned in the insurance policy. In a dispute between a party who has sustained prejudice and the insurer of the other party, it cannot therefore make a ruling binding on the two parties on whether the party which caused the damage (and hence his insurer) is bound to compensate. The commission is empowered to rule only on one point : is an insurance company liable to harm the good reputation of the insurance sector by the manner in which it performs its contracts? The commission thus has jurisdiction only in questions of ethics.

The commission may intervene in disputes concerning insurances in two ways :

a. either upon written request by an insured, another insurance company, a third party, or another interested party (e.g., a person who considers that another party covered by an insurance against accidents caused to third parties is liable for the damage sustained);

b. or spontaneously, the commission being able to decide of its own accord to investigate matters which have come to its knowledge.

An insurer about whom a complaint has been made must furnish all available information. The commission delivers its ruling in writing, stating its reasons, and informs the complainant, the insurer, and the organization of which the insurer is a member, thereof. The relevant organization must ensure that the insurer abides by the decision of the commission.

Decisions have hitherto always been complied with, but the organizations have means to call recalcitrant members to order.

The supervision commission does not charge for its services, even if it is proved that the complainant was in the wrong.

I. FURNISHING ARTICLES

1. Examination of disputes by the federation of furnishers' unions ("Federatie van Meubileringsbonden")

Complaints about furniture, curtains and floor coverings may be submitted in writing to the federation, accompanied by copies of the invoice and correspondence exchanged.

If a complaint appears justified, the federation intervenes. If necessary, it calls in an expert. It may call upon six experts in the country. These must no longer be actively working in the sector. The expert draws up a report in which he proposes a solution. The federation, the complainant and the vendor each receive a copy of this report. This procedure results in a satisfactory outcome in 90% of complaints. Firms not belonging to the unions of which the federation is made up are not always inclined to accept the proposed solution. The complainant can then submit the matter to a court, on the basis of the report furnished to him.

2. Appeal commission of the Netherlands furniture quality mark union ("Vereniging Nederlands Kwaliteitsmerk Meubelen" (Testmeubel Holland))

This organization, whose aim is to promote quality furniture, entitles certain firms to affix its mark to certain furniture sold on the Netherlands market, as a guide to the consumer. Furniture approved by the organization can be recognized by this mark, which is accompanied by the terms of guarantee.

Consumers who find that their furniture does not satisfy the conditions laid down for carrying the quality mark, or the relevant requirements or communications, may submit their complaints to an appeal commission to be appointed by the organization, consisting of three persons, which may have the article of furniture in question examined by agreement with the firm authorized to use the mark. If it is decided to carry out an examination, the costs thereof will be chargeable to the holder of the authorization.

The decision of the appeal commission takes the form of a binding opinion. The appeal commission will examine consumer's complaints only where it is clear that it has not been possible for any agreement to be reached between the consumer and the holder of the authorization. The latter is unconditionally bound to do and guarantee everything stipulated in the quality mark label. If the appeal commission finds in its decision that the quality mark has been used in a manner contrary to the provisions of the organization's regulations, it will require the holder of the authorization to pay the costs incurred in examination of the complaint, including those of any examination to be carried out by a body to be appointed for this purpose.

The appeal commission also decides on the manner in which a complainant whose complaint has been found to be fully or partially justified is to be compensated.

3. Examination of disputes by the central carpets bureau ("Stichting Centraal Tapijtbureau")

Some fifteen Netherlands carpet manufacturers, affiliated to the central carpets bureau, guarantee the quality of their products provided that they are selected, laid, used and maintained in the appropriate manner, in accordance with the seller's recommendations.

If, in spite of the recommendations of the seller as to the choice of carpet, the purchaser finds that the carpet has worn too quickly, or, after some time, that it has defects, affiliated manufacturers undertake to find an appropriate solution to the dispute. In the final instance, the bureau exercises a supervisory function. For this purpose, it can call upon an expert to investigate the complaint on the spot.

SUMMARY

Mr Wendler Pedersen, Chairman of the Consumer Complaints Board, gave an account of the means of consumer protection in Denmark.

Consumer protection is based essentially on two laws, one on trading practices, which entered into force on 1 May 1975, and one setting up the Consumers' Complaints Board, which entered into force on 1 June 1975. Mr Wendler Pedersen outlined the background to the law on trading practices and described its main principles and general structure.

It makes two major innovations : the creation of the post of Ombudsman to protect consumers and the granting of exclusive nation-wide jurisdiction for matters concerning trading practices to the Copenhagen Maritime and Commercial Court.

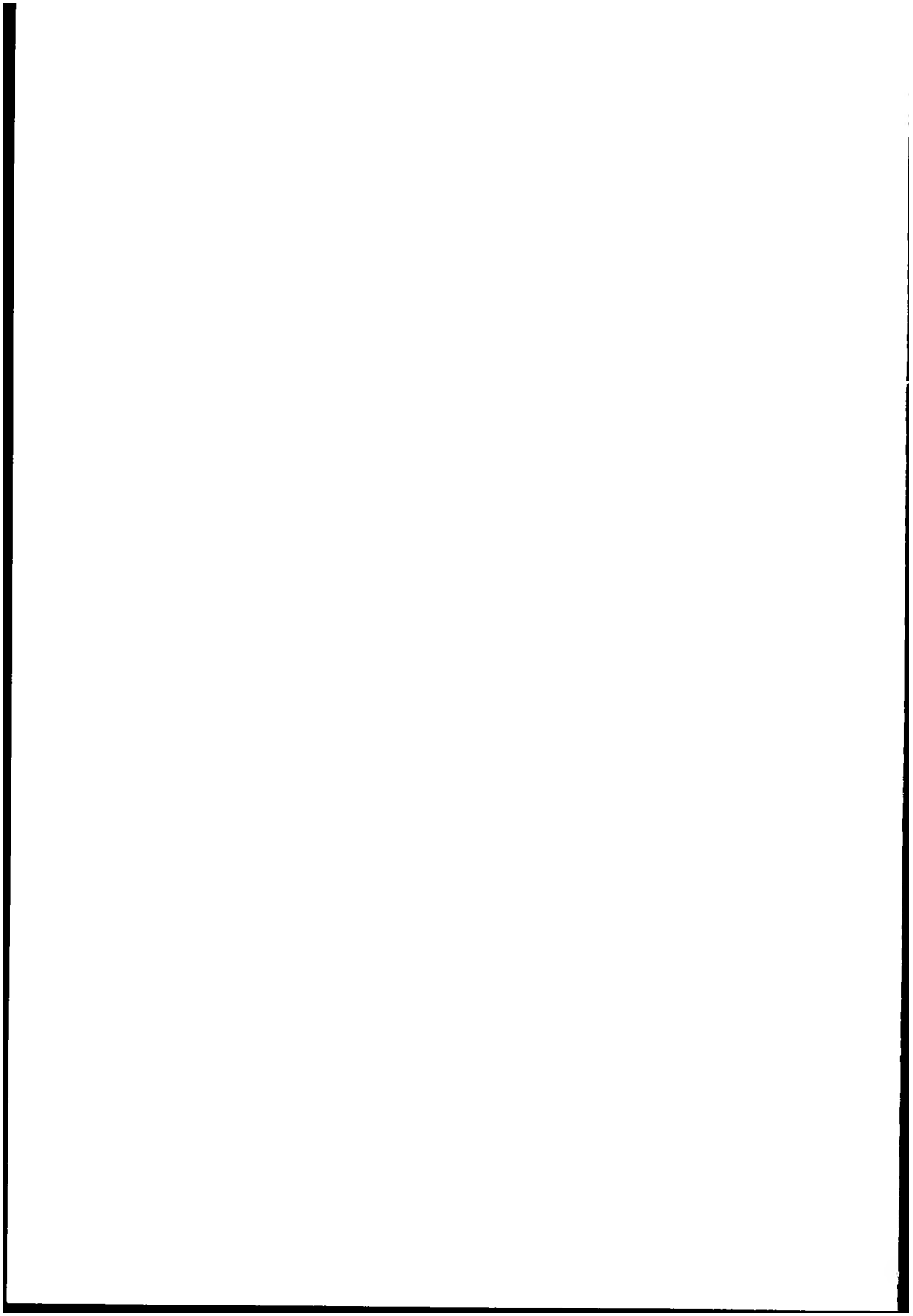
The Consumer Ombudsman is a senior official in charge of his own department, which is responsible to the Ministry of Commerce. His main function is to ensure compliance with the law on fair trading practices.

The law setting up the Complaints Board stipulates that only the final consumer may seek redress, and only against traders acting in the exercise of their occupation. Operations concerning real estate are not within its jurisdiction. The same applies to public sector operations. However, the Minister of Commerce may confer competence on it in respect of goods or services supplied by public undertakings. Applications involving a special procedure and operations concerning motor vehicles (purchase, repairs and maintenance), foodstuffs, professional services, credit and insurance are also excluded from its jurisdiction.

It consists of 52 members representing consumers and traders, it is presided over by a jurist with a judge's training. It has a secretariat at its disposal.

CONSUMER PROTECTION IN DENMARK THROUGH THE COURTS AND BODIES ANALOGOUS TO THE COURTS

by H. Wendler Pedersen
Chairman of the Consumer Complaints Board



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A. Marketing Act

1. Preparatory work on the Act

The Marketing Act, which entered into force on 1 May 1975 and replaced the earlier Law on Unfair Competition of 1912, is the result of work over a long period in Denmark on the reform of competition legislation. This work began in 1959 when the Danish Government appointed a Consultative Committee which, with analogous committees in the other Scandinavian countries, was commissioned to examine whether, in view of developments in the field of competition, the current law still fully met the requirements of trade, industry and consumers in relation to legislation for the promotion of equal and healthy competition. The Danish Committee submitted its final report in 1966. The Committee was divided between a majority and a minority, both of which prepared a new draft law on competition. The Government endorsed the draft of the Committee's majority, and a Bill for a new law on competition was submitted at the beginning of 1967. This was essentially based upon the majority's draft. However, the Government's Bill was never finally adopted by the Danish Parliament.

Following this attempt to pass a Bill, it was decided that the question of reform of the legislation on competition should be once again investigated by a committee. The assignment was given to a Consumer Commission appointed by the Government at the end of 1969. The Commission, which consisted of representatives of many public authorities, consumer organizations and large industrial organizations, was commissioned to prepare an overall assessment of the consumer field to act as a basis for the drafting of an up-to-date policy on consumer affairs. It was specially emphasized in the Commission's terms of reference that the position of consumers within areas of legislation of special interest in this connexion, for example the Law on Competition, should be examined. The Commission completed its work on competition legislation in 1973 and submitted a unanimous report headed Marketing, Consumer Ombudsman, Consumer Complaints Board. This included a draft law on marketing. In the Spring of 1974, the Government submitted a Bill for a law on marketing corresponding in general to the Commission's draft. This Bill was finally adopted in all its essential points by the Danish Parliament in July 1974.

2. Main principles of the Act

The explanatory notes to the Bill emphasized, inter alia, that

the draft was based on the assumption that in the great majority of cases consumers and industry have a congruent interest in the exercise of good marketing practice in trade and industry, but that society's interests must be also satisfied in the Law. The Law is therefore based upon three equal considerations : consideration of consumers, consideration of industrial circumstances and consideration of the interests of society. In comparison with the previous Law on Competition, which was directed particularly towards the mutual relationship between businessmen, as its heading - law on unfair competition - suggests, there has been the fundamental development that consideration of consumers' and consideration of society's interests combine independently and equally with the interests of trade and industry. This development is of considerable importance in understanding the Law's substantive provisions. It is drafted in principle along the lines of the Law on Competition. It has an omnibus clause and a number of special provisions regulating separate marketing questions. The drafting here does not per se differ substantially from the regulations in the Law on Competition. It should however be noted that the emphasis given to the fact that one of the main purposes of the Law is to protect consumer interests must be expected to result in alteration of the interpretation and application of many of the substantive regulations already known from the earlier Law on Competition.

The most important innovation in the Marketing Act in comparison with the earlier Law on Competition is, however, of a procedural nature. This consists on the one hand in the Maritime and Commercial Court in Copenhagen becoming in principle a country-wide body for marketing cases, and on the other hand in the establishment of a Consumer Ombudsman institution to act as the supervisory and prosecuting body under the Law on Competition. The purpose of these procedural innovations, which will be described in more detail later, has been to render the legislation more effective.

3. Marketing Act, Sec. 1. Omnibus Clause

The most important of the Marketing Act's substantive provisions is Sec. 1 of the Act under which no action may be taken by private enterprises and public undertakings equivalent thereto that is contrary to good marketing practice. These provisions replace the earlier omnibus clause in Sec. 15 of the Law on Competition, under which actions carried out for the purposes of business that were contrary to honest business practice resulted in liability to damages and could be

prohibited by the courts, even if the actions were not covered by the Law's other provisions. In the Marketing Act, the omnibus clause has been brought forward to become Sec. 1 of the Act. This has been done to emphasize the significance of this regulation. The explanatory notes to the Act define marketing as any action carried out for business purposes. The regulation covers all stages of marketing, for example the distribution chain : raw material supplier - manufacturer - wholesaler - retailer - consumer. The regulation covers actions directed forwards towards future distribution chains and actions directed backwards towards earlier distribution chains. Every link in the trader's marketing is covered by the provision, including advertising, entering into agreements and service activities. Future servicing is also covered by the regulation. Public enterprise is placed on an equal footing with private enterprise under the regulation, so that, for example, public transportation of passengers and goods is to be evaluated under the same guidelines as analogous private undertakings. Under the Act there is an interaction between the omnibus clause and the special provisions, in the sense that the special provisions will cover circumstances that are generally considered to be contrary to good marketing practice, while the omnibus clause can be applied to supplement the special provisions.

Because the content of this regulation is more one of principle than of precision, contravention of the omnibus clause does not of itself involve a penalty. Under the Act, the Consumer Ombudsman must attempt by negotiation to cause traders to refrain from actions contrary to good marketing practice. If he does not succeed, an injunction can be issued against the action, with the effect that contravention of such an injunction is punishable.

It is clear that in the period immediately after the Act's entry into force doubt may arise in trade and industry and among consumers as to the scope of the legal standard, "good marketing practice".

There is, however, reason to believe that the extensive body of practice that has been built up in connexion with the provisions of the earlier Law on Competition relating to the prohibition of actions contrary to "honest business practice" will form a basis for application of the Law's Sec. 1. Further, the standards that trade and industry have themselves formulated for good business practice, including the code of advertising practice drawn up by the International Chamber of Commerce (ICC), will be applicable in evaluating whether an action is contrary to good marketing practice. In Denmark, the Danish Advertising Tribunal, a private body established in 1971, has had extensive experience in applying a code of

advertising practice, and has decisively influenced the development of the present advertising standards used in Danish trade and industry. This practice will undoubtedly be of great value in interpreting the Act's Sec. 1. For example, the omnibus clause refers to many known marketing standards. In particular, the emphasis given in the Act's explanatory notes to consumer protection as a crucial consideration may well lead to a re-assessment of practice to date. Over and above this, it may be expected that completely new fields of marketing will be subsumed in the implementation of the Law.

An example of a new area whose regulation may be expected under the omnibus clause is the standard contract in the consumer field. The explanatory notes to the Act make a particular point that it will be possible to apply the omnibus clause to give protection against unreasonnable conditions in standard contracts. The background to this is the general experience, probably kwown in all countries where standard contracts in the consumer field are fairly common, that unreasonable contractual conditions are often forced upon the consumer under the standard contract. His usual position as the weaker contracting party means that he generally has no practical possibility of altering the standard conditions, which are usually formulated by the trader or his trade organization. The consumer has the choice of buying under the terms offered or not buying at all. This position of power enables the trader to employ the standard contract to protect his own interests unilaterally, and may involve a departure from those rules of law whose operation can be set aside by agreement between the parties. Such rules of law typically express a balance between both contracting parties' reasonable interests.

In spheres of the law such as insurance, transport and credit purchase that are dominated by standard contracts the omnibus clause may prove to be an effective means of protection for consumers. In comparison with other methods of combating unreasonable conditions in standard contracts, such as regulations whose operation cannot be set aside by agreement between the parties or omnibus clauses under civil law enforced by the sanction of invalidity, there is good reason to believe that the injunction system under the Marketing Act will have several advantages. First, it may readily be imagined that, although a term in an agreement is not in itself so unreasonable that it can be declared invalid, it may be considered within the context in which it is placed to be contrary to good marketing practice, so that it can be prohibited. The omnibus clause of the Marketing Act may therefore be expected to provide wider protection for the consumer against unreasonable terms of agreement in standard contracts in the

consumer field than is possible by means of invalidity rules under civil law. Secondly, the omnibus clause will prove to be more effective because the initiative in intervening against unreasonable terms of agreement rests with the Consumer Ombudsman as the central public authority, whereas rules of invalidity under civil law directed against unreasonable terms of agreement normally require an initiative on the part of the individual consumer. Finally, an injunction under the omnibus clause against certain terms in standard contracts will in practice lead to their deletion from the contracts, so ensuring that these terms are no longer used. This result could not be achieved with certainty if the terms were considered to be merely invalid, since there would still be a risk of the invalid terms being employed in standard contracts. As an example of this, recently published investigations into the standard contracts of the Danish hire-purchase industry have shown that to a significant extent the contracts employ terms that are invalid under the Hire-Purchase Act. The risk here is that these invalid hire-purchase terms may become of significance if the consumer in fact complies with these terms simply because he does not realize that they are invalid.

The application of the omnibus clause as a means of protection for the consumer is not restricted to standard contracts. Important consumer areas in which the application of the omnibus clause has been introduced into the public debate include many special forms of selling, such as door-to-door sales, telephone sales, mail order sales and "excursion"± sales. The main intention was that the omnibus clause should be employed to set minimum requirements in order to control the methods used in these sales. Examples of such minimum requirements are : that it must be indicated immediately upon contacting the consumer that the object is a sale; that the salesman must identify himself clearly, so that the purchaser knows to whom he can complain; that any right of the purchaser to return the goods is supplemented by information concerning the conditions and possible expense involved for the purchaser if he utilizes this right.

Finally, it may be mentioned that the Consumer Ombudsman is considering an investigation into the marketing of real property to buyers, using the omnibus clause as a basis. The purpose of this is in part to secure more informative marketing and in part to assess critically many of the practices and standard terms in this field.

± Translator's note : A trader arranges a coach party to combine pleasure with the sale of his goods.

4. Some other substantive provisions of the Marketing Act

a) Sec. 2 of the Act

Under the regulation, the use of incorrect, confusing or unreasonably inadequate statements that have an effect upon the demand or supply of goods, real property and other property, including performances and services, is prohibited.

The regulation, which is of particular importance in advertising, is not restricted to written statements but includes any statement whatever its form. In the same way as an actual advertisement, the statement's addressee may be an unspecified circle, but may also be a specific group of persons or an individual. As in Sec. 1 of the Act, the regulation covers every stage of distribution and is not merely directed towards the owner or responsible head of the business in whose interest the action is taken. For example, employees and advertising agencies will also fall under this rule. The explanatory statements express no opinion as to where the burden of proof lies, that a statement is incorrect, confusing or unreasonably inadequate. The Consumer Commission's final report says that this must depend upon the detailed content of the statement, and particularly upon the extent to which and with what degree of force it is asserted that the item marketed has certain properties. There has been a broadening in comparison with the earlier legislation on competition in that the use of unreasonably inadequate statements is also prohibited. The idea behind this provision is that it must be possible to strike at omissions and suppressions of facts if they can be considered as having an effect upon supply and demand. Under this provision, there is no positive obligation upon the trader to give information, but if he wishes to give information about his product this must be done in such a manner that the product information is not unreasonably inadequate.

Sec. 2 of the Act also prohibits statements and practices that - whether or not deception can be proved - are unfair in relation to other tradesmen or consumers because of their form or because they include irrelevant circumstances. The explanatory notes to the Bill give some examples of statements that may be unfair because of their form : where a trader exhibits a competitor's good under particularly unfavourable conditions, or refers to the goods using derogatory expressions in such a manner as to bring these goods into discredit among purchasers and so affect demand; statements that are unfair because they relate to irrelevant circumstances, the private life of the competitor or the

special circumstances of certain population groups - including consumer groups - such as of faith, custom or political opinion. According to the explanatory notes on the Bill, methods that may be unfair either because of their special form or because they include special circumstances may be certain forms of pub sales* and door-to-door sales resulting in the abuse of weak consumer groups, and so-called pyramid systems where the salesmen pay to participate and in return have prospects of gain when they employ further salesmen.

Contravention of the provisions of Sec. 2 directly involves a penalty.

b) Sec. 3 of the Act

The regulation provides that when an offer is made or an agreement concluded, or under other circumstances at the time of delivery, proper guidance should be given according to the type of goods or service if such guidance is of importance in assessing the nature or properties of the goods or service, including in particular useful qualities, durability, dangers and possibility of maintenance.

These provisions are not enforceable under criminal law, but have the nature of a legal standard whose content will depend upon the practice built up around the provisions.

c) Sec. 4 of the Act

This regulation provides that a declaration that a guarantee or the like is granted should be employed only in so far as the declaration gives to the recipient a legal status better than that which he has according to law.

At face value, descriptions such as guarantee or the like give an impression that the guarantee provides a qualified legal protection that would not be available under the general rules of law. The provision is directed against the abuse where a trader, under cover of the term "guarantee" or the like, reduces the recipient's legal status - typically by declarations of limitation of liability or exemption from liability - in comparison with the legal status he would have had by virtue of the general rules of law. When assessing whether a guarantee gives the recipient a legal status better than that under the relevant law, the total content of the guarantee must be taken into consideration.

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* Translator's note : A trader takes a room in a pub, offers drinks and sells his goods.

The provision is not directly enforceable under criminal law, but contravention can be met by an injunction whose contravention is so enforceable.

d) Sec. 6 of the Act

This regulation prohibits traders, when selling goods or real property to consumers or when providing performances or services for consumers, from providing a makeweight or gift or anything equivalent thereto unless the makeweight or gift is of insignificant value. Advertising illegal makeweights or gifts is also prohibited.

A makeweight or gift refers to an additional performance that is given without separate payment. A performance of exactly the same kind as the main performance is not, however, considered as a makeweight or gift.

In contrast to the provisions referred to earlier, this regulation applies only to makeweights or gifts to consumers, since the situation is not controlled in the earlier distribution stages.

The regulation is directly enforceable under criminal law.

e) Sec. 8 of the Act

Under this regulation, the trader is not permitted to distribute prizes by drawing lots, by competitions or by other events in which the outcome depends wholly or in part upon chance.

Under this regulation, the trader is prohibited from arranging so-called chance competitions in which the outcome depends wholly or in part upon chance. This prohibition applies whether or not an obligation to buy is associated with participation. The exception to this prohibition is that the publisher of a periodical may arrange a lottery for the distribution of prizes in connexion with the solution of competitions. This exception is based upon the fact that competitions form part of the entertainment material traditionally to be found in daily newspapers, weeklies and other periodicals.

The regulation does not prohibit traders from arranging achievement competitions. The holding of such a competition may however be considered contrary to good marketing practice, particularly if it is seen as an attempt to evade the provisions of Sec. 8. For an achievement competition to be accepted, it is presumably necessary for it to have a certain

independent value which will be utilized by the competition's advertisers.

Contravention of this regulation is directly enforceable under criminal law.

5. Procedural provisions of the Act

As referred to under 2, the most important innovation in comparison with the previous Law on Competition is of a procedural nature, and consists on the one hand in the fact that a single court, the Maritime and Commercial Court in Copenhagen, has been given in principle country-wide jurisdiction in marketing matters, and on the other hand in the establishment of a Consumer Ombudsman institution. These innovations are founded in the recognition that modern developments have given rise to a need for effective control over the entire marketing field, and that this control could not be adequately ensured by the privately-established bodies.

a) Consumer Ombudsman

The Consumer Ombudsman is required to meet the general conditions necessary for appointment as a Danish judge. He need not, however, have the legal status of a judge or of a parliamentary ombudsman independent of the Administration. He is, however, a senior civil servant, who is at the same time head of his own department. The Consumer Ombudsman's department consists, apart from himself, of one legal head of section, four legal assistants and four clerical staff. The Consumer Ombudsman's decisions cannot be referred to any other administrative authority, but in the general performance of his duties he comes under the Ministry of Economics.

The Consumer Ombudsman has several assignments under the Law. His central assignment is to ensure that there is no infringement of good marketing practice or of the Law's other provisions. The law does not prescribe in detail how this supervision is to be effected. For practical reasons, complete supervision of the entire field of marketing cannot be achieved. It has however been shown that in practice supervision has been assisted and facilitated by representations and complaints from individual consumers and traders, organizations, other authorities and the Press. The Consumer Ombudsman's own supervision must for practical reasons consist primarily of various forms of random investigation. In this connexion, it should be noted

that the Consumer Ombudsman may demand for the purposes of his supervisory and other duties all information he considers necessary for his activities, which include reaching a decision on whether a case falls under the provisions of the Law. Disregard of a request for information is punishable by fine.

The Consumer Ombudsman has also been assigned under the Law the duty of seeking to influence traders to act in accordance with the Law. The Consumer Ombudsman's most important means to this end is negotiation with a view to voluntary consent. It is assumed that negotiation will be employed to achieve general control and in actual intervention. The intention is therefore that the Consumer Ombudsman should by negotiation with trade and industry acquire for himself a position of influence over, for example, the general content of standard contracts and of advertising so as to protect consumers' legitimate interests. In relation to actual contraventions of the Law, his main procedure will also be negotiation with a view to reaching a voluntary solution. This procedure is quick and informal, and will often prove more effective than costly and time-consuming Court hearings. Infringement of agreements concluded between the Consumer Ombudsman and traders is not legally actionable, which at first sight might appear to be a weakness. In practice, however, it has been shown that traders adhere to by far the greater part of such agreements.

If the Consumer Ombudsman is of the opinion that a trader is acting contrary to the provisions of Secs. 1-5 of the Marketing Act, and if no result can be reached by negotiation, the Consumer Ombudsman may institute civil proceedings to prohibit the action. The Consumer Ombudsman can himself issue a preliminary injunction when there is an apparent risk that the purpose of a (permanent) injunction will be lost if the Court's decision must be awaited. Actions for the confirmation of such preliminary injunctions must be instituted not later than the following weekday. The Consumer Ombudsman's jurisdiction in instituting injunction proceedings under the Marketing Act is not exclusive, since any person with a legal interest may institute such proceedings.

A decision on whether criminal proceedings for contravention of the Marketing Act are to be instituted is not taken by the Consumer Ombudsman but by the customary Public Prosecutor. There is however a condition that proceedings under the Marketing Act will not be instituted unless the Consumer Ombudsman's opinion has been obtained in advance. There is also the possibility that the Consumer Ombudsman may be

appointed prosecutor in such criminal matters.

b) The Maritime and Commercial Court in Copenhagen

Civil cases in which application of the Marketing Act is of essential significance to the result must be brought before the Maritime and Commercial Court in Copenhagen, unless the parties decide otherwise. Apart from the judge, four experts, of whom two represent the consumers and two the traders, normally participate in the hearing of such matters.

The Court may prohibit actions contrary to the Law. Supplementarily, the Court may issue such orders as it considers necessary to ensure compliance with an injunction, and similarly the Court may declare that future agreements in contravention of an injunction are invalid unless the person against whom the injunction is issued establishes in the individual case that the action prohibited was of insignificant importance to the other party.

Where specific knowledge of the marketing situation is considered essential in reaching a decision in the matter, public criminal cases relating to contravention of the Marketing Act are also heard by the Maritime and Commercial Court in Copenhagen. Apart from the judge, four specialists, of whom two represent the consumers and two the traders, normally participate in the hearing of such matters. The normal penalty may be expected to be a fine. It should be noted that the Consumer Commission has clearly assumed that the previous practice under the Law on Competition of modest fines will be abandoned, and that under the Marketing Act such fines will effectively ensure compliance with the Law.

B. The Law concerning the Consumer Complaints Board

1. Preparatory work on the Law

The Law concerning the Consumer Complaints Board entered into effect on 1 June 1975.

Like the Marketing Act, the Law on the Consumer Complaints Board is based upon the work in the Consumer Commission. The Commission's terms of reference specifically emphasized that

it should pinpoint the potential for rapid handling of complaints etc. in a manner satisfactory in every respect for consumers and for trade and industry, and if appropriate present proposals for legislation to this end. The result of the Commission's discussions was published in the report headed Marketing, Consumer Ombudsman, Consumer Complaints Board. This included a draft law, which was in general the Bill presented by the Government in the Spring of 1974. The Bill was finally passed by the Danish Parliament in June 1974.

The following may be quoted from the Consumer Commission's general considerations that formed the basis of the Law :

"In the opinion of the Commission, experience both in this country and abroad has shown a clear need to improve the consumers' opportunities for securing an investigation into conflicts arising from consumer purchases and other agreements within the consumer field".

In this connexion, the Commission refers to the following statement of the Commission's legal committee :

"It became clear during the legal committee's discussions that the absence of legal protection for consumers is not due to error in the substantive legislation, but that it is rather the consequence of an interaction between his ignorance of the rules of law and lack of encouragement to seek judicial investigation. It is easy to take the view that the expense of going to law is disproportionate to the subject matter, and similarly psychological factors often lead to an unwillingness to embark upon legal proceedings. The fact that the Law Reports show only a few decisions within the consumer field reflects an unsatisfactory state of society. It would by no means be inappropriate for an expanded consumer information service to include information on the consumer's legal position. In the opinion of the legal committee, much will be gained additionally if consumers are given quick, cheap and effective access to the investigation of disputes under such forms that the judicial guarantee exists to the necessary extent...".

In the opinion of the Commission, reforms of the handling of consumer matters must be constructed upon interaction between the courts and extra-judicial complaints boards. On this point, the report says, inter alia :

"The Consumer Commission sees ... teamwork between complaints boards and the courts as crucially important. A firm point of departure should therefore be that hearings before extra-judicial bodies do not exclude normal legal scrutiny. The conflicts concerned fall conceptually under the classic jurisdiction of

the courts. At the same time, it must however be recorded that such cases do not at present reach the courts, and that in addition many complaints and appeal boards have arisen that enjoy considerable trust. Not even a thorough reform of court hearings can replace the advantages associated with the complaints boards. Apart from the economic and psychological factors referred to earlier, it may be said of these boards that they have, or quickly acquire, an expertise which of itself invests them with considerable authority, and that also, during hearings before the boards, there is a much smoother transition from cases in which a complaint is quickly shown to contain no real dispute and cases of substantial legal disagreement between the parties".

The Consumer Commission was of the opinion that a satisfactory extra-judicial complaints board procedure cannot be achieved simply by extending and harmonizing the existing voluntary complaints and appeal boards. This is because it has been realized in recent years that the maintenance of certain of the existing complaints and appeal boards involves financial problems and also because it is considered that it would not be possible in practice to expand the private complaints and appeal boards to cover the entire consumer field.

2. Jurisdiction of the Consumer Complaints Board

a) The Law's principal regulation

The Law's principal regulation concerning the Consumer Complaints Board's jurisdiction provides for complaints from consumers relating to goods, performances or services to be brought before the Consumer Complaints Board.

The Law's consumer concept is set out in the explanatory notes, which state that only the last link in the distribution chain may bring complaints before the Board. This does not however exclude a trader from bringing a complaint concerning goods he has used in his undertaking provided they are not included in the undertaking's production or acquired for resale.

The text of the Law does not say to whom complaints are to be directed, but it is clear from the explanatory notes that the regulation covers only complaints against traders. Although the explanatory notes do not say this expressly, it is also necessary that the trader should be acting within his own undertaking.

These are complaints concerning goods, performances and services that can be brought before the Consumer Complaints Board. The purchase of real property falls outside the scope of the Board. No attempt is made further to define the vague and very comprehensive term "performances and services" in the Commission's final report or in the explanatory notes to the Law. On this point, the Consumer Commission states that it considers it right to avoid curbing the Board's activities in the general description of the Board's jurisdiction. Further, in the preparatory work on the Law, no attempt was made to list the performances and services that were specially in mind. The following may however be mentioned as examples of such services of special interest to the consumer : maintenance, repairs and conversions in connexion with movables and real property, various forms of personal services, transportation services and services of an "incorporeal" nature such as teaching, consultation etc.

According to the Consumer Commission, the experience of the present complaints and appeal boards is that the board procedure is especially suited for the hearing of disputes of a technical nature, whereas because of their methods the boards are not suited to the same extent for considering disputes of a legal nature, such as interpretation of contracts or questions of whether a binding agreement has in fact been concluded. The Commission considers however that it is in practice impossible to make a clear distinction between the technical assessment of a product or the properties of a service and the judicial evaluation of the case. It also states :

"Since property law legislation is a typical example of a law out of which contracting parties may contract themselves, and is thus superseded by countervailing agreements, what is stated applies not only to the effects of breaches of contract that may be provided for in ordinary legislation - including whether the complainant should receive compensation, and if so its extent - but also to the individual agreement's or standard agreement's significance to the consequences of a breach of contract. In the same way as application of the concept of defect requires a judicial evaluation in individual cases, so must the significance that can be given to, for example, an agreed price for the purchaser's quality expectations also be considered as a judicial decision. In practice, therefore, as the boards' experience and expertise increase, they are forced to include more and more elements in their evaluation of the matter. Experience shows that even questions of the assessment of evidence can present themselves in such a standardized manner within groups of cases that a

board has the courage to consider them when reaching its decision. It must be conceded that informal procedures involve the risk of misunderstanding arising in relation to the facts of a case and the parties' standing in the case. In addition, if the parties exceptionally appear before the Board they do not make statements on oath. It is therefore clear that the Consumer Complaints Board must refuse to adopt a position on questions that remain obscure or are incompletely clarified and relate to the testimony. It does not however necessarily follow from this that the field of activity of the Complaints Board should be demarcated in a negative manner. For example, in these duties the Board should have the right during the initial phases of a case to include all its aspects without any doubt subsequently arising as to the justification of this. Also, during the actual Board hearing, it may safely be left to the Board in individual cases to assess where it will draw the line in arriving at its decision."

The Law's explanatory notes assume that the Board will make a decision judicially assessing the facts of the case. It is not therefore intended that the Board should be able to supplement or deviate from the relevant law and arrive at its decision on a basis of an evaluation in equity. It is, however, expected that the Board's hearing will be able to arrive at an amicable settlement on a basis upon which the Board itself could not make a judgment.

b) The main exemptions

The Consumer Complaints Board's jurisdiction does not directly cover the activities of public authorities, but under Sec. 2 of the Law the Minister of Economics may issue regulations under which goods, performances and services originating from public undertakings may be referred to the Board. The Minister of Economics has decided that the following goods, performances and services originating from public undertakings may be referred to the Consumer Complaints Board :

The supply of electricity, gas, water and heating, and the carriage of passengers and goods.

Under Sec. 3, Para 1, of the Law, complaints for which legislation provides special facilities for complaint, for example complaints against lawyers, fall outside the Board's jurisdiction.

Under Sec. 3, Para 2, of the Law, the Minister of Economics may rule that certain goods, performances and services or sectors of trade are excepted from the Board's activities,

or that complaints are not raised if the price of the goods or services exceeds a certain limit. The explanatory notes to this regulation state that it is intended gradually to build up the Board and to expand it in line with experience. At its establishment, therefore, the Board will have a limited field of activity. The Minister of Economics' Notice concerning the field of activity of the Board states that only complaints from consumers concerning goods, performances and services for which payment amounts to 10,000 kr. or less can be brought before the Consumer Complaints Board. Further, many sectors of trade have been excepted from the Board's initial activities. In practice, the most important exceptions are building materials, work on new constructions, conversions, maintenance and repairs in connexion with real property, and the leasing of real property or parts thereof; motor vehicles, components therefor, maintenance and repair work on motor vehicles; food and drink, performances and services originating from the professions; payments relating to banking and insurance.

Under Sec. 6, the Board's jurisdiction is limited to complaints relating to persons against whom, according to the Administration of Justice Act, an action can be brought before the Danish courts concerning the questions covered by the complaint.

Under Sec. 12, Para 1, of the Law, the Consumer Complaints Board can give authority for complaints that could otherwise be considered by the Board to be heard instead by complaint and appeal boards covering certain trades or other defined areas; see further details on this below under C.

3. Procedure for submitting complaints to the Board, and preparation for the Board's hearing

The submission of a complaint to the Board is conditional upon the consumer having first approached the trader about the matter in vain. Complaints must be submitted on complaint forms prepared by the Consumer Complaints Board. These complaint forms are available from consumer and trade organizations, and at public offices, including court registries, whose staff will assist as necessary in the completion of the forms. Upon submission of the complaint, the complainant must pay a fee of 25 kr., which is returned to him if the complaint is not considered in one of the Board's departments or if the Board upholds the consumer's complaint wholly or in part.

The Consumer Complaints Board has a Secretariat. At present, the Secretariat consists of a legal head of section, three

lawyers and four office staff. The Secretariat acts in a servicing capacity, and its duty is to reply to written, telephone and personal enquiries from consumers. Experience shows that very many enquiries can be answered and settled informally at Secretariat level, so that these enquiries do not result in cases actually coming before the Board.

The preparation of a case as far as the actual Board hearing is carried out in the Secretariat. During its preparation, care is taken that both parties are given an opportunity within certain time limits to make a declaration in consequence of the complaint and in consequence of investigations made or declarations received.

The Secretariat has authority to seek an amicable settlement by an arrangement fair to both parties. The Secretariat is also authorized to refuse complaints that it considers unsuitable for hearing by the Board and complaints that it considers to be clearly without foundation.

4. Composition and procedure of the Consumer Complaints Board

Under Sec. 4 of the Law, the Board consists of a group of Chairmen and representatives of consumer and trade interests, who are appointed by the Minister of Economics. At present, one legally qualified Chairman has been appointed, who must meet the general conditions for appointment as a Danish judge. Fifty-two Board members representing consumers and traders have been appointed. They participate in turn in the work of the Board.

Under Sec. 5 of the Law, at least one member of the group of Chairmen must participate when a case is heard by the Board. Further, at least two members appointed by the group of Chairmen must participate from among the representatives of consumer and trade interests, these being equally represented.

Under the Law, it is for the Board to decide whether it can reach a decision in individual cases. The Board may therefore reject complaints that it considers unsuitable for hearing by the Board. By way of example the explanatory notes set out complaints whose decision depends upon interpretation of evidence or upon a difficult evaluation of the law.

The Board's proceedings are in writing. It will not usually be necessary to appear in person before the Board, although this is not excluded.

Neither of the parties pays the costs of the Board's proceedings to the other party.

The Board itself meets the cost of obtaining statements from experts which the Board considers necessary for consideration of the case.

The Board reaches its decisions by a majority of votes.

The Board's decisions, which are published, cannot be referred to any other administrative authority. Likewise, it follows from the Board's character and composition that in its activities it does not accept instructions in the consideration and decision of individual cases.

5. Some information on the practice of the Consumer Complaints Board

In the first four months of the Board's activities, the Secretariat received some 2,850 first-time enquiries from consumers. These involved about 2,000 enquiries by telephone, about 100 personal calls and about 750 written enquiries.

The enquiries were distributed as follows over some of the most important fields falling under the jurisdiction of the Consumer Complaints Board :

Standard contracts relating to door-to-door sales of periodicals and books	about 125 enquiries
Purchase and repair of photographic equipment, watches and optical products	about 125 "
Purchase and repair of bicycles, mopeds and boats	about 50 "
Furniture, furnishings and household products	about 250 "
Clothing	about 275 "
Hardware	about 150 "

It is too early to be more precise about consumer areas with a particularly high complaints-frequency. It is, however, already clear that certain special types of sale, such as door-to-door sales, other sales outside the seller's fixed place of business and mail-order sales, give rise to an exceptional number of complaints. At the same time, it must be emphasized that these complaints have been concentrated on a few traders. In the cases that the Board has considered, it

has been found that by far the majority of consumers' complaints were justified. The Board's reaction has mainly been that agreements concluded could be set aside as invalid, or that because of substantial defect in the articles purchased consumers were entitled to cancel the purchase.

C. The private complaints and appeal boards, and their relation to the Consumer Complaints Board

Upon entry into force of the Law on the Consumer Complaints Board, there existed a substantial number of private complaints and appeal boards, which together covered considerable sections of the consumer field. These boards were not simply dissolved when the Law entered into effect, and an approval scheme was established for those boards that wished to continue their activities. An opportunity was also given for new boards to be set up after entry into effect of the Law. This scheme is based upon the fact that co-operation between consumers and trade representatives in voluntary boards contains per se something of value; similarly, there is no reason to burden the public economy in areas where there are complaint arrangements functioning to the satisfaction of consumers and traders. Under the Law, it is the Consumer Complaints Board that approves private complaints and appeal boards. The effect of such approval is that the Consumer Complaints Board cannot itself consider complaints in areas where there are approved private complaints or appeal boards, and the decisions of such complaints and appeal boards cannot be referred to the Consumer Complaints Board as a court of recourse.

Approval can be granted only if the complaints or appeal board's regulations contain provisions relating to the board's composition and procedure that are satisfactory to the parties. An approval may have a time limit, and may be revoked if the conditions for approval are considered no longer to exist. The Consumer Complaints Board has drawn up some guidelines on the approval of private complaints and appeal boards, the most important of which are as follows :

1° The board should be composed of an equal number of representatives from consumer and trade organizations.

2° It should be ensured that the board has the necessary legal knowledge when considering complaints, where possible by appointing a lawyer as impartial chairman of the board.

3° Disqualification rules are established for the board's members and for employees of the board's secretariat.

4° The board's activities should cover all or the greater part of

the trading activities within the trade or sector concerned.

5° It should be ensured that both parties have an opportunity - within certain stated time limits - to submit declarations in the matter, and similarly it must be ensured that each party is acquainted with information from the opposing party that is considered to be of importance in the settlement of the matter and of documentary specialist opinions for the board's consideration.

6° The board must reach a decision following judicial and specialist evaluation of the facts of the matter. The board may however settle the case amicably on a basis upon which it could not itself reach a decision.

7° Decisions in individual cases are reached at a meeting of the board in which all the board's members must take part, and in which each board member must have access to all information relating to the matter. Decisions are to be reached by an ordinary majority of votes.

8° The board's decisions and settlements must be in writing. Decisions must be accompanied by reasons. Decisions and settlements must be signed by the board's chairman, or by whomever he may authorize to sign.

9° The parties must be given a copy of the decision or the settlement, and similarly they must be informed of the rules for submitting the case to the Courts.

10° Neither of the parties pays the costs of the board's proceedings to the other party.

11° The board's decision must be accessible to the public.

The Consumer Complaints Board's decisions on the approval of private complaints and appeal boards may be referred to the Minister of Economics.

With effect until 1 January 1976, the Consumer Complaints Board has approved the following private complaints and appeal boards :

Appeal Board for Footwear, Assessment Board for the Fur Trade, Appeal Board for Electric and Gas Domestic Appliances, Appeal Board for Radio and Television, travel agents, dry cleaning, some brands of textiles, bricklaying, insurances.

D. Relations between the courts, the Consumer Complaints Board and the approved private complaints and appeal boards

a) Ensuring that a complaint can be submitted to and considered by the Consumer Complaints Board or an approved private complaints and appeal board

The Law excludes a matter being considered both by the courts and by the Consumer Complaints Board or an approved private complaints and appeal board. The Law so provides that the parties in the matter cannot bring an action before the courts relating to the questions covered by the complaint while a case is pending with the Consumer Complaints Board or an approved private complaints or appeal board.

In the event that a matter has been brought before the courts and the consumer wishes it to be referred to the Consumer Complaints Board or to a private complaints and appeal board, the court must adjourn the matter for an indefinite period. The court must inform the consumer of his right to have the matter referred to the Consumer Complaints Board or to an approved private complaint or appeal board. The consumer's claim is absolute and the courts may not give an opinion on whether or not it is reasonable.

b) Enforcement of decisions reached by the Consumer Complaints Board or an approved private complaints or appeal board

Neither the Consumer Complaints Board's decisions nor decisions arrived at by approved private complaints and appeal boards are enforceable. Under the Law, each of the parties can bring a matter before the courts where the boards have arrived at a decision in the matter. If the boards' decisions are not complied with, the Consumer Ombudsman brings the matter before the courts at the complainant's request and on his behalf. This means, inter alia, that a consumer who has been successful wholly or in part before the Consumer Complaints Board or an approved private complaints or appeal board, is relieved of preparing a writ and of the practical problems associated with bringing a matter before the courts.

A further aspect of the arrangements is that consumers who meet the financial conditions for legal aid are granted legal aid in cases brought by the consumer (or Consumer Ombudsman)

for implementation of a decision arrived at by the Consumer Complaints Board or an approved private complaints or appeal board, or of an amicable settlement concluded before the boards. This also applies if the case is brought by the opposing party requesting amendment of the decision or amicable settlement to the disadvantage of the consumer. The consumer shall not pay the costs of the opposing party if he loses the case; any costs of the opposing party are met from the public purse.

There is no precise information on what proportion of the Danish population meets the financial conditions for the granting of legal aid. The requirements are, however, so relatively light that an estimated 80% of the population should receive legal aid.

Regulations No 192 of 23rd May 1975
issued by the Ministry of Commerce

APPENDIX W. PEDERSEN

THE DANISH CONSUMER COMPLAINTS BOARD (RULES OF PROCEDURE) REGULATIONS 1975

The Minister of Commerce, in exercise of the powers conferred on him by section 4(3) of the Danish Consumer Complaints Board Act. No 305 of 14th June 1974, hereby makes the following Regulations :

1.-(1) The Consumer Complaints Board ("the Board") shall consist of a body of chairmen (1 chairman and deputy chairmen if required) and representatives of the interests of consumers and of trade and industry.

(2) The chairmen shall possess the qualifications and fulfil the general conditions necessary for appointment as a judge and shall not have any special interest in consumer organizations or in the organizations of trade and industry. The representatives of consumers and of trade and industry shall be appointed by the Minister of Commerce for a period of three years at a time on the recommendation of the said consumer organizations and the said organizations of trade and industry.

(3) The Minister of Commerce shall appoint an executive committee for the Board consisting of the chairman and 4 representatives of the Board members providing equal representation to consumers and trade and industry.

(4) The Board shall be assisted by a secretariat; - the day-to-day management of the secretariat shall be in the hands of a person holding a law degree.

2.-(1) The Board shall deal with complaints by consumers in relation to goods or services supplied or work performed by trades.

(2) No complaints can be brought before the Board against traders, relating to goods, work or services which are outside the jurisdiction of the Board pursuant to the Danish Consumer Complaints Board (Jurisdiction) Regulations issued by the Minister of Commerce. The same shall apply to complaints against traders, relating to goods, work or services if the said complaint can be dealt with by approved private

complaints boards or tribunals.

3.-(1) Moreover, complaints may be brought before the Board by consumers relating to goods or services supplied or work performed by public bodies to the extent determined by the Minister of Commerce. The term "trader" shall hereinafter include the said public bodies.

4.-(1) Complaints for which a special procedure has been prescribed by legislation shall be outside the jurisdiction of the Board.

5.-(1) A complaint may be made against any person who, under the provisions of the Danish Administration of Justice Act, can be sued in a Danish court on the matter to which the complaint relates.

6.-(1) No person may take part in the hearing of a complaint -

(a) who has a special personal or economic interest in the outcome of the case or is representing or formerly represented a party having such an interest;

(b) who is married or related by blood or marriage, in the direct line of ascent or descent or in the collateral branch as closely as first cousins, to or intimately connected with a party having a special personal or economic interest in the outcome of the case or who is representing a party having such an interest;

(c) if any other reason gives rise to doubt about his being completely impartial.

(2) Any person to whom any of the aforesaid limitations applies shall without delay inform the chairman of the Board to that effect.

(3) The chairman of the Board shall determine if a person shall be barred from taking part in the hearing of a case in pursuance of the provision in Regulation 6(1).

7.-(1) It shall be the task of the secretariat to answer all applications to the Board, whether in writing, on the telephone or personally, and to prepare the cases for the relevant divisions of the Board.

(2) The secretariat shall see that the following conditions of a complaint being taken up by one of the divisions of the Board are complied with -

(a) that the consumer has applied to the trader in vain;

(b) that the complaint is brought before the Board within 3 months after the trader has rejected the said complaint;

(c) that the complaint is filed on a form issued by the Board;

(d) that a fee of Dkr. 25 is paid when filing the complaint; if the complaint is not dealt with by one of the divisions of the Board, or if the Board sustains the complaint in full or in part the said fee will be returned to the consumer.

The chairman of the Board may grant exemption from the time limit stipulated in Regulation 7(2)(b) where special circumstances justify such exemption.

(3) Where a case brought before a court is referred to the Board at the request of a consumer, the latter shall be deemed to have brought the case before the Board.

8.-(1) The secretariat shall pass on the consumer's complaint to the trader complained against for comment; on return of which the secretariat will submit it to the complainant. The secretariat is also responsible for communicating any information from the other party which is considered to be essential to the resolution of the case and of written expert opinions procured for the investigations of the Board; however, this shall not apply where it is deemed reasonable that the interest of one party in making use of his knowledge of the information supplied by the other party should give way to essential public or private interests.

(2) The secretariat shall fix a time limit (usually 14 days) within which the parties must submit the statements referred to above or any other statements required by the secretariat. The time shall be calculated as from the date of the request by the secretariat to the parties for statements. If the trader omits to make a statement by the expiry of the time, the secretariat can refer the case for hearing by one of the divisions of the Board, which in turn can make a decision on the basis of the available information. If the consumer fails to submit a statement by the expiry of the stipulated time, the secretariat shall be entitled to consider the complaint to have lapsed.

(3) The secretariat shall wind up the case if the trader complies with the demands of the consumer while the case is being prepared. The same shall apply if the consumer withdraws his complaint.

(4) The secretariat may attempt to establish an agreement between the parties. The agreement will be drawn up in writing, a copy of the agreement being forwarded to either party providing for a time limit (usually 30 days) for the

implementation of the agreement. The agreement requires the approval of one of the chairmen.

(5) The secretariat shall refer cases remaining unsettled after the preliminary investigation, and agreements not having been implemented by the expiry of the aforesaid time limit to a division of the Board giving all particulars of the claim. The chairman of the Board may have the person preparing the case in the secretariat present the case for hearing by the relevant division of the Board.

9.-(1) The individual decisions by the Board shall be made at meeting in a division of the Board attended by 1 of the chairmen and 4 Board members (cf. Regulation 12(1)(c), however) representing the interests of consumers and of trade and industry in equal numbers. Minutes shall be kept of the meetings of the various divisions.

(2) The decision shall be made on the basis provided by the secretariat. The division may decide to defer the hearing of a case pending for further information; the division may also call in experts for the hearing; the chairman of the division may allow the parties and witnesses, if any, to appear where special circumstances justify such a measure.

(3) The decision shall be based on a legal assessment of the facts of the case. The division may establish an agreement in a case on a basis upon which a decision cannot be made.

(4) All members of a division of the Board shall make the decision together; decisions are made by simple majority.

(5) The secretariat staff shall be entitled to take part in the deliberations of the Board, always provided that they shall not be allowed to vote.

(6) The decisions and agreements reached by the divisions of the Board shall be in writing. Decisions shall be accompanied by statements of the premises. Both decisions and agreements shall be signed by the chairman of the division. The division shall fix a time limit (usually 30 days) for the compliance with the decision or compromise.

(7) The parties will receive a copy of the decision or the agreement; they will also receive information on the rules for bringing the case before a court of law.

10.-(1) The chairman may determine that a case decided by the Board or in respect of an agreement has been arrived at, shall be

resumed owing to special circumstances, such as –

(a) lawful absence of a party who has been unable to make a statement in the case;

(b) fresh information which would have led to another outcome of the case had it been available for the hearing.

11.-(1) Decisions in leading cases and other cases of public interest are published on the initiative of the chairman.

(2) The secretariat shall submit a quarterly survey of its activities to the Minister of Commerce. The chairman shall prepare an annual report, to be submitted to the Minister of Commerce after the end of the fiscal year.

12.-(1) The executive committee shall decide on the approval of private complaints boards and tribunals in pursuance of article 12 of The Danish Consumer Complaints Board Act; further, the executive committee shall deal with matters of a general nature relating to the hearing of complaints by the Board, including –

(a) matters of recommendations to the Ministry of Commerce concerning the jurisdiction of the Board;

(b) guidelines for the appointment of members for the Board and for their participation in the hearing of the types of cases;

(c) the possible allocation of complaints of a rather simple nature to a division of the Board consisting of just one chairman and 2 members of the Board representing the interests of consumers and of trade and industry in equal numbers;

(d) the possible granting of authority to the secretariat in addition to the instances mentioned in Regulation 7 (2)(a)-(d), to dismiss complaints which are not considered suitable to be dealt with by the Board or which are considered to be entirely without foundation, pursuant to article 7 of the aforesaid Act.

(2) The quorum required for the executive committee to make decisions shall include at least 3 members representing the interests of both consumers and trade and industry. Decisions shall be made by simple majority; the chairman shall have the casting vote.

(3) The executive committee shall be convened by the chairman and when required; the chairman shall be obliged to convene the committee at the earliest possible date on the written

application of 2 members.

13.-(1) The chairman of the Board may authorize a deputy chairman or the head of the secretariat to act for and on his behalf in case he is prevented from attending to his tasks.

14.-(1) These Regulations shall become effective on 1st June 1975.

issued by the Ministry of Commerce

THE DANISH CONSUMER COMPLAINTS BOARD (JURISDICTION) REGULATIONS 1975

The Minister of Commerce, in exercise of the powers conferred on him by sections 2 and 3(2) of the Danish Consumer Complaints Board Act No 305 of 14th June 1974, hereby makes the following Regulations :

1. Complaints by consumers relating to the following goods or services supplied or work performed by public bodies, can be brought before the Danish Consumer Complaints Board ("the Board")

   a. the supply of electricity, gas, water and heating;

   b. the conveyance of passengers and goods.

2. Complaints by consumers in relation to goods, services or work the price of which does not exceed Dkr. 10,000, and which is supplied or performed by a private undertaking, can be brought before the Board, subject to the following exceptions :

   a. machinery, instruments, tools and the like applied directly in the commercial production; components of such machinery, instruments and tools; and work and services in respect of the mentioned productive materials;

   b. building materials and building, conversion, maintenance and repair work performed in respect of real property; lease of real property or of part of a property.

   c. goods inlaid in real property and maintenance and repair work on such goods, with the exception of -
      i) machinery and technical equipment for offices or shops; or
      ii) household appliances, carpets, venetian blinds, etc.

   d. work performed and goods supplied to building and construction enterprises for which the General Provisions issued by the Ministry for Public Works apply;

   e. motor vehicles; parts of such vehicles; and maintenance and repairs to motor vehicles;

   f. food, beverages and tobacco;

   g. medicine etc.;

   h. objects of art, antiques, and other collector's pieces;

i. work and services performed by members of liberal professions, e.g. doctors, dentists, veterinaries, estate agents, architects, consulting engineers;

k. services concerning banking or insurance;

l. work and services within the social sector and education, with the exception of correspondence schools.

3.-(1) Complaints relating to goods, services or work in lines of trade, for which approved private complaints boards and tribunals exists, cannot be brought before the Board (cf. s. 12 of the Act).

(2) At the beginning of each calendar year the Board will publish an inventory of the private complaints boards and tribunals approved in pursuance of s. 12 of the Act.

4. These Regulations shall become effective on 1st June 1975.

THE DANISH MARKETING PRACTICES ACT,
No 297 of 14th June, 1974.

Part I.

General Provisions.

1. This Act shall apply to private business activities and to similar activities undertaken by public bodies. Such activities shall be carried on in accordance with proper marketing practices.

2.-(1) It shall be an offence to make use of any false, misleading, or unreasonably incomplete indication or statement likely to affect the demand for or supply of goods, real or personal property, and work or services.

(2) The provisions of the preceding subsection shall apply also to indications or statements which, because of their form or reference to irrelevant matters, are improper in relation to other persons carrying on a trade or business or to consumers.

(3) It shall be an offence to make use of misleading practices affecting demand or supply in the manner stated in subsection (1) of this section or practices of corresponding effect, if, because of their special form or reference to irrelevant matters, such practices are improper in relation to other persons carrying on a trade or business or to consumers.

(4) The preceding provisions of this section shall apply also to associations and organisations which have as an object the protection of the interests of persons carrying on a trade or business or consumers and to institutions specialising in the testing of merchandise on behalf of consumers with a view to the publication of results.

3. At the time of the making of an offer, the formation of a contract or, where appropriate, the delivery of goods or the supply of services, proper information or instructions shall be provided according to the nature of the goods or services, where such information or instructions are of importance in the evaluation of the nature or quality of the goods or services, especially including fitness for

purpose, durability, the nature of any risks involved, and information as to maintenance.

4. A guarantee, warrant or declaration of a 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.

5. No person carrying on a trade or business shall make use of any trade mark or other distinctive business mark to which he is not legally entitled or make use of his own distinctive business marks in a manner likely to cause such marks to be confused with those of other traders.

Part II.

Prohibition of certain Marketing Practices.

6.-(1) Where a person carrying on a trade or business sells goods or real property to consumers or performs work or provides services for consumers, he shall not provide any collateral gift or similar inducement, unless such gift or inducement is of negligible value. The advertising of any such gift or inducement other than a gift or inducement of negligible value shall similarly be prohibited.

(2) A benefit of exactly the same kind as the principal benefit rendered shall be deemed not to be a collateral gift or similar inducement.

7. Where a person carrying on a trade or business sells goods, performs work, or provides services, he shall not allow a discount or provide any other benefit in the form of stamps, coupons or the like for encashment at a later date, unless each stamp is provided with a clear indication of the identity of the issuer and of its value in Danish currency. The issuer of such stamps, coupons or the like shall exchange them for cash in this country at their nominal value at the time when stamps in an amount to be determined by the Minister of Commerce are required to be exchanged for cash.

8.-(1) No person carrying on a trade or business shall distribute prizes by the drawing of lot, prize competition or other arrangement where the results are wholly or partly dependent on chance.

(2) Notwithstanding the provisions of the preceding subsection a publisher of a periodical shall be permitted to arrange the drawing of lots for the distribution of prizes awarded

in connection with prize competitions.

Part III.

Trade Secrets and Technical Drawings.

9.-(1) No person employed by, cooperating with, or performing work or providing services for a commercial enterprise shall, in an improper manner, acquire or attempt to acquire knowledge or possession of the trade secrets of such enterprise.

(2) Where such person has lawfully acquired knowledge or possession of the trade secrets of the enterprise, he shall not, without proper authority, disclose or make use of such secrets. This provision shall apply for the period of three years after the termination of the employment or of the period of co-operation or the completion of the work or of the provision of the services, as the case may be.

(3) Where a person for the purpose of performing work or for any other business purpose has been entrusted with technical drawings, descriptions, formulae, patterns, models or other information, he shall not, without proper authority, make use of or allow others to make use of such knowledge, information or material.

(4) No person carrying on a trade or business shall make use of a trade secret where knowledge or possession of such trade secret has been acquired in contravention of the preceding provisions of this section.

Part IV.

Labelling and Packaging.

10.-(1) The Minister of Commerce may, after consultation with the central organisations of Danish trade and industry and with the consumer organisations, by regulations provide that certain goods sold by retail (sale to consumer) shall be sold or offered for sale only in prescribed units with respect to number, measure or weight, or with an indication of number, measure or weight affixed to or marked on the goods or their wrapping or packaging; and the Minister may similarly by regulations provide that certain goods sold by retail (sale to consumer) shall be sold or offered for sale only where it is stated whether the goods are Danish or foreign or where the goods bear an indication of the place of origin or production. The Minister may

specify the manner in which the said indication or statement shall be affixed to or marked on the goods and how the expression "place of origin or production" shall be interpreted in each case.

(2) The Minister of Commerce may, after consultation with the central organisations of Danish trade and industry and with the consumer organisations, by regulations provide -

1) that certain trade descriptions or symbols shall be reserved for or applied to goods that comply with certain specified requirements; and

2) that certain goods shall be sold or offered for sale only where such goods or their wrapping or packaging are, in a manner prescribed by the Minister, provided with information relating to the contents and composition of the goods, their durability, directions for use and other properties.

11. Goods of foreign origin shall not be sold or offered for sale with a reproduction or indication of the Danish flag or other national symbol or monument affixed to or marked on the goods or their wrapping or packaging. Similarly, goods of foreign origin shall not be sold or offered for sale if, without proper authority, a portrait of any member or members of the Royal Family is affixed to or marked on the goods or their wrapping or packaging.

12. The Minister of Commerce may, after consultation with the central organisations of Danish trade and industry and with the consumer organisations, by regulations provide the restriction of the right to purchase, sell, and use such packaging or parts thereof as are, in a prescribed manner, either marked with the name or trade mark of any commercial enterprise registered in this country or are marked in a manner reserved exclusively for the packaging of goods of a specific kind. The Minister of Commerce may similarly prohibit wilful destruction of or damage to such packaging.

Part V.

Institution of Proceedings in the Maritime and Commercial Court. Consumers' Ombudsman.

13.-(1) Civil proceedings for the decision of which the application of this Act is of material importance shall be brought before the Copenhagen Maritime and Commercial Court, unless otherwise agreed by the parties.

(2) Public prosecution for an offence under this Act shall be brought before the Copenhagen Maritime and Commercial Court provided that detailed knowledge of marketing practices is considered to be of material importance to the decision of the case. Further, the provisions of Part 63 of the Danish Administration of Justice Act shall apply.

14. The court may issue injunctions prohibiting acts done in contravention of the provisions of this Act.

15.-(1) It shall be the duty of the Consumers' Ombudsman to see that proper marketing practices or any other provisions of this Act or regulations made by the Minister of Commerce in pursuance of this Act are not contravened.

(2) The Consumers' Ombudsman shall, on his own initiative or in consequence of complaints or applications made by others, use his best endeavours by negotiation to induce persons carrying on a trade or business to act in accordance with the provisions of this Act and with the regulations made by the Minister of Commerce in pursuance of this Act.

16.-(1) Civil proceedings with a view to injunctions prohibiting acts done in contravention of Part I of this Act may be brought by the Consumers' Ombudsman.

(2) The Consumers' Ombudsman may issue an interlocutory injunction where there is a reasonable possibility that the object of an injunction referred to in the preceding subsection may not be achieved if the decision of the court has to be awaited. An action to confirm the injunction shall be brought not later than the next following weekday. The provisions of paragraph (1) of section 648 (1), sections 648 (2), 649, 650 and 651 of the Danish Administration of Justice Act shall apply correspondingly and the provisions of sections 628 (1), 629, 633 (2), 634 (2) and (4), 636 (1), 639 and 640 (1) shall apply with the necessary modifications.

(3) Where judgment in a case to confirm an injunction under the provisions of the last preceding subsection cannot be given before the expiration of five weekdays after the institution of proceedings, the court may, in the course of the preparatory stages of the case before the expiry of the said period, order that the injunction shall continue. Before such a decision is made the court shall, as far as possible, give the parties an opportunity to make representations. If the injunction is not confirmed before the expiry of the said period, it shall lapse.

(4) Where the Consumers' Ombudsman has made a statement of claim, the court may, when judgment is given, or at a later date - 1) make such orders as it considers necessary to ensure

that an injunction is complied with; and

2) direct that future agreements which are concluded in contravention of an injunction shall be void, unless the party against whom the injunction has been issued establishes in each case that the subject matter of the injunction was not of material importance to the other party.

17. The Consumers' Ombudsman may require all such information as he considers necessary for the performance of his functions including information considered necessary to decide whether a matter falls within the scope of this Act.

18.-(1) The Consumers' Ombudsman shall possess the qualifications and fulfil the general conditions necessary for appointment as a judge.

(2) Decisions made by the Consumers' Ombudsman under this Act cannot be made the subject of an appeal to any other administrative authority.

(3) The Minister of Commerce shall be empowered to make regulations specifying the functions of the Consumers' Ombudsman.

Part VI.

Prosecutions and Penalties.

19.-(1) Any person guilty of breach of an injunction or non-compliance with an order issued by the court shall be liable to a fine or to mitigated imprisonment (hæfte) for a term not exceeding a period of 6 months.

(2) Any person who fails to give such information as is required of him under section 17 of this Act or, in matters falling within the scope of this Act, gives false or misleading information to the Consumers' Ombudsman shall be liable to a fine, unless the offence carries a more severe penalty under any other enactment.

(3) Any person who is guilty of an offence under sections 2, 6, 7, 8 or 11 of this Act or who wilfully contravenes the provisions of section 5 of this Act shall be liable to a fine, unless the offence carries a more severe penalty under any other enactment. Offences under subsections (2) and (3) of section 2 of this Act consisting in injurious statements made in respect of a person carrying on a trade or business or in respect of any other matters particularly relating to him shall be a cause for private prosecution.

(4) In regulations made under sections 10 and 12 of this Act

fines may be prescribed as the penalty for offences committed under these regulations.

(5) Any person guilty of an offence under section 9 of this Act shall be liable to a fine or to mitigated imprisonment (hæfte) for a term not exceeding 6 months or to ordinary imprisonment for a term not exceeding 2 years. Proceedings may be instituted only at the request of the injured party and shall be dealt with as police cases. The remedies afforded by the provisions of Parts 68, 69, 71, and 72 of the Administration of Justice Act shall apply to the same extent as in cases dealt with by the Public Prosecutor.

(6) Where the offence is committed by a company, co-operative society, private company or other corporate entity, the company, society or corporate entity as such shall be liable to a fine.

Part VII.

Commencement and extent etc.

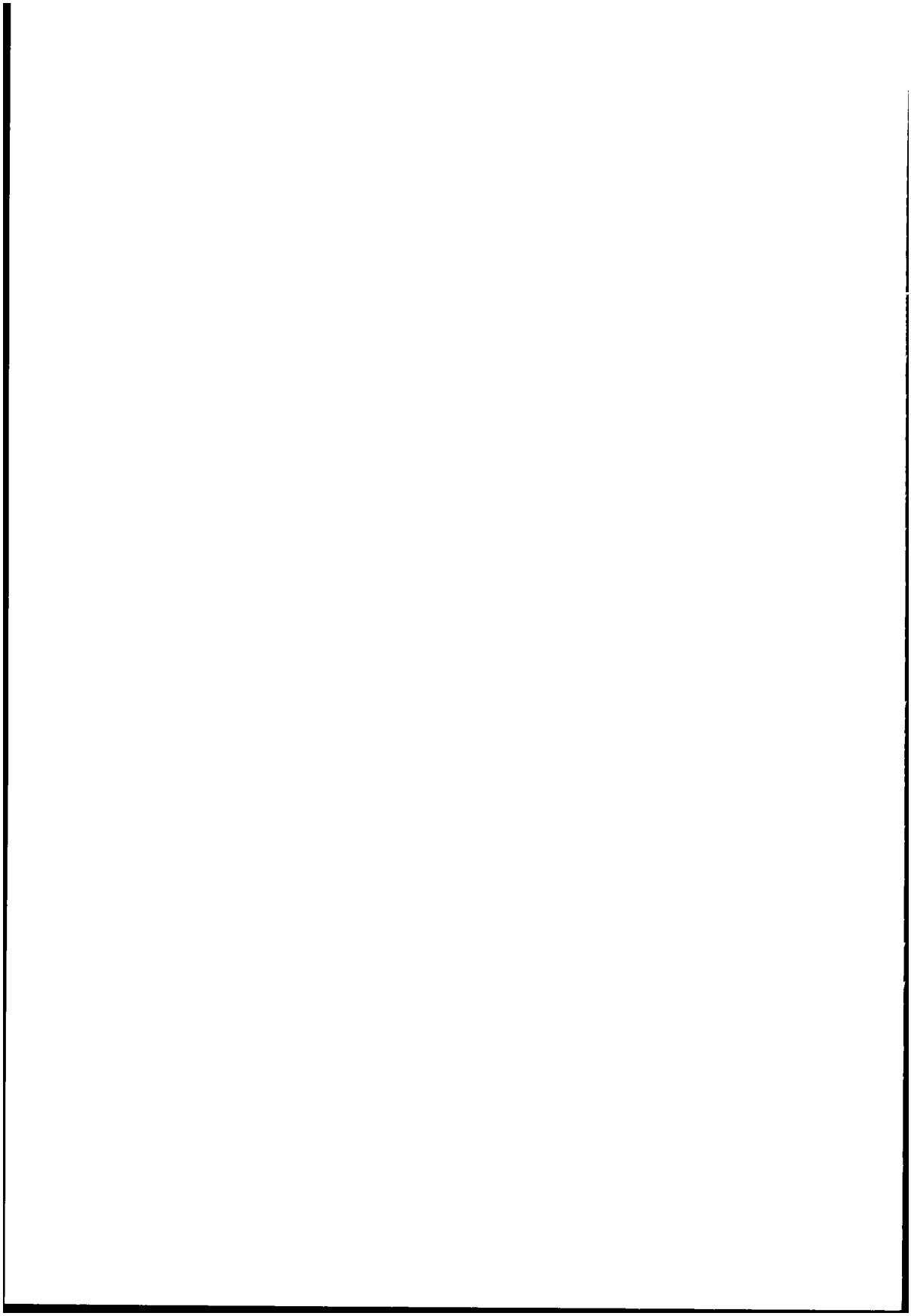
20. This Act shall come into operation on 1st May, 1975 with the exception of section 18 (1) and (3), which shall come into operation on 1st April, 1975.

21. Act No. 98 of 29th March, 1924 on Unfair Competition and False Trade Descriptions, cf. Executive Order No. 145 of 1st May, 1959, shall be repealed on 1st May, 1975.

22.-(1) Act No. 165 of 13th April, 1938 on amendment to Act on Unfair Competition and False Trade Descriptions shall be repealed on 1st May, 1975.

(2) The regulations made in pursuance of the said act shall remain in force until such time as they are superseded by regulations made in pursuance of this Act. Any person guilty of an offence under the said regulations shall be liable to a fine and section 19 (6) of this Act shall apply correspondingly.

23. This Act shall not extend to the Faeroe Islands and Greenland; it may, however, by Royal Order be extended to these parts of the Kingdom of Denmark, subject to such modifications as may be required in view of the special conditions prevailing there.



THE DANISH CONSUMER COMPLAINTS BOARD ACT,
No. 305 of 14th June, 1974

Part I.

Consumer Complaints Board.

1. Complaints by consumers relating to goods, work or service may be brought before the Consumer Complaints Board (in this Act referred to as "the Board").

2. The Minister of Commerce shall make regulations determining the extent to which complaints from consumers relating to goods or services supplied or work performed by public bodies may be brought before the Board.

3.-(1) Where any other enactment provides for special boards or tribunals for dealing with complaints, such complaints shall not fall within the field of the Board.

(2) The Minister of Commerce may direct that certain goods, work or services, or sectors within trade and industry, shall not fall within the field of the Board, or that a complaint cannot be made where the price of the goods, work or services exceeds a specified limit.

4.-(1) The Board shall consist of a body of chairmen and representatives of the interests of consumers and of trade and industry. The Board shall be assisted by a secretariat.

(2) The members of the Board shall be appointed by the Minister of Commerce. The chairmen shall possess the qualifications and fulfil the general conditions necessary for appointment as a judge and shall not have any special interest in consumer organisations or in the organisations of trade and industry. The representatives of consumers and of trade and industry shall be appointed for a period of three years at a time on the recommendation of the said consumer organisations and the said organisations of trade and industry.

(3) The Minister of Commerce shall make regulations governing the rules of procedure of the Board. These may include regulations with respect to the payment of a fee for the

hearing of complaints by the Board and the publication of the decisions of the Board.

5. The quorum required for the hearing of a complaint shall include at least one chairman of the Board, who shall be assisted by two members appointed by the chairmen from among the representatives of the interests of consumers and of trade and industry in a manner providing for equal representation.

6.-(1) A complaint may be made against any person who, under the provisions of the Danish Administration of Justice Act, can be sued in a Danish court on the matter to which the complaint relates.

(2) Where contracts stipulate that disputes shall be submitted to arbitration or to any other form of mediation or compromise, the parties shall not be precluded from bringing complaints before the Board.

7.-(1) The Board shall dismiss complaints which are not considered suitable to be dealt with by the Board.

(2) The Board may refuse to deal with a complaint which is considered to be entirely without foundation.

(3) The Board may authorise the secretariat to make the decisions referred to in the preceding subsections of this section.

8.-(1) Pending a decision of the Board, the parties to the complaint shall not institute legal proceedings in the courts in respect of the matter to which the complaint relates.

(2) Where proceedings have been instituted in the courts, and the consumer wishes the complaint to be brought before the Board, the court shall stay the proceedings indefinitely.

(3) Where the case has been submitted to arbitration or to any other form of mediation or compromise and the consumer wishes it brought before the Board, the matter shall be deferred until it has been heard by the Board.

9.-(1) Neither of the parties shall be ordered to pay costs to the other where a complaint is heard by the Board.

(2) The Board shall defray all expenses incurred in the procuring of such expert opinions as it considers necessary for the hearing of the complaint.

10.-(1) When the Board has made a decision in respect of a complaint, the case may be brought before the courts by either of the parties.

(2) Where the decisions of the Board are not complied with, the

Consumers' Ombudsman referred to in the Danish Marketing Practices Act shall bring the case before the courts at the request of and on behalf of the complainant.

11.-(1) The name "Consumer Complaints Board" shall apply only to the Board referred to in this Part of this Act.

(2) The Minister of Commerce may take regulations prohibiting other boards or tribunals which deal with complaints from making use of any name which may be confused with the name Consumer Complaints Board. Any person committing an offence under this section shall be liable to a fine.

Part II.

Approval of Private Complaints Boards and Tribunals.

12.-(1) With the approval of the Board, complaints which might otherwise be heard by the Board may be dealt with by complaints boards or tribunals which deal with complaints from certain branches of trade or other limited fields.

(2) The Board shall give its approval only where the rules of procedure of complaints boards or tribunals contain such provisions with respect to the composition of the board or tribunal and to procedure as are considered to be satisfactory to the parties.

(3) The Board may restrict its approval to a specified period of time and may withdraw such approval where the conditions justifying the approval are no longer considered to exist.

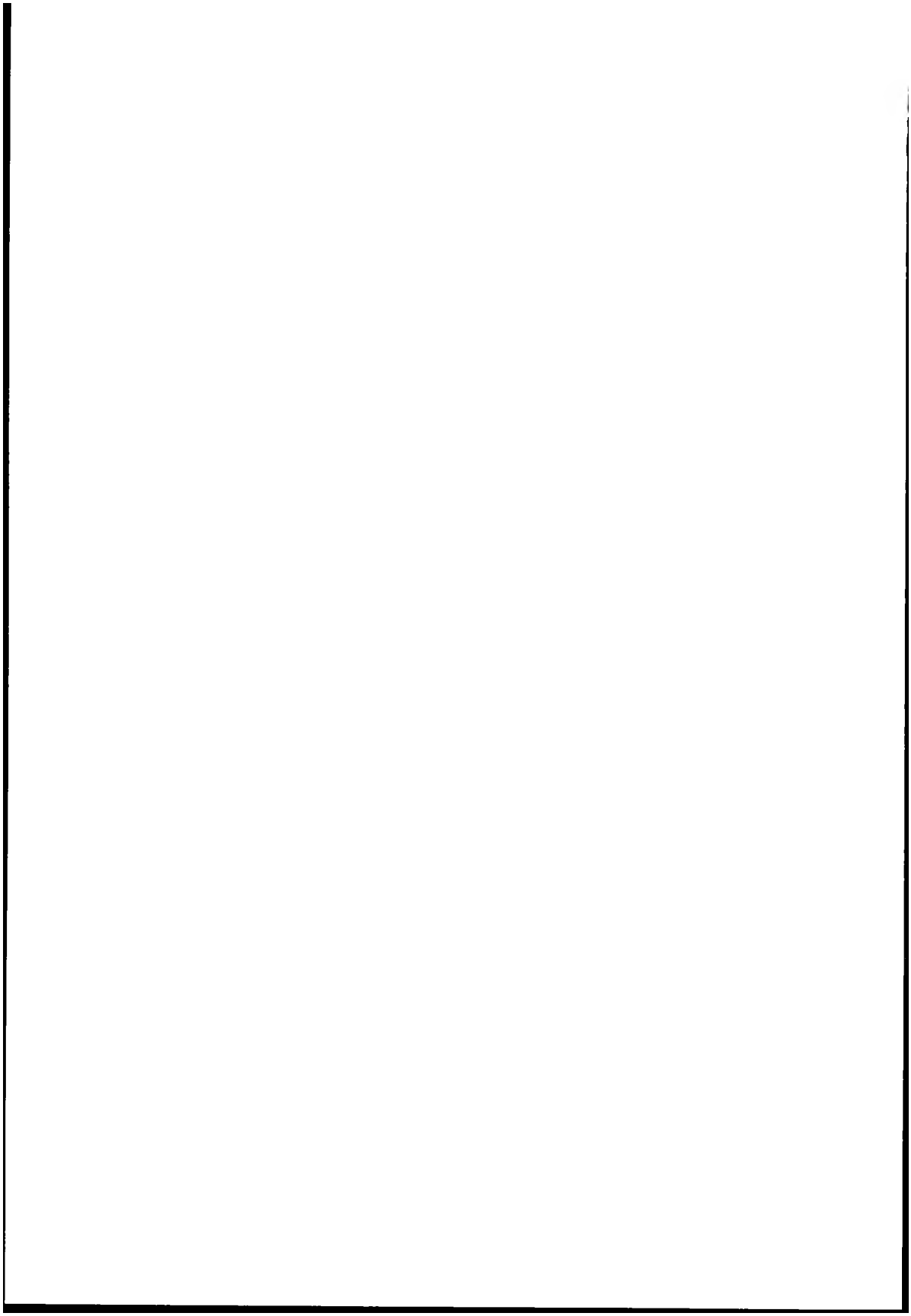
(4) The decisions of the Board under the preceding subsections of this section may be the subject of appeal to the Minister of Commerce.

Part III.

Commencement and Extent etc.

13. This Act shall come into operation on 1st June, 1975 with the exception of sections 4 and 12, which shall come into operation on 1st April, 1975.

14. This Act shall not extend to the Faeroe Islands and Greenland; it may, however, by Royal Order be extended to these parts of the Kingdom of Denmark, subject to such modifications as may be required in view of the special conditions prevailing there.



SUMMARY

Mr Nils Mangård, Vice-Chairman of the Public Complaints Board, Stockholm, gave an account of the measures and techniques of consumer protection in Sweden.

They have three main functions :

1) to improve consumer information on the market in general;

2) to strengthen the consumer's legal position vis-à-vis the vendor (trader, wholesaler, manufacturer);

3) to enable a consumer who has suffered injury to enforce his rights more easily, either before extra-judicial bodies with a view to reaching an amicable settlement, or before a court.

Some of the bodies set up for this purpose fulfil each of these functions successively.

The Market Court and the Consumer Ombudsman started their activities in 1971; they will have special responsibility for enforcing two new laws designed to protect consumers against unfair trading practices and unfair terms of contracts.

The Consumer Ombudsman keeps a constant watch on trading activities and on the clauses and conditions of firms' sales to consumers.

The Market Court, a joint court of jurists, consumer representatives and representatives of firms, may prohibit traders from using unfair marketing methods or improper contract terms. A penalty or a fine is normally imposed as well.

Other consumer protection laws in force :

- January 1972, the Law on food products, the enforcement of which is supervised by the Swedish Foodstuffs Agency;
- July 1973, the Law on products harmful to health and the environment;
- 1973 the Law on sales to consumers, which regulates certain sales methods and their conditions, such as doorstep or credit sales and so on.

To make it easier for consumers to enforce their rights, Sweden set

up a Complaints Board in 1968 to examine consumers' claims, and introduced a simplified procedure before the ordinary courts in 1974. In addition, the legal aid system has been expanded.

THE SWEDISH SOLUTIONS

by Nils Mangård
Judge of the Svea Court of Appeal,
Vice-Chairman of the Public Complaints Board, Stockholm

I. Introduction

Consumer policy as a whole came into focus in Sweden during the 1960s, and was inscribed in the programmes of several political parties. Particular emphasis was placed on the legislative and administrative activities in the field of consumer protection in the early 1970s. These activities are of various kinds. Some are directed towards investigation and research regarding product development etc., and aim at providing the consumer with better market information. Others aim to protect the consumer against inferior products and unfair practices of different kinds, and in general to strengthen the position of the buyer/consumer vis-à-vis the seller/trade'sman when purchasing goods and services. A third group of measures have been adopted to help a dissatisfied consumer to seek redress in the courts of law or through the good offices of extra-judicial institutions in those cases where there is no amicable settlement of a dispute.

II. Government agencies for consumer protection

Three Government agencies were recently established to administer the greater part of the first two groups of consumer protection activities mentioned above. In 1973 the National Board for Consumer Policies (Konsumentverket) was set up as the central administrative agency for consumer affairs. Its main task is to carry out information and investigation work, and to negotiate with other public authorities, private enterprises, and industrial and commercial associations for the purpose of improving the situation of the consumer in various fields.

In 1971 the special Market Court (Marknadsdomstolen) and the Consumer Ombudsman (the Konsumentombudsman, KO) began their work. This consists mainly in administering two recent laws which aim at protecting the consumers against unfair marketing

practices and unfair terms of contract (see below). But the Market Court also supervises the Swedish antitrust legislation, with the assistance of the Antitrust Ombudsman.

The KO's job is to watch such business methods used by the commercial enterprises that come within the scope of the two laws just mentioned. This is done through the continuous examination of their marketing, and of the terms and conditions they use in selling to the consumer. Of great importance here are the complaints made by the public to the KO.

If the KO deems that contract terms and conditions or marketing practices are contrary to the interest of the consumer, he negotiates with the business enterprise and/or the trade association concerned in order to bring about changes. Should the negotiations not be successful the KO may bring the case before the Market Court. The Court can forbid producers and dealers to use unfair marketing methods and/or unfair contractual clauses. Such orders are usually combined with a fine. Not only lawyers take part in the decisions of the court but also representatives for consumer interests, for organizations of salaried employees, and for business associations.

The total number of complaints received by the KO in 1974 - mainly from the public - amounted to about 5,000. During the period 1971 - 1974 only about 100 cases were brought before the Market Court*.

III. Product information and product safety

Some statutes have recently been enacted with the object of making it easier for the consumer to select goods and services in the market-place, and to remove from circulation such products that are considered unsuitable mainly from the point of view of safety.

The Marketing Practices Act came into force in January 1971. The purpose of the act is to create effective guarantees that advertising and other marketing measures are not carried on unfairly. The act is administered by the Market Court and the KO.

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* At the end of December 1975 the Parliament accepted a Government proposal for a merger of Konsumentverket and the KO's office to take effect as from 1st July, 1976. The Director-General of Konsumentverket, thus reorganized, will also fill the functions of the KO.

The Marketing Practices Act will, however, soon be replaced by a new Marketing Act which has just been passed by Parliament. In addition to such measures that can be taken against him under the present act a businessman may be compelled to disclose information of special interest from a consumer point of view when marketing goods and services. Furthermore, the sale or leasing of goods apt to cause damage or which are clearly unsuitable for their purposes may be prohibited.

The Food Act came into force in January 1972. The act and the directives issued in connection therewith contain provisions on such matters as the composition of food, the handling, labelling and marketing, personnel hygiene, premises for the handling and storage of food, and inspection by public authorities.

The National Swedish Food Administration (Livsmedelsverket) is the central authority responsible for the implementation of the act. The county administrative boards and the public health boards have functions at the regional and local levels.

The Act on Products Hazardous to Health and to the Environment which came into force in July 1973 brought about an increased control of goods which because of their chemical or physico-chemical qualities may be suspected of causing injury to people or damage to the environment.

The Product Control Board (Produktkontrollnämnden) is responsible for the handling of questions regarding goods dangerous to health and environment. It is administratively annexed to the National Swedish Nature Conservancy Board (Naturvårdsverket). Day-to-day supervision is the responsibility of the Conservancy Board and the Workers' Protection Board as well as of the county administrations, the industrial inspection and the local public health boards.

Further investigation in the field of product information and product safety is carried out by various Government commissions, and has led to proposals for reforms which are now being studied by the Government.

IV. Sales regulations etc.

Among legislative measures - already adopted or in a preliminary stage - with an aim to strengthen the legal position of the consumer when purchasing goods and services the following may be noted :

The Consumer Sales Act (1973) supplements the general Sale of

Goods Act of 1905. It guarantees to the consumer certain fundamental rights when buying goods from a professional trade'sman (who may be the manufacturer, distributor, whole-saler or retailer). In other words the consumer is given a basic protection of which he can not be deprived by terms of contract, order notes, certificate of warranty etc.; the provisions of the act are mandatory.

The act regulates inter alia the position of the consumer when the seller does not act according to the agreement, for instance when he delays delivery of the goods or when the goods are faulty. In case of breach of contract on the part of the seller, in principle the buyer has a right to cancel the purchase. The buyer may further withhold payment whilst waiting for proper performance. The buyer may claim a reduction in price for minor faults in the goods.

The act contains provisions as to when goods shall be considered faulty. A special provision concerns the effect of goods being sold "in existing condition". This provision aims at preventing a seller from avoiding all responsibility for the condition of the goods simply by including such a reservation in the contract.

The Consumer Sales Act also contains some provisions regarding the position of the buyer in relation to the manufacturer, general distributor etc., as well as provisions on credit purchase intended to protect the buyer when the seller has transferred his claim for payment to special granters of credit.

A Consumer Services Commission was set up in 1972 to prepare legislation similar to the Consumer Sales Act for the protection of the consumer in the field of services such as repairs, maintenance etc...

The Act Prohibiting Unfair Contract Terms (1971) - one of the two acts administered by the Market Court and the KO - is aimed mainly at the protection of the consumer against unfair clauses in printed contract forms, so-called standard or type contracts, which are used in selling goods and services. It should be mentioned that although contraventions against this act - as well as against the Marketing Practices Act - normally lead to injunctions combined with the penalty of a fine, certain offences against the acts may be prosecuted in the ordinary law courts. The maximum penalty is one year's imprisonment.

There is a Government commission now examining the insurance laws with a view to improve the protection of policy holders. Another commission is studying the problem of how to obtain better protection for consumers in the purchase of small houses.

If a contract clause has been classified as unfair in accordance with the Act prohibiting Unfair Contract Terms, this does not

automatically mean that the term is not valid when included in an individual contract. This question has been studied by the General Clauses Commission. In its report of 1974 entitled "General Clauses in Property Legislation" the commission presented a proposal for a general provision, a so-called general or blanket clause, to the effect that the terms of a contract may be modified or set aside by a court of law, should the terms be considered unfair. The Government has recently proposed to the Parliament that such a clause shall be inserted in the Contract Act of 1915.

Normally a consumer who wants to invoke a blanket clause in his favour will have to bring an action in a law court. Now, it is a well established fact that consumers are hesitant of going to court because of the trouble and possible expenses involved. In order to increase the consumer protection aimed at by this kind of legislation it has been proposed, both by the commission and by the KO, that the instructions of the KC should be amended so that he may be allowed to open a file on behalf of an individual consumer against the enterprise or, by agreement, the trade association concerned, if the KO believes that a test case regarding a specific contract term would be of general interest. The costs of the consumer side, would then be borne by the State. This proposal if adopted would constitute an exception from the principle that - contrary to a current misapprehension abroad - the Swedish KO does not deal with the settlement of consumer disputes.

The Act on Door-to-Door Sales (1971) gives the consumer a right to go back on certain purchases within a week ("repentance week") i.e. cancel the purchase and return the goods. The act applies to commercial sales of personal property for the personal use of the buyer. A further requirement is that the sales contract is negotiated with the seller or his agent away from their permanent place of business, for example at the home of the purchaser. There are plans to make this act applicable also on sales by telephone.

Regulations on buying by credit are to be found in the Hire Purchase Act of 1915 and the Consumer Sales Act. These laws are felt to give the consumer insufficient protection. New kinds of consumer credits, such as credit card buying have lately become frequent. These forms of credit often fall outside the frame of the present regulations. In 1971 the Credit Purchases Commission was formed in order to see what can be done to improve the position of the consumer/debtor with regard to different types of credit purchase.

Closely related to credit purchase are credit information and debt collecting activities. Special laws have been introduced

to increase the protection of the privacy of citizens in these matters.

V. Judicial and extra-judicial means of consumer protection

However well the consumer is informed, however well the manufactured products are controlled, however well the consumer's rights are legally protected, there will always be cases where a consumer/buyer is not satisfied with the performance of the seller or manufacturer and claims the right to avoid the contract or to get a price reduction etc., and where the opposite party does not agree. In Sweden as in most countries the ordinary court procedure takes a long time and has proved unreasonably expensive for typical consumer disputes, considering the relative small amounts usually involved. Consumer protection would therefore be incomplete without a fairly simple, rapid and cheap system for adjudicating disputes of minor value. The Swedish solutions to - or rather attempts to solve - this problem are mainly two : the institution in 1968 of a general consumer complaints authority, the Public Complaints Board (Allmänna Reklamationsnämnden), and the introduction in 1974 of a simplified procedure for this type of dispute in the ordinary courts of law. In addition, the legal aid service was expanded in 1973.

The Public Complaints Board

Within the framework of consumer protection policy a discussion started in the mid-60s regarding ways and means to help "the little man" to get his complaints against business enterprises examined and his rights (if any) respected - to find a simple and cheap procedure for solving everyday disputes. Statistics showed that consumers rarely instituted law suits regarding minor claims - partly for psychological reasons (the courts and their complicated procedure were regarded with certain awe, not to say fear) partly because of the heavy costs involved.

Many trade associations had their own complaints board - or their managing committee functioned as such - but all or a majority of the board members were usually representatives of the trade, and so the authorities and the consumer agencies regarded these organs with some distrust.

The question was therefore raised by the then existing Consumer Council, following an example from Norway, whether it would be possible to form a general complaints board with consumer participation and financed with State money. Negotiation with

representatives of trade and industry took some time as the business people were not over-enthusiastic about "giving the Devil a finger". They finally agreed however, subject to certain conditions. The Ministry of Commerce promised to supply funds for a test on a limited scale during a couple of years. So the Public Complaints Board came into being and started its work on 1st January, 1968.

The Board originally comprised only a part-time chairman, a legally-qualified secretary, a staff of about five persons and approximately 30 members. But it soon turned out to be a success, and grew very rapidly. The Board now has 72 members representing the consumers and the business community in equal numbers, and there are 25 employees on its staff. It is organized in more or less specialized divisions according to product groups, each division comprising 6 - 8 members. The present 10 divisions deal with tourism, motor vehicles, home electronics, pleasure craft, textiles, footwear, laundry and dry-cleaning, furs, insurance, and - lastly - with complaints regarding goods and services not belonging to any of these product groups. The insurance division was formed only in January, 1975.

The Board itself is an autonomous body endeavouring to lay down principles and reach solutions acceptable to both the consumer and the business side. But the staff is appointed and paid by the principal consumer agency, the National Board for Consumer Policies, which is a somewhat questionable arrangement because of the double loyalties involved.

The meetings of the Board divisions are chaired by persons who hold a law degree and have had experience on the Bench. There is now a full-time chairman who also supervises the work of the secretariat, and six judges who are appointed vice-chairmen hold meetings of the Board divisions in addition to their regular duties. The Board may be assisted by technical experts, and may commission laboratory analysesetc... In addition there is a fair amount of technical knowledge and experience represented within the Board itself. Whenever possible faulty goods (textiles, shoes etc.) are inspected during the meetings.

According to its bye-laws the Board must examine, upon the request of a consumer, his or her dispute with a trade'sman concerning goods or services, and shall decide how in the Board's opinion the dispute should be settled. The decisions of the Board are not enforceable at law - they are only recommendations. Voluntary compliance with the decisions averages about 85 percent. In some industrial and commercial branch organizations the members have undertaken to follow the recommendations of the Board, and then the compliance is 100 percent. The motor trade association (manufacturers and dealers) has even established a fund from

which a consumer is paid if a member refuses to follow the recommendation.

The public contact the Board through its secretariat which has its centre in Stockholm. Complaints are made by telephone, in writing, or by personal visits. By far the greatest number of complaints are made over the 'phone. During 1974 almost 6,000 written complaints were received. In addition, approximately 17,000 oral complaints are settled by the secretariat, often immediately through 'phone calls. The secretariat also gives advice to the public on a large scale.

For the first six months of 1975 the number of complaints were as follows. Registered complaints in writing : 3,170. Telephone calls in new cases : 9,400.

The proceedings are in writing. Complaint forms regarding different types of goods and services are available. No fees or costs are charged to the parties, the work of the Board being financed by the Government.

Some special features of the work and organization of the Public Complaints Board may be worth mentioning.

The competence of the Board is restricted, partly by its bye-laws, partly by decisions taken by the Board in pleno.

1. The seller must be in business, and must have acted in the course of his profession. If you ask a private person to help repair your car, or if you buy a second-hand TV from a private person, you can not complain to the Board.
2. The buyer must be a consumer, i.e. he must have bought the goods or service for personal consumption and not as a trade'sman. The Board is not concerned with disputes between businessmen as such.
3. In principle the Board does not take up complaints solely regarding the amount of the price paid (when the quality of the goods or service is not questioned per se).
4. Some intangible services (rendered by doctors, dentists, solicitors etc.) are excluded.
5. The Board does not take up claims regarding immovable property or goods and services functionally connected with real estate. A special board for immovable property has been set up by the National Board for Consumer Policies on a trial basis for two counties, and another board with consumer representation has just been organized by the association of plumbing and sanitation firms for complaints against installation and repair works.

6. Disputes which are "too old" are dismissed.

7. Claims for certain types of damages are usually not acceptable.

8. When the written (or telephonic) statements of the parties are contradictory, and the Board finds that the taking of oral evidence is necessary to reach a reasonably wellfounded decision, the Board declines to make any recommendation.

Such complaints as those which have been enumerated here are thus left to the law courts to deal with, now usually in a simplified way (see below). Arbitration is not really a practical alternative in minor consumer cases. On the other hand most of the present restrictions on the competence of the Board are adopted for practical and not for theoretical reasons. The jurisdiction of the Board could be extended at any time, given the necessary funds and personnel.

As previously stated, the decisions of the Board are not binding on the parties, and not legally enforceable. This fact was used by the Ministry of Justice as an argument for introducing the simplified legal procedure in actions concerning small claims. An alternative solution would have been to make the decisions of the Board binding, either immediately or if the losing party failed to bring an action in court within a limited time (three weeks were mentioned). But there seem to be good reasons against this alternative.

Essential advantages of the present flexible and informal procedure would be lost. The Board would have to apply much stricter rules of procedure and also in other respects work in more judicial forms, both in assessing the evidence and in the strict application of substantive law. Cases where the Board now - for instance in questions of a technical nature - feels free to base a recommendation in favour of the consumer on probability or on the general experience of technical expertise would often result in a dismissal of the claim as not satisfactorily proved. It is true that, as a whole, the decisions of the Board are - and should be - founded on statutory law and legal principles as interpreted and applied by the law courts. But all the same the present system leaves more space for fairness and equity in the judging of the individual case than could be allowed if the decisions were enforceable. On several points the Board during the past eight years has unanimously "stretched" the interpretation and application of the Contract Act and the Sale of Goods Act quite a bit in favour of the consumer. In fact, some of the new principles laid down in the Consumer Sales Act were admittedly borrowed from the practice of the Board.

A second possible disadvantage for the consumer would be that

even unfavourable decisions - maybe the result of the shortcomings inherent in a written procedure - would have to become binding unless challenged within a short time. Many "small" consumers, not familiar with the necessary formalities, might thus lose their rights.

Still another argument may be raised against making the decisions enforceable. As long as compliance with the recommendations depends on their persuasive effect, the Board will have to continue to act as an instrument for co-operation between consumers and the business world. Its work must be trusted and respected by both sides, as a safeguard for its independence and impartiality. At present more than 99 percent of the decisions are unanimous.

Finally : Would the consumer really be much better off with an enforceable decision? If one looks at the kind of firms which do not follow the recommendations of the Board - mostly companies having stopped payments, car dealers with no premises and without known assets etc. - the answer tends to be "no".

A question now under discussion is whether or not the functions of the Board should be decentralized. Would it be to the advantage of consumer interest if regional boards were set up, for instance one in each county? The answer is also probably "no" to this question. As every village could not get its own board, most complaints would have to be dealt with by post or telephone anyhow. The present central organization ensures a more uniform appraisal and application of what should be regarded as fair commercial practices in the consumer/business relationship. A central board will necessarily have a better knowledge of consumer questions in general as well as of the special problems of an individual trade than each one of 24 regional boards. It is easier for the consumer and business organizations to find and nominate board members sufficiently well qualified - both from a technical point of view and otherwise - to represent their interests in a proper way considering the kind of quasi-judicial work entrusted to them. At present many of the associations on both sides have nominated new leading members as members of the Board. The feed-back effect of their experience from the work with individual consumer cases and from discussions with the "opposite" party on questions of principle is therefore considerable, they are usually able to make their respective organizations accept the views on legal and ethical matters taken by the Board.

A good compromise might be to decentralize the counselling and mediating functions to the local level but to keep a central organ for the "judicial" task.

A summary legal procedure for small claims

While the Public Complaints Board was being built up and tested under the auspices of the Ministry of Commerce, the Ministry of Justice started to work on a simplified court procedure intended for summary consumer cases. A memorandum on the subject was published in 1971. During hearings arranged by this Ministry, representatives of the Judiciary and the Bar, among others whilst acknowledging the need for a general revision of the Court Procedure Rules - especially with regard to very big cases - expressed their doubts as to the advisability of making a partial reform of these Rules by introducing in the ordinary law courts a special procedure to be applied to consumer litigation. The need of such a reform from the consumer point of view was also questioned. It was said that unless the activities of the Public Complaints Board were suspended, the consumer disputes brought to the courts, even under the proposed system, would be too few to justify special legislative measures for these cases in advance of the general revision of the court procedure which was under way.

For reasons not to be examined here the Government, however, insisted on a partial reform. In a second memorandum of 1972 the scope of the proposed law was widened to also include other types of civil cases regarding small values besides consumer disputes. And in July, 1974 the Act on Legal Procedure in Actions Concerning Small Claims came into force.

This procedure is to be used in civil cases of a type which may be settled by agreement, chiefly where the value of the object or sum in dispute does not exceed an index-tied amount, at present about Skr 4,500, or - regardless of the value - where the Public Complaints Board has already given its opinion. This exception will make it easier for a consumer, who has got a Board recommendation in his favour, to acquire an enforceable judgment against a recalcitrant seller etc. in a cheap and simple way.

The action must be brought in the ordinary Court of first instance (the Tingsrätt). In order to keep the cost of litigation down, the law has designed the procedure in such a way as to enable the parties to plead without the aid of counsel. A party may elect to be assisted by a lawyer, but then the costs are not recoverable from the opposite party except for a small consultation fee.

The main features of the simplified procedure are as follows. The parties are assisted by a court clerk in drawing up statements of claim and defence clearly and comprehensively.

The case is heard by a single judge, who conducts the case actively and informally so that the issues are clarified and the parties know what they have to prove. Necessary technical expertise is provided and paid for by the court. The judge must try to settle the dispute amicably. The proceedings are mostly oral. Normally one hearing should be sufficient. Only essential costs are recoverable from the losing party. The right to appeal from the judgment of the Tingsrätt is very much restricted.

In this Act and its travaux préparatoires, the existence of the Public Complaints Board and the importance of its activities in the field of consumer protection is at last officially recognized, although the final organization and administration of the Board are still left open. A close cooperation between the Board and the courts in consumer cases is envisaged. When the court clerk finds that a claim falls within the competence of the Board he should advise the consumer/claimant to make a complaint to the Board in the first place. And the court may at any stage adjourn a case and ask the opinion of the Board.

Court statistics for January-March, 1975 show that about 1,400 cases were dealt with under the new act during this period. But only 300 of these cases were consumer disputes. And only about 100 of the cases were initiated by the consumer ... It seems therefore that so far the introduction of the simplified procedure has not considerably increased the role of the courts in the field of consumer protection. But it is of course too soon to express any firm opinion of the future developments.

SUMMARY

Mr Gordon Borrie, Dean of the Faculty of Law at the University of Birmingham, gave an account of the means and techniques of consumer protection in the United Kingdom.

He outlined the provisions of the Sale of Goods Act 1893, and went on to describe a set of more recent rules covering certain circumstances where consumer protection was most needed.

However, none of the means advocated until recently lent themselves to practical application by consumers, and various methods are still being tried out in the quest for the best solution.

County courts are normally the ones qualified to deal with minor disputes, but consumers make little use of them because the procedure is complex and a barrister must be briefed.

Simplified arbitration systems for minor claims have been tried out in various places, such as Manchester and Westminster. The system there covers claims of at most £250, but requires the consent of both parties to arbitration of the dispute under the rules laid down. Once they have given their consent they are obliged to comply with the arbitrator's decisions. Non-compliance is equivalent to a breach of contract and the decision becomes directly enforceable.

A similar unofficial arbitration system operates in London for small claims.

Rather different but equally simplified arbitration systems have been introduced by the Director-General of Fair Trading, an official appointed to keep under review any trading practices which may adversely affect the economic interests of consumers in the United Kingdom. One of his responsibilites is to encourage traders' associations to draw up voluntary codes of conduct as a guide for their members with a view to safeguarding and fostering consumer interests.

In addition to these informal, and preventive, procedures, new unofficial procedures were introduced for minor disputes in October 1973. They are part of the county court system.

NEW DEVELOPMENTS IN PROCEDURES FOR THE PROTECTION OF CONSUMERS IN ENGLAND

by Professor Gordon Borrie
Dean of the Faculty of Law
University of Birmingham

Introduction

The legal rights of consumers in England are considerable. These rights are embodied in legislation such as the Sale of Goods Act 1893 which sets out the basic obligations of sellers of goods and in the judge-made rules of the Common Law that require, for example, those who provide services of various kinds to take reasonable care to avoid injury or damage to the consumer or his property. These rights have been enlarged in recent years to provide for such modern developments as the use of standard form contracts ("contrats d'adhésion") which seek to deprive the consumer of his normal legal rights and the growth of consumer credit. The Supply of Goods (Implied Terms) Act 1973, which renders void any contractual clause whereby a consumer's right to sue in respect of defective goods is excluded, and the Consumer Credit Act 1974 are important landmarks in this field.

But there has been a growing realisation in England that the reform and modernization of our substantive law has little meaning unless legal advice is readily available, the machinery of justice is adequate, and suitable procedures for enforcing the improved rights of consumers are available at reasonable cost.

The Legal Advice and Assistance Act 1972 (now consolidated in the Legal Aid Act 1974) made legal advice more readily available at State expense, subject to a means test, and there has been a growth (albeit an uneven growth) of advice centres of various kinds, either staffed by lawyers or with access to lawyers. As part of the Government's present attack on inflation, additional finance is being made available specifically for the development of consumer advice centres.

Then, there has been a greater use of the criminal law, particularly through the Trade Descriptions Act 1968, as a means of consumer protection. With statutory responsibility for prosecution imposed on local authorities who are responsible for upholding trading

standards, and considerable publicity in the press, prosecutions and the possibility of prosecutions for misleading descriptions of goods and services have made a substantial contribution to consumer protection. A review of the Act has been undertaken by the Office of Fair Trading which published a Consultative Document in August 1975. By the Criminal Justice Act 1972 (now the Powers of the Criminal Courts Act 1973), if a court convicts a trader for an offence it may make a compensation order in favour of the consumer affected by the offence without the consumer having to incur the trouble and expense of initiating a civil claim in the civil courts. The civil law has also been buttressed by Part III of the Fair Trading Act 1973 whereby a public official (the Director-General of Fair Trading) may seek written assurances from any trader who has persistently broken the civil law (or indeed, the criminal law) and if the trader refuses or breaks such an assurance, the Director-General may seek an injunction in the courts forbidding such conduct. Disobedience of an injunction is punishable as a contempt of court.

However, none of these developments of recent years obviate the need to provide adequate judicial or parajudicial procedures which the consumer can himself employ in his own interests for a personal remedy. England is still in the process of experimenting with such procedures and no fully satisfactory solution has yet been found. The problem may not be intractable but it is by no means a simple one to solve.

Most consumer claims are for quite small sums to compensate for the purchase of defective goods, or the faulty repair of domestic equipment, or in respect of financial loss suffered from failure by a travel agent or a builder to provide the holiday or service he has promised. In England the judicial forum provided for the adjudication of small claims is the County Court. There are more than 300 such courts throughout the country and at the present time their jurisdiction, in cases of contract or tort, is limited to claims for not more than £1,000. When the County Courts were first established in 1846 they were specifically intended to meet the needs of those with small claims. It was meant to be a "poor man's court" but, as was shown in a survey by the Consumer Council, published in 1970, ("Justice out of Reach") the great majority of actions brought in County courts were brought by traders. The County Courts were being used by traders as debtcollecting agencies and it was rare for individuals to use the County Courts in order to enforce consumer claims. Why have the English County Courts not been used by consumers? The principal reasons for the non-use of County Courts by consumers are :

The complexity of the procedures so that it is not easy for a person to pursue a claim without the assistance of a lawyer, particularly if the other party (probably a trader) is represented by a lawyer. Court forms, though simpler forms of wording are frequently being devised, require some precision as to what facts are being relied on and what remedy is being claimed. A party needs to appreciate the importance of evidence, the possibility of compelling witnesses

to attend court, the rules about expert evidence, and the distinction between argument and cross examination.

It does not make economic sense to engage a lawyer privately in order to pursue a small claim because, if you win, although the court will usually order the other party to pay your lawyer's fees (an order as to "costs") this will not cover the whole of your lawyer's fees or your other expenses and, if you lose, you will have to pay not only your own lawyer's fees but probably your opponent's lawyer's fees as well. English law does not allow a lawyer to be paid on the basis of a "contingency fee", i.e. on the basis that the lawyer is paid only if his client wins the case.

A graphic example of the consumer's difficulty was given by the Law Society (the governing body of the Solicitors' branch of the legal profession in England) in 1970. It gave an estimate of the costs involved in bringing and defending a claim for £100 compensation in respect of a defective central heating system, assuming a one-day trial in the County Court, with one expert witness on each side. In total the householder's costs would amount to £129 and the contractor's costs to £121. Thus, to pursue a claim for £100 by litigation, the consumer would have to risk liabilities of £250. Clearly to most consumers, the risk, the gamble, is too great. What lawyer would advise a stake of up to £250 to win £100?

Obtaining a lawyer's assistance under the State-financed legal aid scheme is not usually possible. The basic requirement is to show that one has "reasonable grounds" for taking action in court but legal aid may in any case be refused "if it appears unreasonable that he should receive it in the particular circumstances of the case" (Legal Aid Act 1974, s.7). The legal aid committees that administer the scheme do thus have considerable discretion but in practice the criterion used is whether a prudent unaided person who has adequate but not over-abundant means of his own would choose to risk them by bringing the action. For reasons made apparent by the kind of example just given about bringing or defending a claim for £100 compensation, the use of this criterion means that a consumer with such a small claim is unlikely to be granted legal aid.

The Consumer Council's remedy, as proposed in 1970, was that small claims courts should be established, run on an informal basis with the minimum of rules of procedure and with no lawyers allowed to participate, but in order to make use of existing buildings and court personnel, these small claims courts should be created within the existing County Court structure. County Court Registrars (assistant judges) should be the judges of the small claims courts, only individuals should be entitled to bring actions, and the Registrar and his staff should assist the individual claimant by making their own enquiries, taking the initiative in seeking the facts, and not

relying entirely on the litigants to bring forward the necessary evidence which is the traditional method of conducting trials in England. In other words, the small claims court should have inquisitorial powers and not depend on traditional adversary procedures.

One aspect of the Consumer Council's proposals : that lawyers should not be permitted to participate in the proceedings of a small claims court, was particularly controversial. It was put forward because, in the view of the Consumer Council, if it became customary for traders to engage a skilled advocate to defend an action brought by individual claimants, traders would have an unfair advantage; individuals might feel they could not go to the court without a lawyer and they would continue, therefore, to be inhibited from taking their claims to court : - "The admission of lawyers would thus undermine the whole object of the court". It was also thought that the presence of lawyers would make the courts more formal and forbidding.

Informal Arbitration Schemes for small claims.

As we shall see, the proposal to forbid the presence of lawyers was not implemented when the Government established new informal procedures for small claims in the County Courts in 1973. But, before examining these new procedures, I must refer to the development of informal arbitration schemes for small claims, outside the ordinary court structure, which do ban lawyers and which permit only individuals (not traders) to be claimants. The informal arbitration schemes now operating in Manchester and Westminster for claims up to £250 are experimental and on a small scale but their work is of interest as examples of para-judicial procedures for handling small claims. The Manchester scheme was started in 1972, financed by a charity (the Nuffield Foundation), but the finance is now provided by the Greater Manchester Council (a local Government authority). Its greatest weakness is that because the scheme is outside the ordinary court structure, its operation is dependent on the consent of both parties to allow a claim to be arbitrated under the scheme - if a consumer claims he has purchased defective goods and seeks compensation, the trader cannot be compelled to submit to arbitration. If the trader does agree to arbitration, then he must comply with the arbitrator's decision - failure to do so amounts to a breach of contract and the arbitrator's decision is enforceable through the enforcement procedures of the County Court. The arbitrator is someone appointed by the President of the Manchester Law Society and is usually a lawyer. The arbitrator may consult an expert or commission a test in order to assist him in his determination of the dispute. The expense to the claimant is very small - he must pay a standard £1 fee and, if expert evidence is required, may have to pay a further fee of up

to £10. The administrators of the scheme have the responsibility of ensuring that all relevant information is provided by the parties and that expert opinion is obtained, if necessary. An arbitration hearing is conducted with complete informality, the arbitrator taking the initiative in eliciting the facts from witnesses and there is no cross examination. The parties can agree that the arbitrator should make his decision without an oral hearing, on the basis of written evidence only.

A similar informal arbitration scheme for small claims is operated in London by the Westminster Law Society. The Administrator of the Westminster Scheme, who is a solicitor, has written an article describing the operation of the scheme in its first year of operation, 1973-74, and has argued that there is no evidence that parties feel deprived as a result of the ban on legal representation because the administrator and the arbitrator assist the parties not only in the preparation of their cases before the hearing but also in the presentation of the cases at the hearing through questioning to bring out relevant facts and argument. He claims that the objectivity of the arbitrators is not impaired when they descend into the arena of the dispute and that the informality is more satisfactory to parties than the traditional adversary process which tends to create an abrasive atmosphere. The aim is not just "rough justice" but a thorough and painstaking process of adjudication. However, it must be borne in mind that the thoroughness claimed is only attainable because the case loads of these informal arbitration schemes has been very small. Of 243 claims filed in the Westminster Scheme's first 15 months of operation, there were only 30 hearings.

Rather different arbitration schemes, but also informal, are those which have been inspired by the Director-General of Fair Trading, an official whose office was established by the Fair Trading Act 1973 to keep under review all commercial activities which may adversely affect the economic interests of consumers in the United Kingdom. One of his duties (under s.124(3) of the Act) is to encourage trade associations to prepare codes of practice for the guidance of their members in order to safeguard and promote the interests of consumers. During the first year of the Director-General's work, he was able to announce that two trade associations had adopted codes of practice, each supported by an independent system of arbitration to deal with disputes : one of these codes was that adopted by the Association of Manufacturers of Domestic Electrical Appliances (A.M.D.E.A.), which was intended to improve the standard of domestic appliance servicing and was worked out in full consultation with the Office of Fair Trading. Among other things, this Code provides that an offer of service should be made within an average of three working days and that 80% of all service jobs should be completed, satisfactorily, on the first visit; manufacturers should stock enough spare parts to maintain machines in running order during the currency of the model and for a minimum period after the machine has gone out of production.

Any customer who has a complaint that a member of the Association has broken the Code is entitled to take his complaint to an independent arbitrator appointed from a panel approved by the Director-General of Fair Trading, on payment of a £5 deposit.

The other Code is that agreed by the Association of British Travel Agents (A.B.T.A.). The Code prohibits certain exemption clauses in brochures and booking conditions so that tour operators are unable to disclaim responsibility for misrepresentations, failure to show diligence in making arrangements for clients, or for losses suffered by clients through an operator's breach of duty. The Code contains a declaration that, except in circumstances amounting to force majeure (such as political unrest in an overseas country) a tour operator should not cancel a tour, holiday or other travel arrangements after the date when the balance of the price becomes due. The Code establishes a new conciliation service to try and resolve disagreements between tour operators and customers and, if conciliation fails, the customer may seek arbitration under a scheme operated by the independent Institute of Arbitrators. The Director-General of Fair Trading made one reservation in welcoming the new A.B.T.A. Code - that the cost of arbitration would involve a family of 2 adults and 2 children with a maximum bill of £32 if the case goes against them - "it is unfortunate that the Association felt unable to reduce this amount". From the point of view of cost, at any rate, the procedures for a small claim in the County Court, shortly to be discussed, would seem to be preferable for the consumer.

One should also mention an experimental local Code of practice adopted by the Croydon Chamber of Commerce for retailers in that town which is being studied by a number of other local Chambers of Commerce. This Code establishes a Conciliation Panel with consumer representatives and an independent chairman. Members of the Croydon Chamber of Commerce have agreed to refer disputes with customers to the Secretary of the Chamber of Commerce who seeks to resolve the dispute but any consumer who is dissatisfied with the Secretary's intervention has the right to have the matter considered by the Conciliation Panel, free of any charge. Written submissions of the consumer and retailer are collated and copied for both the parties to the dispute and the members of the Panel. At the hearing each party may be accompanied "by a friend but the friend must not be a barrister or solicitor acting in a professional capacity". The retailers have agreed to implement any recommendation of the Panel within 14 days. Unfortunately only about 1800 out of the 6000 retailers in Croydon are members of the Chamber of Commerce and therefore subscribe to the Code of Practice.

Small claims in the County Courts.

New informal procedures for small claims within the County Court

structure and available, therefore, throughout the country, have been operative since October 1st, 1973, as a result of the Administration of Justice Act 1973, and new rules of procedure made under that Act. Since that date, if any individual (or trader) has a claim for not more than £75 (the limit has recently been raised to £100) the Registrar of a County Court may refer it to arbitration whenever one or other of the parties to the proceedings requests. If the amount in dispute is greater than £100 (but within the County Court's overall jurisdiction of £1000) the Registrar may refer the claim to arbitration only if both parties agree but the Judge may do this even if one of the parties does not consent.

An arbitration under the new County Court procedures is usually conducted by the Registrar but the appointment of any other suitable person may be agreed between the parties. The purpose of the new procedures is to enable people to have disputes (particularly small claims) resolved in an informal atmosphere, avoiding so far as possible the strict rules of procedure usually associated with court proceedings. To ensure uniformity of practice throughout the country and to give parties an indication of what is likely to happen, the Lord Chancellor (who is responsible for judicial administration generally in England) has issued a Practice Direction to County Courts to ensure that they specify to the parties certain common features of arbitration practice as applicable. An extract from this Practice Direction reads as follows: -

"In order to secure uniformity of practice and to give the parties and their advisers an indication of the course likely to be taken under these provisions, the registrar should, in settling the terms on which an order of reference is to be made, consider the desirability of including such of the terms mentioned in the schedule below as he may think appropriate. The list is not intended to be exhaustive and the registrar may consider other terms to be desirable in the circumstances of the particular case; but the parties should be given sufficient notice of a contemplated departure from the terms set out in the schedule to enable them to make any representations they may think fit, and a party who himself wishes to propose a different term should inform the registrar and the other side before the order is made."

SCHEDULE

(1) The strict rules of evidence shall not apply in relation to the arbitration.

(2) With the consent of the parties the arbitrator may decide the case on the basis of the statements and documents submitted by the parties. Otherwise he should fix a date for the hearing.

(3) Any hearing shall be informal and may be held in private.

(4) At the hearing the arbitrator may adopt any method of procedure

which he may consider to be convenient and to afford a fair and equal opportunity to each party to present his case.

(5) If any party does not appear at the arbitration, the arbitrator may make an award on hearing any other party to the proceedings who may be present.

(6) With the consent of the parties and at any time before giving his decision and either before or after the hearing, the arbitrator may consult any expert or call for an expert report on any matter in dispute or invite an expert to attend the hearing as assessor.

(7) The costs of the action up to and including the entry of judgment shall be in the discretion of the arbitrator to be exercised in the same manner as the discretion of the court under the provisions of the County Court Rules.

The new County Court procedures do not forbid participation by lawyers. It was thought wrong to deprive a party of the normal right to have legal representation if he chose. However, the new procedures do involve some discouragement to parties to engage lawyers. One of the new rules is that if a claim does not exceed £100, the party who wins the case will not normally be allowed to recover from the loser the cost of his lawyer's fees. Such costs will only be allowed if the Registrar considers the case was very complicated or they were incurred because of the unreasonable conduct of the other party. An exception was introduced in August 1975 to the effect that, if a person suing for a personal injury wins his case, the court may allow him to recover from the loser his lawyer's fee provided the damages awarded exceed £5. (This exception was made because experience showed that the inability to recover costs on a claim for a personal injury may cause hardship, even if the claim is small, because it may be difficult for someone who has suffered an injury to estimate the damages he can claim, or deal with the case himself.)

In the first 12 months of the new County Court procedures, only some 5000 cases were referred to arbitration in the country as a whole but no statistics have been kept of the number of requests for arbitration and many such requests have resulted in a satisfactory outcome for the claimant either by the voluntary payment of compensation or by a judgment given in his favour in default of any defence being made or at the pre-trial review of the claim by the Registrar. Virtually every County Court case now comes before the Registrar at a pre-trial review for preliminary consideration and this presents a clear opportunity, by bringing parties together, for facilitating settlements.

In July 1975, the Consumers' Association magazine "Which?" published a report on the new procedures based on the views of 94 people who completed a detailed questionnaire about their experiences. 15 of the 94 claimants had engaged solicitors to help them but the conclusion

of the report was that, unless the claim is particularly difficult, it is not generally necessary to have a lawyer. Most of the claimants found the procedures straightforward but the average time each claimant spent on the case was 9 hours. Court officials were found to be sympathetic to "litigants in person". On the other hand, in over one-third of the cases the trader failed to pay the judgment in full without the claimant taking further action to enforce the judgment and enforcement procedures were not found to be very satisfactory - 14 of the claimants never obtained a penny of the money the court awarded to them.

Further research into the workings of the new procedures is clearly necessary and the Institute of Judicial Administration at the University of Birmingham is beginning to undertake such research. A major part of the research consists of interviews with Registrars, who are the key people in the administration of the new procedures. Their assessment of how the new procedures are working and their views as to the desirability, purposes and value of the new procedures are of great importance. Under the new procedures Registrars and court staff are expected to adopt unfamiliar informal methods. Patience and adaptability are required. If the new procedures are to be used more widely, it is necessary for Registrars to become not just accustomed to the new procedures but to be willing and keen to work them effectively and efficiently. Court staff should be required rather than discouraged from assisting people to prepare their claims or defences. It is also necessary for there to be adequate publicity for the new procedures so that it is not only the aware and articulate middle class consumer who makes use of them.

Ideally it might have been better to create a new system of small claims courts, outside the present County Courts, with a blaze of publicity, bright, inviting modern premises, and a new breed of young enthusiastic judges or arbitrators. But the expense, especially with our present economic difficulties, makes any such ideal impracticable and politically impossible. In England we must make do with what we have, use for new purposes our existing resources and make justice more widely available throughout the community by adapting these existing resources, by ensuring adequate publicity and by trying to change public attitudes so that people feel that going to the County Court is no more traumatic than going to the Post Office.

Those responsible for the administration of the new County Court procedures should look to the informal arbitration schemes of Manchester and Westminster to see whether some aspects of these schemes should be copied, such as the greater informality, the less complex procedure, the greater willingness to take the initiative in obtaining evidence and the use of part-time arbitrators. Consideration should be given to the use of part-time arbitrators for evening hearings because many people would find it much easier to attend in the evenings and the very well used Small Claims Court in New York has

shown how successful evening hearings can be. But the County Court procedures already have the vital advantage that they can compel a trader to submit to arbitration and in the long run the informal arbitration schemes outside the courts may no longer be needed even as exemplars. In time, the present limit on the Registrar's jurisdiction to order arbitration where only one party requests it (£100) should be increased. It is too early to tell whether the fact that lawyers are allowed to participate in new County Court procedures (though their use is discouraged as we have seen) will prevent the greater use of the new procedures by claimants and prevent the development of the informality that is required. The possibility of forbidding legal representation in some cases should be further considered.

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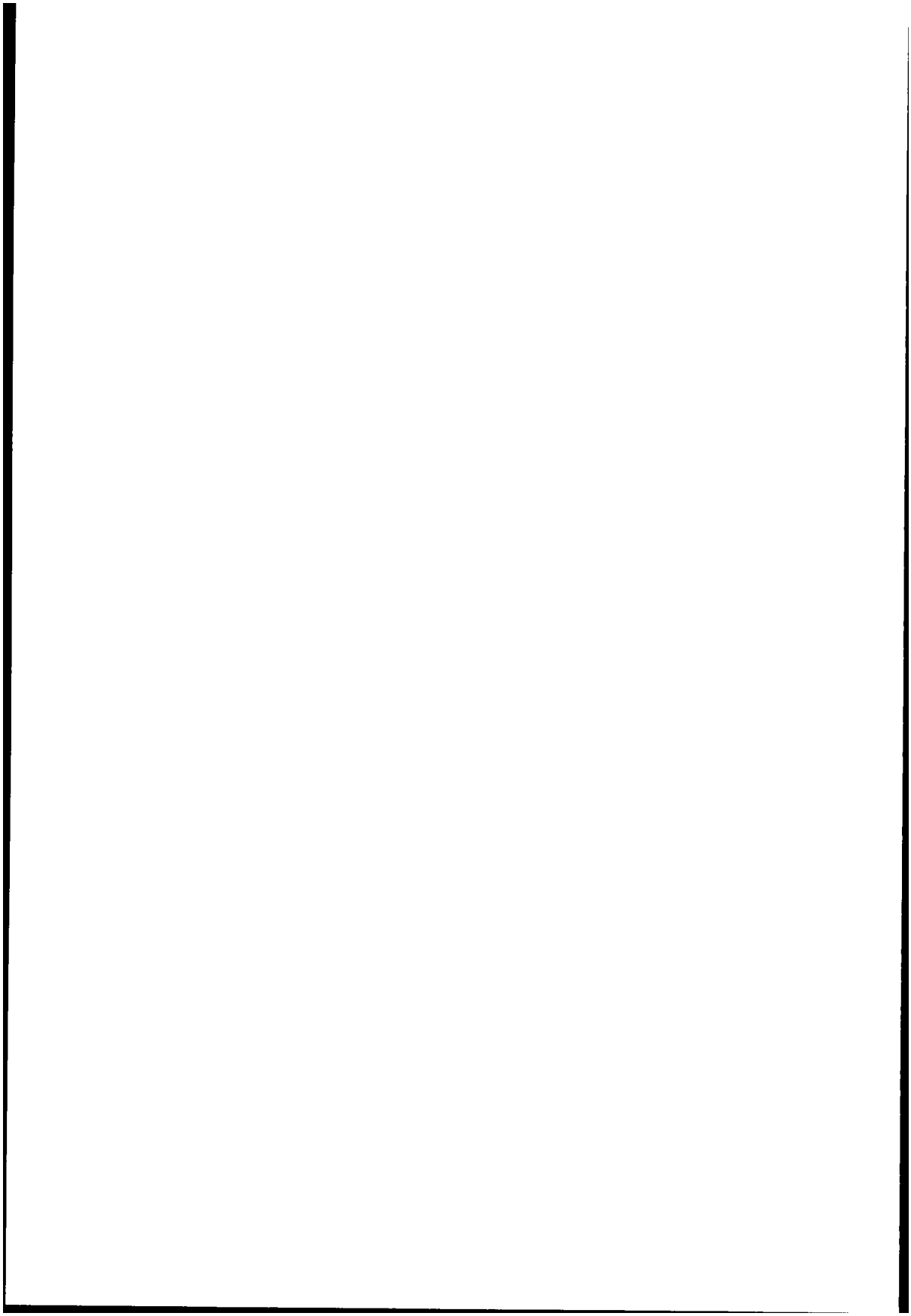


SUMMARY

Dr Norbert Reich, Professor at the Hamburg School of Economics and Political Science, spoke on judicial and quasi-judicial means of consumer protection in German law.

There are three means of consumer protection in the Federal Republic of Germany : action by the public authorities, a system of self-monitoring, and civil action by individual consumers. The resources offered by criminal law are of doubtful value and may be disregarded for all practical purposes.

The public authorities ensure consumer protection in various fields - controls relating to foodstuffs and pharmaceutical products, display of prices and so on - through the Federal Cartel Office and various laws, including those prohibiting restraints on competition (GWB) and unfair competition (UWG).

In certain matters, particularly as regards unfair competition, there is a system of self-monitoring in which consumer associations may participate.

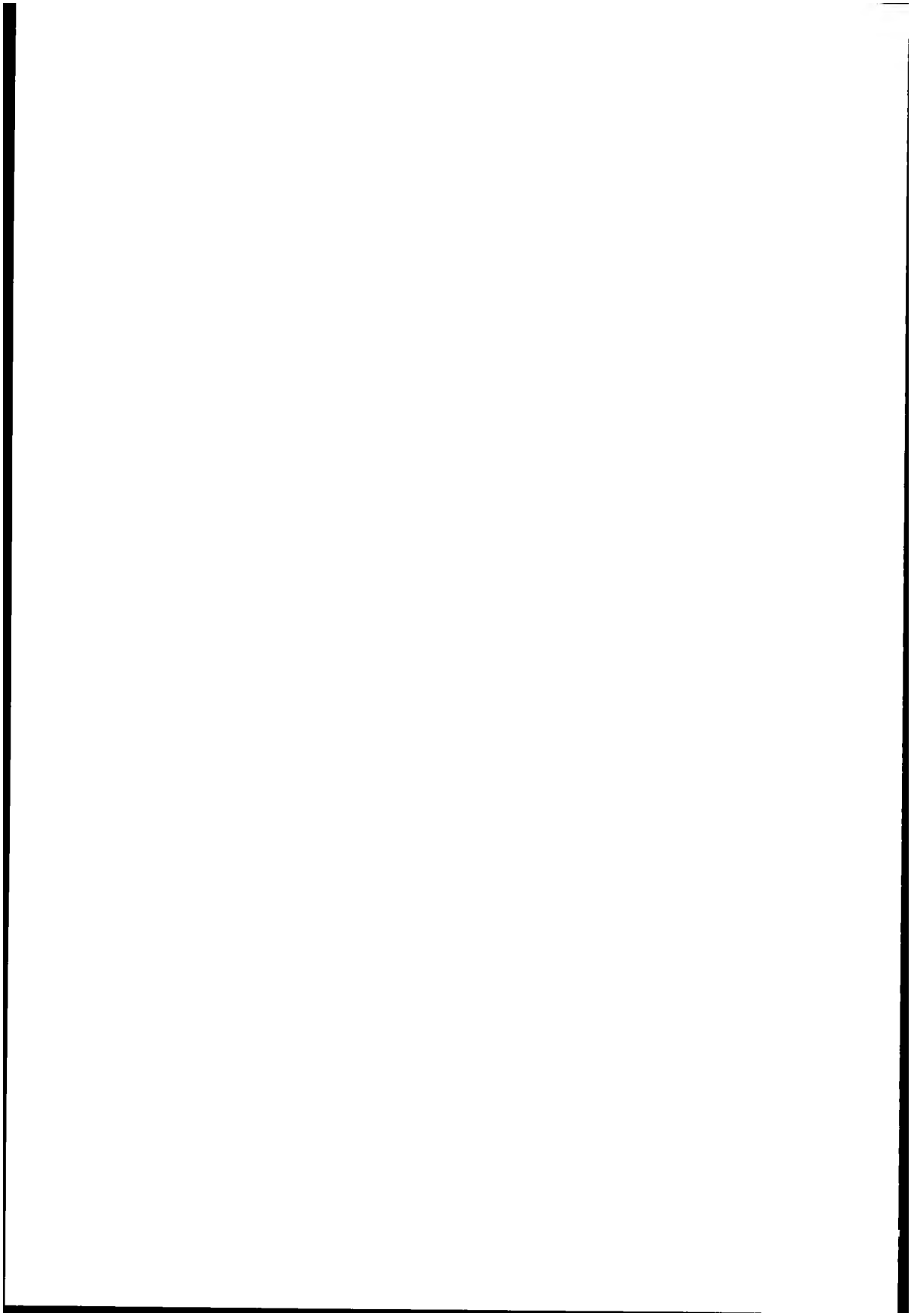
If a consumer suffers injury personally, he may initiate civil proceedings for damages.

Collective action (Popularklage) does not exist in German civil law.

The consumer associations cannot take part in the defence of one of their members, nor can the public authorities intervene in civil proceedings on the side of a consumer (save for rare exceptions as regards contracts).

Industrial concentration in the consumer goods sector is constantly weakening the position of consumers, who need better administrative control and increased collective protection through associations with sufficient powers to guarantee their members effective legal protection.

Professor Reich made a number of suggestions for improving the position of the consumer.



METHODS AVAILABLE BY ACTION BEFORE THE COURTS AND OTHERWISE TO PROTECT THE CONSUMER UNDER THE LAW OF THE FEDERAL REPUBLIC OF GERMANY

By Professor Norbert Reich
Professor at the Hamburg School of Economics
and Political Science

Introduction

The following paper is taken from one chapter of a research work prepared by the writer on behalf of the Bonn "Committee for Economic and Social Change", entitled "Outdated Concepts, Gaps and Defects in leading Consumer Legislation in Western Germany, and Trends in Case Law". The whole work breaks down into six parts - a general section and introduction, protection of the consumer against exaggerated prices and unilateral price increases, publicity and consumer information, quality control and liability under German civil law, individual protection available to the consumer as contracting party, and prosecution and execution of proceedings under consumer law.

The work is concerned with the legal aspects. It begins by defining, by analysing consumer protection, the effective lines of consumer policy, which are seen as controls on the powers and behaviour of the vendor, consumer information, opposing forces, and protection of the individual. On this basis, it goes on to investigate existing civil law and competition law in Western Germany with particular regard to precedent of the courts; possible reforms are discussed with regard to the gaps in protection noted. Finally, the closing chapter, submitted here, investigates the opportunities open to the consumer by court and, particularly, other action, within the effective lines of consumer policy.

LIST OF GERMAN ABBREVIATIONS

APPEARING IN THE ENGLISH TRANSLATION

BKA	Bundeskarkellamt	Federal Monopolies (Anti-Trust) Office
GWB	Gesetz gegen Wettbewerbsbeschränkungen	Law against restrictions of competition
UWG	Gesetz gegen den unlauteren Wettbewerb	Law against unfair competition
AGB	Allgemeine Geschäftsbedingungen	General conditions of business
DJT	Deutscher Juristentag	Conference of German lawyers
BMW	Bundesminister für Justiz	Federal Minister of Justice
GG	Grundgesetz	Basic Law (Constitution)
BGB	Bürgerliches Gesetzbuch	Civil Code
ZPO	Zivilprozessordnung	Code of procedure for civil suits
GVG	Gerichtsverfassungsgesetz	Law on the constitution of the courts
AbzgG	Abzahlungsgesetz	Law on hire purchase
StrGB	Strafgesetzbuch	Criminal Code
WiStrG	Wirtschaftsstrafgesetzbuch	Code on economic criminality
RBG	Rechtsberatungsgesetz	Law on legal advice
BGH	Bundesgerichtshof	Federal Supreme Court
BVerfG	Bundesverfassungsgesetz	Law on the Federal Constitution

The implementation and execution of consumer law.

I. Intention and Reality in Implementing the Law

Section I The existing position in law

Implementation of existing consumer law is for the most part left to three different bodies or institutions (1) :

a) In certain areas of consumer law, implementation is a matter for the State Authorities. This is in accordance with the effective line of consumer policy represented by controls on the powers and behaviour of vendors.

Price controls under Cartel Law are put into effect through an institutional procedure, the Federal Cartel Office's abuses procedure.

The same applies, if in attenuated form, as regards the controls on vertical price behaviour. This principle as applied through Cartel Law, however, is not without its gaps and s. 35 GWB (Act against Restraint of Trade) permits proceedings for compensation and cease and desist orders by fellow competitors and their trade associations, and under section 51 (II) of the Act the associations may be joined in proceedings under Cartel Law. To what extent these provisions are also applicable to consumer associations and individual consumers is dealt with in sections 5 + 7.

Further institutional control proceedings exist where consumer interests are protected by public law e.g. in the field of supervision of business activities, the foodstuffs inspectorate, weights and measures, pharmaceuticals, product quality controls, the labelling of prices, etc. We cannot enter into detail here.

b) Other fields of law are characterised by a system of "self-control", which, when consumer associations participate, can contribute towards building up a "countervailing force" and accordingly represents a further effective line of consumer policy. This pattern is followed particularly in the area covered by the UWG (Act against Unfair Competition) section 13 (I), (Ia) and (II), (section 5 below).

Institutional controls exist with regard to foodstuffs law and the

advertising of medicaments and also under section 4 of the UWG (criminally misleading information) (2) but in the field of unfair competition and advertising only in exceptional cases. The powers of the Cartel Office are limited substantially to controls over competition rules under section 28 GWB and to supervising the self-restriction agreements in advertising (3). The Federal Cartel Office has a means of extending controls under the supervision against abuse by undertakings dominating the market (section 3 below).

c) As regards consumer protection under German civil law, precedence is given to individual remedies by the injured party or by a consumer whose freedom of contract has been adversely affected. The effective line of consumer policy represented by protection of individual rights is brought to bear on application of the law by substantive law; only a consumer whose private rights have been injured may bring an action at civil law; civil law does not recognize a test case brought in the public interest. In principle, consumer associations play no part in the legal prosecution of private rights; their ability to obtain cease and desist orders with regard to competition have no more than an indirect effect on the protection of the consumer's private rights.

Those Government institutions, too, which are concerned with consumer protection interests have no place in the prosecution of private rights under civil law. An apparent exception to this principle is the opportunity open to the consumer to seek compensation for a breach of official regulations e.g. for infringement of s. 823 (II) of the Civil Code regarding product quality; but even here, the injured party must bring the action himself and receives compensation only for his personal loss; applicable law makes no provision for test cases, class actions, government assistance etc. (cf. on this point, s. 6 et seq. below).

As regards general conditions of trade, however, government powers of supervision already exist under present law, e.g. in the insurance and the building society industries (4). The Cartel Office already possesses supervisory powers under existing law with regard to conditions of trade of a type to which Cartel Law applies, e.g. in the case of monopoly conditions and recommendations and in the field of controls on market power (ss 2, 12, 22, 38 (III/GWB) (5).

Section 2 Opportunities for improvement - principles

Various methods of prosecuting the law with regard to consumers are the result of developments both in the history and the theory of law and are based on the distinction between private law and public law (6). The "private law" sector (civil law, and to a certain extent also the UWG) is open to individuals whose particular

rights have been encroached upon, or possibly by their associations. The field of "public law" (foodstuffs law, supervision of businesses, price-labelling of goods, but also appreciable parts of Cartel Law), on the other hand, according to prevailing doctrine impinges with sovereign means "from the outside" on the market activities, which are in principle unfettered, of commercial entities; the form, the prerequisites and the "public" framework for market dealing, but not, however, the terms and conditions of the market itself.

The differentiation between public and private law gives rise to a whole range of problems of which neither the economic nor the legal aspects can be elaborated upon here. As regards consumer law, it might just be mentioned that the gap between the separate fields of "public law" and "private law" is being increasingly narrowed in legislation. Public law impinges on the field of private transactions; conversely, contracts under civil law are losing their private nature, e.g. through the use of general conditions of trade. Instead of a strict division the two fields of law are tending to complement each other with the single goal of consumer policy.

If these considerations are accepted, it follows that there can be no question of restricting institutional controls within the concept of public law on the one hand and narrowing the opportunities for implementation under civil law to the prosecution of particular rights under "private law" on the other (7).

The problem that is central to the considerations that now follow is that of the horizontal dove-tailing of institutional controls, the formation of countervailing forces, and the prosecution of particular rights; the possibility of "self-controls" must also be taken into account (8). The opportunity for dove-tailing of this kind under existing law will therefore be dealt with in some detail.

The precedence of a market-compensatory concept in consumer law also means, however, that the improvement of institutional controls on implementation and the formation of opposing forces should be a central factor in consumer interests (9). In view of the mergers of industries producing consumer goods, the relative weakening of the position of the consumer, and the broad effect of the damage done to consumers and the infringement of their legal rights (e.g. as regards producer liability and unfair general conditions of trade), protection of private rights can be applied as a means of effective prosecution only to a very limited extent. This does not mean, however, that protection of private rights is no longer of any importance. Only if it is firmly set within improved systematic institutional controls and comprehensive group protection by consumer associations will the optimum of protection of private rights be guaranteed.

II. Improvement of Institutional Controls Under Consumer Law

Section 3 The Federal Cartel Office as supreme consumer authority

Inasmuch as the consumer generally meets his needs through the market, as is the case with the economic system in Western Germany, the taxation and controls on this system are also of immediate importance in consumer protection. There is also then justification in clothing the Cartel Office, as the supreme market authority, with powers as a consumer protection authority (10). This is in accord with current practice in the price behaviour controls field. It is only a matter of subjecting the other effective lines of consumer policy to control by the Cartel Office, insofar as it is not merely the individual consumer who is effected thereby, especially in the field of advertising, quality control and general conditions of trade, where there is insufficient protection by other authorities. In part, this can be done within the framework of existing Cartel Law, but in part corresponding new legislation will be required.

In the advertising field, controls on undertakings that dominate the market and oligopolies against the abuse of publicity is already possible within the framework of s. 22 GWB. A market-dominating oligopoly is not eliminated by the mere fact that there is intensive competitive advertising within its confines; excessive competitive advertising is in fact an indication of the existence of a market-dominant position .

The definition of an "abuse of advertising" by a market-dominating undertaking or oligopoly gives rise to some difficulty, however, through lack of practical experience. In the first instance it may be assumed that a breach of the concrete provisions of the UWG can be described as an abuse under Cartel Law (11). This applies particularly to suggestive forms of advertising and to misleading advertising. A breach of advertising prohibitions in other legislation could also constitute an abuse. Quantitative controls in advertising, e.g. in the case of excessive expenditure on advertising in the detergents and pharmaceuticals market, is unlikely, however, to be covered by s. 22 GWB. In this case, price controls under Cartel Law can be expected to have only an indirectly inhibiting effect on advertising. More radical proposals, e.g. the introduction of an advertising tax, go beyond the scope of the GWB (12).

As regards the rules of competition that may be set up under s. 28 (II) GWB by trade and professional associations to promote fair and effective competition and which must be registered with the Cartel Office (13), the Office must ensure that certain forms of

positive advertising that increases the consumer's awareness of the market are not prohibited under the rules, e.g. comparative advertising or the so-called special offers. Further, self-restriction agreements in advertising may be permitted under Cartel Law if they serve a purpose in the public interest that may be pursued without hindrance under s. 1 GWB; where necessary, the Cartel Office may approve a self-restriction agreement under s. 8 GWB, as has been done with regard to the advertising of cigarettes on television (cf. s. 22 Foodstuffs Act) (14).

The powers existing under the law as at present are, however, still very limited; the threshold at which they attach is high (market dominance) or requires a specific situation under Cartel Law (competition rules, voluntary restriction agreements). It will therefore seem preferable for the Federal Cartel Office to be granted direct control of advertising on the lines of the American Federal Trade Commission, which is both a cartel board in the traditional sense and a consumer protection institution (15). The means by which substantive law could be applied might well be advertising rules or a code of conduct (reverse onus of proof, compulsory publication of corrections of fact) under a UWG amended to take account of consumer protection aspects.

Quality controls are on the whole left to special authorities; the Cartel Office's powers are therefore only of subsidiary importance. Here, too, s. 22 GWB again offers an opportunity for intervention if a market-dominating situation exists. However, where there is appreciable competition in quality the basic features of a market-dominating oligopoly are already lacking.

If competition in quality is neither present nor possible, particularly in the case of goods of the same kind, an abuse may exist e.g. in the way of a planned obsolesence strategy (16), for example where rapid-wearing exhaust silencers are built into motor vehicles even though the engines are claimed to be "long-life". Misleading information regarding product quality can be dealt with by advertising controls under Cartel Law. Apart from this, there are opportunities under Cartel Law for undertakings to co-operate in improving quality, e.g. through type and specialization cartels, and rationalization recommendations. Further, product safety agreements do not fall within the cartel restrictions, nor do seal-of-quality associations, RAL (State Conditions of Supply Committee) certifications, etc. (17).

With regard to general conditions of trade, the Cartel Office already has certain powers of supervision. For example, the Office took account of consumer interests in the protest procedures under cartels and recommendations regarding terms and conditions (ss 2 and 38 (II)3.GWB) when drawing up general conditions of trade, e.g. in the case of liability under guarantee (18).

An extension to the above position in law in the form of preventive controls on general conditions of supply by the Cartel Office has been proposed by several regional Social Democratic Jurists Associations (ASJ's) by one federal ASJ group, and by the speaker at the 50th German Jurists Conference, Peter Ulmer (19). Nevertheless, the proposals differ substantially. Some have proposed that general conditions of trade should be subject to prior approval by the Cartel Office (20). Proposals of this kind must however, be regarded as hardly practicable in view of the abundance of existing general conditions of trade and of the cost involved (21). The ASJ national working party has therefore come forward with model controls based on registration of general conditions of trade with the Federal Cartel Office and providing, as part of the registration process, for the conditions to be checked as to their conformity with substantive law provisions under corresponding legislation, and which would make registration a prerequisite if the conditions were to be effective under civil law when applied to individual contracts and provide for subsequent abuse proceedings even against general conditions of trade already registered (22). Peter Ulmer's proposal at the 50th German Jurists Conference is based on similar considerations but within the registration procedure provides for only outline controls and not for complete controls on the content (23).

In accordance with the concept of consumer policy adopted in the present paper, precedence is given to the ASJ working party's proposals. Registration and controls as to legality by the Cartel Office, have a far-reaching preventive effect; defects that may arise at a later date can be corrected by the supervisory procedure against abuse. In view of the extensive encroachment on room for competitive manoeuvre, compulsory approval would seem too radical (24); from the consumer's point of view, simple outline controls as proposed by Ulmer are inadequate.

If it is decided to accept this model, the need for consumer associations to proceed against general conditions of trade, e.g. under s. 31 (I)a.UWG, no longer arises. (cf.s. 5 below) However, when it comes to institutional controls, the consumer associations will have to be more closely concerned in the procedures of the Cartel Office than in the past. Protection of the individual consumer's particular rights in disputes under a contract governed by general conditions of trade is not curtailed by institutional controls but reinforced (section 7 below).

Section 3a The General Conditions of Trade Committee's Proposals to the Federal Ministry of Justice

In March 1975 the working parties set out by the Federal Minister

of Justice put forward proposals regarding procedural controls on general conditions of trade (25). The proposals reject preventive controls, even in the form of a registration procedure. The working party in fact is content with a subsequent formal control procedure concerning general conditions of trade which would take place before certain divisions of the Higher Regional Courts and would be introduced by trade or consumer associations, or by a special Federal Office for Consumer Protection. Judgment given in favour of an action would determine the illegality of general conditions of trade and this decision would bind other courts; it would also affect contracts already concluded before the decision concerned became legally effective, but not yet executed. Legally binding decisions would be published in a central register. Formal actions and interim orders would be possible against unlawful general conditions of trade. Parallel users of general conditions of trade that have already been confirmed as unlawful are not, however, bound by the judgment; where necessary, it may be possible to obtain an interim order against them (point 17).

As regards preventive controls, the working party suggests a process of preparing specimens. These would be prepared by special committees involving the practitioners concerned (points 21 and 26). It would not, however, be compulsory for undertakings to draw up or use specimen general conditions of trade of this kind; nor are they in the nature of legal provisions. However, they would not be subject to the formal approval procedures and will therefore benefit from legal advantages as against standard general conditions of trade (point 23).

The working party's proposals are contradictory and inadequate in terms of consumer policy. Firstly, they limit the quasi-institutional controls to a subsequent inspection to be undertaken not by the institution (the Consumer Protection Office) itself, but through a semi-judicial procedure in which an authority would take part. The working party attempts to solve a mass phenomenon - that of general conditions of trade - by means of contentious proceedings inter partes, the legal effect of which it must nevertheless seek to apply to all contracts concluded under those general conditions, without however involving parallel users (26). Proposals include the setting up of a new authority, but limit the latter's powers to such an extent that the public need for such an authority is eliminated; in this case, integration with existing authorities (the Federal Cartel Office) and procedures would have been better. Even where a decision is legally binding, any person who has drawn up general conditions of trade found to be unlawful is still free to use such general conditions with only slight modifications; in this event, further legal proceedings must therefore be brought (an action or a request for an interim order). A consumer affected by the general conditions of trade is still expected, even where these are unlawful, to take legal action with regard to execution

of the contract and the pursuit of his rights; if the contract has already been executed, the consumer will no longer benefit from a decision as to the illegality of general conditions of trade (point 4).

The procedure whereby specimen general conditions of trade are drawn up attempts to introduce indirect compulsion to use general conditions that are beneficial to the consumer through the grant of legal privilege, but cannot really enforce this owing to the lack of "equal bargaining rights" in consumer law and the lack of binding effect in law. The problems under Cartel Law with general conditions of trade of this kind still await clarification (cf.ss. 2 and 38 (II) 3 GWB). Nor is it possible to compel the drafting of general conditions beneficial to the consumer against the will of the undertakings concerned, since the voluntary users, i.e. the representatives of the consumer associations and the undertakings side, must agree to the specimen general conditions of trade (point 33).

In view of the opportunities that already exist so far for controls on general conditions of trade, there is no need for the procedure proposed by the working party to be given a statutory basis; this would be a retrograde step in present thinking on consumer policy. Preventive controls through an institutional registration and abuses procedure might well, on the other hand, be more effective; it gives the undertakings side the advantage of generally rapid clarification of the legal position. Registered general conditions of trade would be framed in a way beneficial to the consumer and similar to the specimen general conditions but could also be put to practical use in formal business dealings.

Section 4 Voluntary Controls

The objection often levied against institutional controls is that they are not only expensive but of little effect; better results at less expense could be achieved through voluntary controls by the competitors concerned.

The introduction of voluntary controls as an "alternative" to State Controls is at present being discussed in the advertising industry and with regard to the drafting of general conditions of trade. Existing competition law already caters for possible voluntary controls of this kind, particularly as regards cease and desist orders under ss. 13 UWG and 35 GWB, the registration of rules of competition under s. 28 GWB, and association recommendations and terms and conditions cartels under ss. 2 and 38 (II) 3. GWB. In order to avoid attempts to introduce State Controls, the Central

Committee for the Advertising Industry (ZAW), has set up a "German Advertising Council" to develop guidelines and rules for advertising, to encourage self-discipline in the advertising industry through information and advice, and to maintain contacts with consumer associations (27).

The model for this is the British "Advertising Standing Authority". However, the "German Advertising Council" includes only representatives of the advertising industry and not of consumers; nor has it any executive powers; nor can it, in any event, impose sanctions such as boycotts etc., for reasons of Cartel Law (s. 26 (I) GWB). Experience of voluntary controls so far does not give much cause for regarding this as a step towards better prosecution of the law. A voluntary control body will either possess only advisory powers, in which case it cannot replace State controls, or may be granted powers to levy sanctions, in which case conflict with the GWB (ss. 1, 25 and 26) over and above the UWG will be unavoidable.

Existing law does indeed make provision for voluntary controls on general conditions of trade through specimen conditions or specimen recommendations, but these cannot replace institutional controls from the consumer aspect as proved by ss. 2 (II), 28 and 38 (II) 3 GWB. To this extent, voluntary controls in the true sense no longer arise. Apart from this, a privileged position for specimen general conditions of trade would be open to the objections set out in section 3a.

III. Increased Opportunities for Associations Representing Consumer Interests to set up Countervailing Forces

Section 5 The Composition and Powers of Consumer Associations

If the need for "countervailing forces" as an effective line of consumer policy is accepted, two points will arise with regard to the legal position - firstly, the concept of the consumer association must be defined, since it is not the individual consumers but an association, organisation or group etc. which collectively is to safeguard and implement consumer interests. The legal powers of such associations must also be investigated, with particular examination of the extent to which legislation exercises an inhibitive effect on the activities of such associations. Reference will be made later (section 9) to the social importance of the question of countervailing forces, particularly in connection with the consumer movement.

1. The concept of the consumer association is very confused both in consumer sociology and in consumer law (29); the lack of terminological clarity in the concept of the consumer extends into the field of organising associations. Existing law recognizes more or less the following associations that concern themselves with consumer matters (30).

a) As regards State-promoted consumer organizations, there are the central consumer associations of the Länder, various associations representing sectional interests, housewives associations, and the home economics co-operative (Hauswirtschaft). The consumers co-operative (Arbeitsgemeinschaft der Verbraucher - AGV) is an umbrella organization to which the above bodies, amongst others, belong with full members'rights, without the AGV having any powers of direction over them. The trades unions, however, are not members of the AGV. There is no consumer organization functioning as a self-help body representing the interests of individual consumer-members in Western Germany, unlike the position in the U.S.A. or the Netherlands.

b) By an extension of functions, the consumer organizations have, with State participation, set up the Testing Foundation (Stiftung Warentest) to carry out comparative testing of goods, and the Consumer Protection Association (Verbraucherschutzverein) at Berlin to supervise cease and desist actions relating to competition.

c) Specific consumer interests are represented on a membership basis by the automobile associations (ADAC, AvD) and tenants' associations. The scope of their activities is limited to consumer interests on the part of the driver (as opposed to State Institutions, manufacturers, dealers and repairers) and tenants (particularly within the framework of the rent adjustment procedures under the Second Tenants Protection against Notice Act and the protection of tenancies under leasehold property law).

d) Ad-hoc associations, e.g. citizens' action committees, consumer associations to pursue actions under the UWG (so-called "legal fees associations"), "accident clubs", associations for special purchasing and sales voucher facilities, and book-sellers societies to safeguard refund on returns (31).

e) Consumer co-operatives, being self-sufficient organizations set up to meet consumer requirements (32). They are subject to the discounts ban under section 5 of the Discounts Act.

f) Trade Unions, where they also include consumer protection within their purview, which has been the case only quite recently (cf. s. 10 below) (33).

In view of the fragmentation of the representation of consumer

interests, discussion is centering upon whether a central consumer association on a membership basis should not be set up. In particular, the Metaplan investigation conducted on instructions from the Federal Minister for Economic Affairs supported this, and suggested that the State should encourage its formation and grant a subsidy (34).

In law, the freedom of association of consumer organizations (of whatever kind) is based on a.9 (I) of the Provisional Constitution. If a consumer association wishes to exercise specific powers, however, it must abide by the appropriate statutory provisions. This applies especially to consumer associations' powers to institute legal proceedings under section 13 (I)a UWG, which can be assumed only if certain organizational structures exist. Case law has established in the meantime that only such consumer associations may proceed for cease and desist orders in connection with competition as safeguard consumer interests not only according to their Constitution but also in actual fact through education and advice; simple "legal fees associations" and ad-hoc associations cannot sue or be sued (35). Special consumer associations e.g. ADAC, may proceed at law only within the framework of their formal activities, e.g. in connection with the motor vehicle market. Trade unions have already been deprived of such opportunities to institute proceedings for some time. Conversely, the consumer protection association and the central consumer associations of the Länder have rights at law, the latter only, however, with regard to their local effect.

2. The legal powers of consumer associations are still very limited; to some extent, they are also directly constricted by legislation.

a) Consumer associations' chief rights within the meaning of the above are based on s. 13 (I) a. UWG. The consumer association is restricted to bringing cease and desist actions (warnings, interim orders and injunctions); the UWG does not provide for any compensation. Legal capacity is not tied to a breach of membership rights but is, in principle, "independent of grounds"; s.13 (I) a. UWG introduces formal controls on illegal aspects as competition, but taking account of injured consumer interests (36). Actual legitimation is restricted to the breach of certain provisions specified in section 13 (I) a. UWG, particularly in the case of offences against the ban on misleading advertising under section 3 UWG. Advertising contrary to public morals can be proceeded against only if it affects appreciable consumer interests; these include unfair methods of competition.

In other fields of competition law, consumer associations have no capacity to proceed at law, particularly not in Cartel Law,

the law relating to bargain purchasing and discounts, foodstuffs law, and in the field of the advertising of medicaments (ss 35 GWB and 12 Discounts Act, and 2 Bargain Purchasing Regulations) (37).

b) There are express statutory provisions preventing consumer associations from bringing an action for compensation for prejudice to its own interests or damage to consumer interests represented by it. An apparent exception applies only in the case of interim orders and cease and desist orders, which may be successfully obtained; under these, there is a claim for the replacement of costs under general principles of law; conversely, if they lose they must bear the respondent's costs.

Whether consumer associations can, as a kind of compensation, obtain refund of the cost of legal proceedings other than before a court, particularly of legal fees in the case of a successful warning, has not yet been determined at the highest level. Since, however, legal opinion holds that associations have a claim of this kind for the refund of costs under substantive law when opposing unfair competition in accordance with s. 13 (I) UWG, this should also be extended to consumer associations within the meaning of s. 13 (I) a. UWG; s. 13 (II) UWG does not prevent this (38).

Conversely, where warnings prove unsuccessful, it cannot be assumed that the consumer association is liable, from the protection of undertakings point of view, to the undertaking warned with regard to compensation under section 823 (I) of the Civil Code. There is no case similar to that where unjustified warnings give a right of compensation for frivolous complaints (39).

If a consumer association obtains a cease and desist order or an interim order subject to provisional execution, it will be liable to pay compensation under ss 717 and 945 of the Code of Civil Procedure if the order is later lifted. These provisions, on the one hand, represent an appreciable obstacle to consumer associations' activities and, on the other, they complicate the kind of rapid legal action particularly necessary in competition law; it may take years before a judgment becomes binding. These liability provisions further relate only to the relationship of competitors amongst themselves and not to the activities of consumer associations. They are therefore unlikely to be applicable in respect of cease and desist actions in accordance with s. 13 (I) a. UWG.

Further, in discussion on the legal basis, an <u>extension of claims for compensation</u> by consumer associations has been sought in two directions :

The effect of the "narrow" approach is to give the consumer association a right to compensation with regard to its so-called

prosecution and representation costs in extra-judicial proceedings (the costs of investigating prohibited acts of competition, examination costs and the costs of sending a warning). Such claims are not excluded under s. 13 (II) UWG; however, its bases in applicable law are questionable, since ss. 823 of the Civil Code and 1 UWG cannot apply in this case (40).

A more radical approach provides for the association to be able to demand replacement of loss of value on behalf of its members where the latter are prejudiced by misleading acts of competition. Loss of value in this case is the difference between the hypothetical market value of the service misleadingly offered and the price actually asked. This would in some cases be paid to the persons concerned and in others to the association (41). Such an approach could apply only in the case of a membership-based organization. It would have to be taken up into the UWG and leads to considerations as to "class actions" (s. 8 below).

c) The powers of consumer associations would be extended if they were able to apply for cease and desist orders against users of general conditions of trade by analogy with s. 13 (I)a. UWG. This proposal appears in s. 27 of the General Conditions of Trade Bill put forward by the CDU/CSU party (42). Were it decided to introduce preventive controls on such general conditions (s. 3 above), this proposal would be superfluous.

d) Consumer associations' opportunities for participating in official supervisory procedures within the framework of consumer law are still very slight; they should be improved so as to dove-tail official controls and group protection. It is true that the consumer association - like anyone else - can draw the authorities' attention to abuses, e.g. in the field of price-labelling, foodstuffs law and Cartel controls. There is no more right to participate, however, as there is a right to legal remedy.

A specific exception is provided by s. 51 (II) 4. of the Cartel Act (GWB). Under this, associations of persons whose interests are appreciably affected by decisions of the Cartel Office and whom the office invited to attend the proceedings at their request may take part in Cartel proceedings. Where the GWB also protects consumer interests, particularly within the framework of price supervision, consumer associations' interests are appreciably affected by Cartel Office proceedings; they can therefore take part on request (43). So far, this provision has had little practical application. It ought to be extended to the effect that all consumer associations should automatically be invited to attend all Cartel Office proceedings that affect consumer interests (44), e.g. in the case of controls affecting

prices advertising and general conditions of trade. Those participating in Cartel Office proceedings may also lodge protest under s. 62 (II) GWB. Where terms and conditions of Cartels (s. 2 (II) GWB), rules of competition and recommended terms and conditions are arranged (s. 38 (II) 3. GWB), consumer associations should be given a hearing if consumer goods markets are affected.

e) Legal advice by consumer associations is governed by the Legal Advice Act of 13.12.1935 (RBG). Although the original "protective aim" of the Act (protection against "outside control" of the legal profession) (45) is largely obsolete, there is no doubt as to the validity of the Act.

The concept of the provision of legal services in s. 1 (1) RBG is very widely drawn according to legal precedent. No remunerated activity is necessary to be subject to the ban on the provision of legal advice by way of business. All legal advice on a specific case, any assistance in framing a contract, any correspondence in prosecuting legal claims, any reply in a question and answer column is subject to the ban under article 1 (1) RBG as soon as it is more than a chance incident (46). In its decisions on "accident clubs" the Federal Supreme Court has regarded the activities of friendly societies as legal advice where after an accident they undertake legal prosecution, financing, repair and hire of replacement vehicles in the ordinary way of business under assignment of compensation claims (47).

Exceptions exist to the ban on legal advice in the case of membership-based associations who give advice to their members (s.1 (7) RBG); this includes e.g. the ADAC and tenants' associations within the scope of their formal activities, but not, however, central consumer associations, since these are not organized on a membership basis. However, the central associations or individual employees may be allowed to give advice, as has been done e.g. in the Land of Lower-Saxony.

A word must also be said about the Legal Advice Act with regard to the prosecution of individual consumer claims (s. 6 below). Since it is intended to protect the consumer against unqualified legal advice, it still serves some purpose today in protecting the consumer. However, insofar as it hinders consumer associations' activities, even though they may give legal advice in certain circumstances (this at least no longer gives rise to problems such as the cease and desist order under section 13 (1) a. UWG), it has lost its original protective object. The difficulties under the RBG can be "circumnavigated" (48), by granting approval in exceptional cases and through organizing consumer associations on a membership basis.

f) Mention should also be made, if only for the sake of completeness, of the fact that according to a decision by the Federal Supreme Court of 28.2.1975, the ban on voucher trading under s. 6 (b) UWG also applies to consumer associations (49).

IV. Improvement in Private Prosecution by the Party Concerned

Section 6 Private prosecution of the law and legal advice

The opportunities proposed here for prosecution by authorities in groups of legal claims under consumer law should in no way reduce the safeguards on the individual consumer's particular rights, but improve and activate them even through preventive measures before legal proceedings are taken. In addition, the machinery of individual safeguards available under the existing system in substantive law and in procedural law should also be further improved. Taking legal action in a wider sense also includes legal advice and the legal treatment of contracts arising out of unlawful market behaviour by firms (s. 7 below). The problem of taking legal action in the present situation lies rather less in the opportunities available at law than in their "stratified" effect. The pattern for protection of the individual under civil law and procedure is based on the "adult" consumer having equal rights, and safeguarding his rights and obligations either independently or through legal advisers, although in the field of consumer law such a person is exceptional (50).

Procedural law follows different patterns than company law, consumer law and civil law, by, for example, the setting up of special courts of law for commercial matters, disputes concerning industrial patents and Cartel Law, i.e. areas of company law, while on the other hand, through local court procedures, recognizing a proper court for consumer questions (e.g. tenancy cases, actions under the numerous types of contract relating to consumer matters, and s. 23 of the Constitution of Courts Act). Apart from this, through the competent courts amendment of 21.3.1974, persons other than traders, i.e. usually consumers, have been prohibited from agreeing places of execution and competent courts; rules regarding summary proceedings for debt are still pending (51).

Legal aid, as part of State social service, benefits a consumer requiring protection if he is poor and if proceedings have some chance of success; this is examined by a special procedure (s. 114, Code of Civil Procedure). If legally aided, a party can obtain exemption from court fees; he may apply for the appointment of a lawyer if one is necessary (s. 115 and 116, Code of Civil Procedure) (52). Grant of legal aid, however, does not allow exemption from

costs if the case is lost (s. 117, Code of Civil Procedure), particularly as regards the other party's legal fees, and does not extend to pre-trial proceedings.

Legal aid, does overcome the most serious difficulties in prosecution of the law by the (poor) consumer, but falls short where the consumer requires only information and advice on legal matters, a financial claim, correspondence with firms, and the like. An improvement in the status of protection of the consumer's rights through provisions of substantive law will be advantageous to the consumer in individual cases only if he is also aware of his rights. A move towards seeking extra-judicial legal advice is the inevitable outcome of consumer protection legislation (53).

Legal advice is substantially hindered at the present time by the Legal Advice Act (RBG) (s. 5 above). The central consumer associations in particular, despite their involvement with the matters in question, are not permitted to give legal advice unless they have been granted special approval. The question of legal advice to consumers by trades unions does not generally arise since their powers to give such advice are restricted to trade union activities protected under article 9 (III) of the Provisional Constitution i.e. labour and social law. An extension of such activity is unlikely to be compatible with s. 1 (7) RBG (54). Legal advice given to tenants' and dirvers' associations is restricted to their constitutional activities. However, s. 1 (5) 1.RBG allows a consumer to be given legal advice by his business associate, a company; a broker, for example, may prepare draft contracts for his client, carry on correspondence, etc. (55). Such legal advice, however, is not altogether desirable for the consumer in the case of a dispute, as it is not objective.

According to s. 1 (3) 1. RBG, local authorities may also give legal advice within the scope of their overall jurisdiction, which is protected under the Provisional Constitution (s. 28); for this purpose, official advisory centres can be set up, as had been successfully done at Elmshorn and Lübeck; the "ORA" at Hamburg is not affected by the RBG as it is a Land institution (56). Under existing law, basic powers of legal advice are given to lawyers (s. 3 Federal Lawyers Act). Since advice by lawyers as a rule is intended to lead to a hearing before the courts and the lawyer's services are remunerated according to the sum in dispute and the extent of proceedings, it cannot take the place of extra-judicial legal advice or surmount the initial fears and lack of legal knowledge of the consumer requiring protection. Whether the lawyer advisory centres already existing at courts are adequate is still doubtful.

If extra-judicial legal advice therefore becomes a duty of the State in the field of consumer law, the question arises to whom this should be entrusted. In fact, two models have been proposed :

The German Lawyers Association (DAV) has proposed extra-judicial legal aid. Under this, legal advice would be undertaken solely by lawyers; it would be available to the financially under-privileged who would receive advice from a lawyer chosen by them on submission of an entitlement certificate. The fees would be paid by the State. An examination as to need would be made by the lawyer. Advice would then be offered in the lawyers' central information offices (in large cities) or in the lawyer's own office (57). A similar line is taken in a model proposal by the Lower-Saxony Ministry of Justice, which also seeks to introduce legal advice by lawyers through central information offices and (at a second stage) through private consultation in the lawyer's office (58).

There are no legal obstacles to this model. The problem arises only with regard to distribution of costs. The question must also be asked whether this kind of legal consultation is sufficiently alligned to consumer needs, i.e. meets the consumer's concern in protecting his particular rights. Other social problems arising from this solution, which has been developed with social welfare in mind rather than consumer law, cannot be dealt with here.

A second model, which is supported by the Federal Committee of the Social Democratic Jurists Association, wishes to entrust legal advice to public advisory centres set up by the various local authorities (59). Advice can be given by professional men on a voluntary basis; this would reduce costs. The Bremen models for legal advice by workers or employees associations (60) is based on similar principles but would be entrusted to different institutions. All these models assume that the classes hitherto excluded from legal advice are generally to be found amongst the non-self-employed; they are aimed at social-compensatory legal advice. Legal consultation is not aimed at the preparation of a legal case but at avoiding it, if those seeking advice can be helped in this way.

No attempt can be made here to decide in favour of one model or another. It also appears that in discussion so far too little attention has been paid to the specific consumer protection components of legal advice. This in fact requires legal advice to be tied to the länder central consumer associations and their advisory centres (61).

In law, this approach can be effected through special approval under s. 1 (1) I. RBG or through a membership-based consumer organization as under s. 1 (7) RBG (cf. s. 5 above). Where central consumer associations are concerned with advising consumers on economic matters, e.g. through price comparisons, an explanation of, and campaigns against unfair methods of distribution, and possible calls for boycott measures, their most proper function is to advise on protection of the individual. The funds for this should be provided by the State. To what extent a consumer's

entitlement to free legal advice by the central consumer associations should be linked to specific income bands cannot be decided here; as a rule, this would be contrary to the system, since the concept of the consumer adopted is based on economic status and not on income. Consumer advice in this sense is not social welfare but legal reinforcement of the structurally weak position of the consumer in the market.

In discussions on improving individual protection of the consumer attention has also been given to the extension of conciliation and arbitration procedures already existing within certain branches of industry (e.g. motor car repairs). For detail, reference may be made to the work of von Hippel (62). In my opinion, such procedures can be recommended only if the various parties can be given some form of constitution and are of equal strength.

Section 7 Follow-up Contracts, Nullity and Compensation

One question so far unanswered in pursuing the consumer's rights concerns the extent to which contracts that have been made in breach of consumer protection legislation can be impugned at law, e.g. in the case of prohibited methods of advertising, misleading indications of prices and quality, abuse of maximum price rules permitted under Cartel Law, misleading loss-leader offers, and the use of unlawful general conditions of trade. The consumer concerned gains small benefits from injunctions against advertisements, supervisory proceedings by the Cartel Office, official controls on general conditions of trade, and the like, if the regulations or official controls do not "carbon through" to the individual contract.

Within the scope of appropriate civil law, several possible approaches exist.

1. The simplest way is that offered by s. 1 (b) of the Instalment Payments Act (AbzG)(s. 6 above). If right of cancellation is extended, e.g. to cover all consumer credit contracts or all door-to-door trade, the cancellation rights already associated with the duty to provide information give effective consumer protection. However, cancellation rights are limited to a short period of grace.

   A Bill introduced in the Upper House on 1.10.1975 (62a) on the initiative of the Länder of Bavaria (62b) and Bremen (62c), provides for a right of cancellation for customers in door-to-door sales and similar transactions. The Bill attempts thereby to reinstate, by means of civil law remedies, the freedom of decision in formal transactions of a customer who in sales on the doorstep, at "coffee parties", by "bargains" offered by

the road-side and the like generally has too great a demand made on his powers of decision. In this way, the Bill pursues a "new consumer policy, of directing the citizen as consumer to economically more rational action and thereby to safeguard his role as a party to market dealings" (62d). The White Paper to the Bill also confirmed that the means of protecting the consumer available under present law are inadequate; the right of cancellation in instalment business is restricted only to certain types of contract without being co-ordinated to the special situation of door-to-door selling and the like; other provisions of the Civil Code (ss 119, 123, 134 and 138) are not sufficient (on this point, ss 2 to 7 below); the customer has a right of cancellation only in exceptional cases where competition law is infringed (ss 8 and 9). Even where such action is open to the customer, he often finds that there is insufficient proof.

Under s. 1 (I) of the Bill, the customer entitled to withdraw statements of intent to which "he has been led by oral negotiation other than in the other contracting party's permanent sales room or that of his representative." This includes not only door-to-door business and sales concluded at so-called "coffee parties" but also contracts initiated on the street, at the place of work, on trips and at special events; where exactly the lines should be drawn in specific cases has proved difficult to determine (62e).

The right of cancellation does not apply if the oral negotiations have been conducted only at the customer's request, if the declaration of intent has been certified by a notary, or if the services are rendered and paid immediately when negotiations are concluded and the cost is small; the onus of proof in this case lies on the trader (s. 1 (II)and (III)).

It is worth noting that the Bill sets out its personal nature in accordance with the concept of consumer policy discussed here (ss 3 and 4 above) and is different from that in s. 8 AbzG (s.62). There is no right of cancellation if the customer concludes the contract in pursuit of his own business as a purchaser or if the other contracting party acts contrary to business principles, (s. 6). The Federal Government has generally welcomed the objectives of the Bill (62 f). Is has also referred to some difficulties of interpretation that obscure its scope. In accordance with the concept pursued in this paper, the Bill cannot but be acclaimed as a further improvement in the protection of the consumer's individual rights. In order to clarify its scope, it is desirable for the customer to be given cancellation rights in all cases where a contract is concluded in accordance with general conditions of trade.

2. In the case of unfair standard conditions of contract, case law operating to controls on their content has indicated that the contract may continue to exist once a prohibited clause has been removed (so-called partial avoidance, cf s. 139 of the Civil Code) (63). The consumer has no right of option between cancellation of the contract and its continued existence with the removal of the offending clause (64). Section 5 of the General Conditions of Trade Bill is based essentially on partial avoidance, but allows the contract to be regarded as null in exceptional cases where a contracting party cannot be expected to maintain it. This rule applies to both parties, i.e. where applicable, to the trader although it is in fact his own general conditions that offend against applicable law (65). "Equal treatment" of this kind is however undesirable. The contract can be examined for nullity only whether it is reasonable to the consumer or not. It would be desirable for the consumer to be given a right of option. If official controls are introduced on general conditions of contract, registration with the Federal Cartel Office is a prerequisite under civil law if they are to be applied to individual contracts.

3. In the case of misleading advertising in breach of s. 3 UWG, particularly as regards prices and quality, there may on the one hand be contractual guarantee claims and on the other, a right of avoidance under section 123 of the Civil Code (66). It should be noted, however, that the concept of "misleading information" under s 3 UWG is interpreted differently from "false pretences" under s. 123 of the Civil Code. Falsity always presupposes guilt, which may also arise with the deliberate concealment of facts where there was a duty of disclosure only to the other contracting party. "Falsity" is interpreted very widely, however, by the courts, e.g. in the case of concealment of a mistake in design, accident proneness, the age of a motor vehicle, etc. (67). In this way s. 3 UWG is brought closer to s. 123 of the Civil Code. Evidence must be adduced to indicate whether, in the case of misleading advertising directed towards a sale, false pretences exist as under s. 123 of the Civil Code. This would ensure that the consumer would normally be able to avoid the contract where advertising has been misleading.

4. If the content of the contract is in conflict with the ban on profiteering under s. 138 (II) of the Civil Code, the contract is void. Profiteering arises only, however, if a need etc. is expressly exploited or if there is clear discrepancy between consideration and performance. This provision has had no practical application to consumer transactions. The Bill to combat commercial delinquency (68) is intended to complement section 138 (II) of the Civil Code as follows :

"If several persons act as agents, representatives or in some

other way, when determining whether a clear discrepancy exists, all pecuniary advantages promised or granted to such agent, representative or other persons shall be compared with all services promised or granted the other party."

This addition is intended particularly to include credit representatives in the definition of profiteering.

5. Other breaches of prohibitions on profiteering, particularly as provided by ss. 302a et seq. of the Commercial Offences Act do not lead to avoidance of the transactions but to reduction of the contractual content to provide for appropriate service. Avoidance will depend entirely on the amount of excess (s. 134 of the Civil Code). The excessive part may be demanded back from the firms concerned in accordance with section 9 of the Commercial Offences Act and s. 812 of the Civil Code (69).

6. Breaches of price regulations are subject to similar rules, i.e. s. 134 of the Civil Code applies with the proviso that the transaction will be null only in respect of the excessive part that may be demanded back under s. 812, while the other part will continue to stand. A demand for repayment cannot be countered by section 817 of the Civil Code (70). The contract must, however, offend against a statutory ban, i.e. the pricing rule that the contract has failed to observe must be based directly on the Act or on statutory regulations. This does not apply to a Cartel Office maximum price arrangement. This is, based on the Act, (s. 22 (IV) and (V) GWB), but does not amount to a statutory ban. The Federal Cartel Office can, within its powers under section 22 (V) GWB, only declare such contracts as invalid as have not given rise to subsequent contracts. The gap in protection arising in this case cannot be filled by existing law.

7. The ban on business contrary to public morals under s. 138 (I) of the Civil Code is not generally considered to affect the method and manner in which a contract has been brought about but its content and other attendant circumstances. Oppressive contracts are contrary to public morals as are transactions similar to profiteering for objectionable purposes (71). The interpretation of this provision by the courts has so far been of no importance in protecting consumers.

8. Contracts brought about contrary to a statutory ban are void under s. 134, e.g. if the ban on door-to-door business under advertising law and medicines law is infringed (72). A statutory ban is also included under the provisions of the UWG insofar as they protect the individual consumer and a competitive act is directed towards the conclusion of a contract. This is the case with prohibited advertising methods. The transaction is in breach of a statutory ban which in this case arises in the

procurement of a contract through immoral conduct in competition. If in a specific case a consumer wishes to retain the contract, he may counter an objection by the trader that the contract falls under the ban in a complaint against his own conduct (so-called "reply to falsity", s. 242 of the Civil Code) (73).

9. In literature on this subjects, consideration has further been given to whether a consumer prejudiced by a transaction in breach of the ban has any claim to compensation under s. 823 (II) in conjunction with the legal provision infringed, e.g. ss 1 and 3 UWG, on release from the contract (74). There is some doubt in particular as to what provisions may be said to be protective legislation. It is generally felt that a protective statute under s. 823 (II) of the Civil Code may always be said to exist if the statute also aims to protect an individual or specific group of persons, in this case the consumer (75). A distinction must be drawn under provisions of public law and competition law that protect the consumer according to whether they have been enacted merely to protect the general public or the individual consumer as well.

As far as the UWG is concerned, legal precedent has hitherto not claimed any aims of protecting the individual, particularly under s. 3 UWG (76). This opinion can, however, no londer be maintained when determining the protective nature of the UWG. The ban on misleading advertising in competitive trading on consumer goods markets and the prohibited methods of advertising under s. 1 UWG also serve to protect the individual consumer; they are protective legislation under s. 823 (II) GWB. Protection is not nullified by the right of associations to bring actions under s. 13 (I)a UWG (s. 5 above).

The question of prejudice, however, presents a problem. Schricker and Sack regard the making of unfair contracts as prejudicial; title to compensation is aimed at release from the contract, s. 249 Civil Code (77). This opinion is not without its problems, since it regards as prejudicial the conclusion of a contract which is actually valid. Title to compensation is really a legal fiction to create a possible right of cancellation in respect of contracts conflicting with ss 119, 123, 134 and 138 of the Civil Code. Such an approach can be adopted in law only, however, if the existing legal remedies protecting the consumer are inadequate; this is not in fact the case, since s. 134 of the Civil Code applies.

10. In the case of breach of provisions of Cartel Law, s 35 GWB provides title to compensation if an undertaking has intentionally or negligently contravened a provision of the GWB or an order issued by the Cartel Office under the GWB, insofar as the provision or order, concerns the protection of another. In literature on Cartel Law, there is argument as to

which provisions or orders under Cartel Law also have the effect of protecting the individual (78). The problem has so far been investigated only with regard to firms and not to consumers. Legal precedent, for example, regards sections 25 (II) and 26 (II) GWB as protective legislation but also in the case of breaches of the Cartel ban (ss 1 and 38 GWB) in favour of such competitors who were already impeded when entering the market affected by the contract in consequence of the restriction of competition (79); s. 22 GWB is not generally regarded as a protective provision (80).

If the protective aims of the GWB are extended to consumer protection, specific provisions of the GWB may be regarded as protective legislation (e.g. protective orders) under s 35 GWB, *insofar* as they directly serve to protect the individual consumer or consumers as a group. One protective provision of this kind is the ban on tied prices, s 15 GWB. A Cartel Office pricing order under s.22 (IV) and (V) GWB contains a protective provision in favour of the consumer. Breach of the provision or the order must be unlawful and culpable; this must be proved by court proceedings. The prejudice must be causally attributable to the breach. Only direct prejudice, and not consequential and contingency loss is intended to be *made good* (81). If a firm has adopted tied prices in breach of s.15 GWB, the consumer is directly prejudiced to the extent of the difference between the tied price and the hypothetical market price; he may therefore demand repayment of the extra, though not from the other party to the contract but from the firm acting against the ban. If a firm dominating the market ignores a price regulation under s.22 (IV) or (V) GWB, it has caused direct prejudice to the consumer; the difference between the price asked and that imposed can be demanded back as compensation. In other cases, however, the consumer has no title to compensation, particularly where de facto tied prices have been introduced and where recommended prices are wrongly maintained.

Section 8 Class actions

It is questionable whether protection of the consumer as an individual could be linked with possible countervailing forces such as the American class action (82). The class action, it is true, allows individual cases of damage to be combined (e.g. product liability, fraudulent price-fixing) into a single claim and consequently is repressive in effect. It should be noted that in the U.S.A., too, recourse to the class action has in recent times been limited (the need for "notification" i.e. communication of the action to members of the "class"). The class action is consequently fortuitous

in effect and gives rise to problems of procedure which are almost impossible to surmount.

V. Implementation of the law and social policy (82a)

Section 9 The Social Policy Aspect

The problem of implementation of the law cannot be adequately settled by the opportunities offered by legislation to bring proceedings and actions. Implementation of the law with regard to consumer protection encroaches on social policy, e.g. particularly on the so-call "consumerism" movement, and the discussion in Germany on consumer education, demands for boycotts, public criticism and purchaser strikes (83).

Section 10 Trade Union Strategy

It follows from the concept of the consumer developed above (s. 4) that while there is a conflict of roles as between trade union strategy and consumer strategy, there are no differences between them in principle. To what extent the trade unions may wish to be active in the field of consumer protection is a matter that they must decide for themselves. There is cause for doing so, particularly in the field of price policy and advertising controls (84). Legal advice and possible legal action also come to mind, by analogy to labour law (cf. s. 6 above).

Section 11 Participation

There has also been discussion on models for consumer participation, e.g. as the third parity member on the management boards of undertakings, and the appointment of special consumer representatives in undertakings to examine price, advertising and other corporate policy from a consumer aspect (85).
The question of consumer participation is also topical in connection with the setting-up of a consumer protection authority on parity basis. This hardly seems feasible in the foreseeable future (86).

Section 12 Ombudsman

Discussion has also been devoted to a so-called Ombudsman approach along Swedish lines (87). Under this proposal, an independent consumer Ombudsman would promote consumer interests as against firms, particularly in connection with advertising and general conditions of trade. In view of the extension of institutional powers called for (s. 3), the Ombudsman approach would seem to be superfluous.

Section 13 Judicial organization - Chambers of Consumers

Effective implementation of consumer interests requires a court organization involving representatives of consumers and undertakings as lay members. Prototypes are the labour courts on the one hand and, chambers of trade and industry on the other.

A transformation of this kind in the organization of the courts is possible without constitutional change by an amendment to the Court Constitutions Act, the UWG and the GWB. Chambers of consumers should be set up at all levels of the judicial procedure in both civil and competition cases, i.e. from the local court upwards to the Federal Court of Justice. At the least, representatives of persons affected by the market should participate at the initial stage, as in the Swedish Commercial Court (88) (The Berlin Superior Court for Cartel matters, the competition courts for UWG matters, the local and regional courts in matters affecting protection of the individual).

EXPLANATORY NOTES

(1) Criminal methods of prosecution are not dealt with here; their effectiveness as the UWG shows, is open to doubt, cf. Klug, GRUR 1975, p. 217; Schricker, GRUR Int. 1973 p. 693 et seq. On methods of consumer protection, see also von Hippel. Consumer Protection, 1974 p. 14 et seq..

(2) Baumbach-Hefermehl, Commentary on the UWG, 11 A 1974, appendix I, section 4 UWG as amended, note 1.

(3) See Sack, GRUR 1975, p. 297; Emmerich, "Competition law", 1975, p. 77 et seq.; admissibility of a self-limitation agreement in cigarette advertising, WuW/E BWM 143 "Advertising ban on cigarettes on TV" with comments by Möschel, BB 1972, p. 464.

(4) Cf. Kötz, Paper A at the 50th German Jurists Conference 1974, p. A41 et seq..

(5) Rinck, WuW 1974, p. 291 et seq.; Laufke, Paulick Presentation Papers, 1973, p. 121 et seq..

(6) Pullinger, "Public law and Private law" 1968 p. 37 et seq. 54 et seq., Grimm, "The political function of separation of public and private law in Germany, studies for a history of European law", published by Wilhelm, 1972, p. 224 et seq..

(7) L. Raiser, "The future of private law" 1971, p. 1 et seq.; Steindorff, "Raiser Presentation Papers", 1974, p. 621 et seq.. This is certainly superseded by item 11 of the Resolutions of the 50th German Jurists Conference, which states "the Conference rejects any involvement by administrative authorities in the protection of the consumer against general conditions of trade. This matter should rather be solved exclusively within the framework of civil legislation and precedent." The Upper House took a similar view of a general conditions of trade Bill, Parliament Printer 7/3919, p. 54.

(8) von Hippel, op. cit. p. 14 et seq. apparently gives equal weight to each of these measures.

(9) Reich, ZRP 1974, p. 191 et seq. with references; similarly, proposals by the consumer associations and the trade unions on

consumer protection, in von Hippel, op. cit., p. 200 et seq., p. 213 et seq. Developments in the U.S.A. and in Sweden are taking a similar direction; cf. continual references in von Hippel and below.

(10) Gunther, WuW 1972, p. 427 et seq.; Gunther/Petry, "Market Economy" 1973 p. 43 et seq. Cf. also Annual papers 1974, Parliamentary Printer 7/2848, items 354 and 437; Federal Cartel Office Annual Report 1973, Parliamentary Printer 7/2250, p. 8; 1974, Parliamentary Printer 7/3791, pp. 10 and 22 (particularly on the connection between competition and consumer policy, which is also said to affect the distribution of powers). Similarly, von Hippel, op.cit. p. 85; Scherhorn et al., "Problems of consumer policy" MS 1973, p. 223 et seq..

(11) Cf. Raisch in "Competition as a Duty" 1968 p. 392. The Cartel Office has not so far made any avail of these powers which may well be due to the legal difficulties in supervision against abuse, s. 11 et seq. above.

(12) Cf. in particular the Trade Union paper on consumer protection, in von Hippel, op.cit., p. 219.

(13) Cf. Federal Cartel Office Annual Report 1974, op.cit., pp. 18, 57 and 62; 1973 op.cit., pp.7, 76, 79 and 101 et seq. At present, their significance with regard to advertising controls is still slight. They tend also to serve consumer protection less than protection of so-called competition in service-rendering, cf. s. 26 above and/Sack, GRUR 1975.

(14) Cf. WuW/E BWM 143 with note by Moschel BB 1972, p. 464.

(15) Grimmes, "E. Ulmer, Colleagues Presentation Papers" 1973, p. 359 et seq.; idem, GRUR Int. 1973, p. 643 et seq.

(16) Ingo Schmidt, WuW 1971, p. 868 et seq. These points are extremely disputed and have so far had little practical application in Cartel Law.

(17) Cf. Federal Cartel Office of 20.2.1969, WuW/E BKA 145 - 2 pin plugs. The problems of co-operation in Cartel Law cannot be gone into deeper here; the comments of Emmerich in "Competition Law" 1974 p. 57 et seq., cannot be accepted, however, as they are characterised by a unilateral confrontation against co-operation and do not take account of consumer or small-traders aspects; cf. also Benisch "A Manual on Cooperation " 3 A 1975 with many examples.

(18) Rinck, WuW 1974 p. 291 et seq..

(19) Cf. reference in the Second Interim Report by the general conditions of trade working party of the Federal Ministry of Justice, 1975, p. 14 et seq.; Reich/Tonner, Hamburg Year Book 1973, p. 238 et seq.; Kotz, Paper A at the 50th German Jurists Conference, 1974, p. A94 et seq..

(20) Proposal by the Bremen Employees Association, 1973; "The Scandal of the Oppressed", published by the Bremen Employees Association, 1973 (Cf. Rohr, DuR, 1975 p. 161); the Collaborative of Social Democratic Jurists of Southern Bavaria, RuP 1972, P 35; Resolutions of the fourth Law Conference of the SPD 1972, in "Justice in the Industrial Society" 1972, p. 73 et seq.; Resolutions of the SPD Conference in 1973 at Hanover, p. 23; von Hippel, op. cit., p. 77 et seq..

(21) Resolutions by the Federal Committee of the Socialists Jurists Association of 14.3.1975, RuP, 1973, p. 54 et seq. to which the writer contributed.

(22) Cf. comments by Reich/Tonner, op. cit., (note 19, p. 243; Lowe, "Larenz Presentation Papers" 1973, p. 396; P. Ulmer in : Proceedings at the 50th German Jurists Conference, 1974 p. H33.

(23) Report H on 50th German Jurists Conference, 1974 p. H35 et seq.; however, these proposals were rejected as too far-reaching in the final vote.

(24) Cf. precedent of the Federal Constitutional Court on the principle of proportionality in encroachment on freedom of occupation and freedom of ownership, BVerfGE 25, 1(12); 30, 292 (316 et seq.; 336 (347); contra, Rohr, DuR 1975, p. 161 et seq. who however wishes to have general conditions of trade approved only for specific industries and consequently takes the effects of grouping into account; cf. also, the proposal by the Bremen Employees Association, op. cit. (note 20); on the question as a whole, also the comments in the Socialist Jurists Association proposals in RuP 1975, p. 54.

(25) Second Interim Report by the general conditions of trade working party of the Federal Ministry of Justice, 1975; on this, Schlosser, ZRP 1975, p. 148 et seq., and Hohmann, JZ 1975, p. 590 et seq., criticism in Rohr, DuR, 1975, p. 159 et seq.; the Upper House views, op. cit. (note 7), p. 54.

(26) Cf. Schlosser, ZRP 1975, p. 150, while also supporting class actions (section 73 below); scepticism, also, from P. Ulmer, op. cit., p. H34.

(27) von Hippel, op. cit. (note 1), p. 60 et seq., with comparative references; it is worth noting that Sweden has changed over from

a voluntary controls model to State controls on advertising, see Casten, WuW 1973, p. 667 et seq..

(28) von Hippel, op. cit., p. 61.

(29) von Braunschweig "The Consumer and His Representatives" 1965; Schernhorn et al., "Problems of Consumer Policy" MS 1973, p. 176 et seq.; Rehbinder, Burgbacher, Knieper, "Civil claims in environmental law", 1973, p. 178; Knieper, NJW 1971, p. 2251; M. Wolf, "Associations' powers to sue" 1971; the study by von Hippel says nothing on this point although the problem of consumer representation and consumer organizations has been raised on several occasions.

(30) Cf. the reference in the Meta Inquiry commissioned by the Federal Ministry of Justice into the development of institutions serving consumers, Metaplan Quickborn, February 1975, pp. 4, 19 and 31.

(31) Cf. on this point, the judgment by the Federal Court of Justice NJW 72, 1989 (consumer association under s. 131a UWG); NJW 1974, pp. 50 and 557 (accident clubs); NJW 1975, p. 877 (purchase voucher association) and NJW 1975, p. 215 (booksellers returns).

(32) On this point, Scherhorn, op. cit., p. 209 et seq., Schultz "Cooperatives", 1970, p. 27 et seq.; the consumer cooperatives have not come up to expectations; for this reason, e.g. the pro-consumer cooperative, Hamburg, has been changed into a consumer company!

(33) Cf. the status paper by the trades unions, in von Hippel, op. cit., p. 1 et seq., and the resolutions of the tenth Trade Union Conference in Hamburg on 28.5.1975, p. 128 et seq..

(34) Meta Enquiry, op cit, p. 34 et seq..

(35) Cf. Federal Court of Justice NJW, 1972, 1989 (no test cases under the UWG). On this point, Baumbach-Hefermehl, Commentary on the UWG, 11 A 1974, s. 13 UWG, note 18 et seq..

(36) Cf. on the one hand, Knieper, NJW 1971, 32253 - 4; Rehbinder et. al. op. cit., p. 103; on the other, M. Wolf, op.cit. (note 20), p. 34.

(37) Cf. Benisch in "Community Commentary on the GWB" 3 A 1973, s. 35 GWB note 19; contra, M. Wolf, op. cit., where a group interest is prejudiced; since consumer associations are not organized on a membership basis they cannot, according to Wolf, apply for a cease and desist order.

(38) Baumbach-Hefermehl, op. cit., general notes 131 et seq.; introduction to the UWG, note 430 et seq.. The Federal Court of Justice has admitted a claim for compensation in substantive law by associations to combat unfair competition under s. 13 (I) UWG. by analogy to s. 1004 of the Civil Code, NJW 1970 p. 243; criticism, however, in Baumbach-Hefermehl, op.cit.; Kurbjuhn, NJW 1970, p. 604; doubtful on the refund of costs for a first warning, Essen regional court, NJW 1974, p. 997. A decision at highest level is pending on this subject with regard to consumer associations.

(39) Federal Court of Justice, NJW 1974, p. 315 (non-ladder stockings). On the question as a whole, now, Tilmann NJW 1975, p. 1913 et seq..

(40) Cf. Schricker, GRUR 1974, p. 588 and note 38.

(41) Cf. the proposals by the Federal Ministry of Justice Committee on the combating of economic delinquency, 1975, unpublished minutes of a meeting of April 1975.

(42) Parliamentary Printer 7/3200 p. 20 et seq., with reasons. Similar proposal by the Upper House, views, op. cit. (note 7), p. 52 et seq., which would give every customer and not just trade and consumer associations a right to seek cease and desist orders; Government objections to this, pp. 62-63. Kotz, Paper A to the 50th German Jurists Conference pp. 84-85; Lowe, "Larenz Presentation Papers" 1973, p. 390 et seq.; M. Wolf JZ 1974, pp. 44-45; resolutions of the 50th German Jurists Conference, item 13, Conference Report H, 1974, p. H 232. Criticism by Reich, ZRP 1974, p. 187. Cf. also Hohmann, JZ 1975, p. 590 et seq..

(43) Cf. Federal Cartel Office, WuW/E BKA 196, 320; von Hippel op. cit. p. 87; contra Junge in "Community Commentary" op. cit., section 51 GWB note 8. On EEC practice, Deringer NJW 1974, p. 403.

(44) Cf. the proposals by the Socialists Jurists Association Federal Committee, RUP 1975, p. 54 et seq..

(45) Cf. the comments during the "Third Reich" period on the purity of the status of lawyers, particularly with regard to Jewish elements, Jonas DJ 1935, p. 317. The Federal Court of Justice is more concerned with protecting status, NJW 1955, 422; 1967, p. 1558.

(46) Altenhoff-Busch-Kampmann, "Legal Advice Act" 3 A 1975, p. 9 et seq., with references. Federal Court of Justice, NJW 1956, p. 591; Schoreit, "Free legal aid", 1974, p. 62 et seq..

(47) Federal Court of Justice NJW 1974, p. 50; if, however, a claim is assigned only by way of security, the RBG does not apply.

(48) Cf. the proposals in the Meta Enquiry op.cit., p. 35 et seq., and practice in the Land of Lower-Saxony.

(49) NJW 1975, p. 878; in my opinion, this judgment is not covered by s. 6B UWG; to what extent the Federal Court continues to assume a misleading factor in this case is hard to see. On this question, Baumbach-Hefermehl op.cit, s. 6 B UWG, note 1 et seq.. The initiative for the issue of purchase vouchers did not come from the wholesale trade but from the consumer association.

(50) Cf. particularly, the critical comments on a sociological basis by Rasehorn, "Law and Classes" 1974, particularly p. 157 et seq..

(51) Cf. on this point, the proposals in the First Interim Report by the trade union working party at the Federal Ministry of Justice, 1974, which under s. 8 (20) contained a ban on competent court clauses in summary proceedings; the Government Bill has not taken up this provision however. A Bill to amend and simplify s. 689 (II) of the Code of Civil Procedure (Parliamentary Printer 7/2729) makes provision for new exclusive jurisdiction in summary proceedings.

(52) On the constitutional significance of legal aid as "social welfare", Federal Constitution Court, NJW 1974 p. 229; for criticisms of legal aid by the courts, cf. E. Schmidt, JZ 1972, p. 679; Baumgärtel, JZ 1975, p. 425; Wasserman, "Justice in the welfare state" 1974; idem, RuP 1975, p. 4 et seq.. We cannot go into detail here on the proposed improvements, e.g. general legal fees insurance, changes in the law on costs, waiver of preliminary examination, etc., as these extend beyond the field of consumer protection and concern the general question of equality of opportunity before the courts.

(53) Cf. the Socialist Jurists Association decision RuP 1974, p. 98; Schoreit, "Free legal advice" 1974, with extensive references; idem, DB 1975, p. 89; Idem, Code of Civil Procedure 1975, p. 62 et seq.; Baumgärtel, JZ 1975, p. 425 et seq..

(54) Cf. Altenhoff op.cit. (note 46) pp. 131-2; Federal Court of Justice NJW 1955, p. 422 (ban on independent legal advice by other than professional and similar interests).

(55) Cf. Federal Courts of Justice, NJW 1974, p. 1328 and criticism in Schoreit op.cit., p. 72.

(56) Cf. references in Schoreit op.cit., p. 32 et seq..

(57) German Lawyers Association, AnwBL 1974, p. 254 et seq.; Baumgärtel, ZRP 1975, p. 65; Schoreit op.cit., p. 84 et seq., also for criticism of this model.

(58) Free legal advice, information by the Lower-Saxon Ministry of Justice, March 1975.

(59) Cf. in particular, the Socialist Jurist Association decision RuP, 1974 p. 98; Schoreit op.cit., p. 76 et seq., 92 et seq.; Wassermann, RuP 1975, pp. 2 and 3.

(60) Cf. the Bremen regulations concerning employees associations of 3 July 1956, in Schoreit op.cit., pp. 122-3, which it is intended to extend in this way.

(61) Meta Enquiry, op.cit. (note 30) p. 38; cf. von Hippel, op.cit. p. 102.

(62) von Hippel, p. 97 et seq.. Particularly concerned are conciliation offices in the travel industry.

(62a) Parliamentary Printer 7/4078.

(62b) Parliamentary Printer 384/75.

(62c) Parliamentary Printer 394/75.

(62d) Parliamentary Printer 7/4078, p. 7.

(62e) Op.cit., pp. 9 and 10; Government attitude, op.cit., p. 16.

(62f) Op.cit., p. 16.

(63) BGHZ 20, 92; has now become prevailing case law. Government Bill, Parliamentary Printer 360/75, p. 21, denies any need for protection as regards cancellation rights.

(64) Cf. on this point, justified criticism in Daubler JuS 1971, p. 403; Emmerich, JuS 1972, p. 369.

(65) Cf. on this point, the hardly convincing comments in the White Paper to the Bill, op.cit. (note 65) p. 21.

(66) It is generally considered that guarantee provisions do not preclude avoidance for fraud, which is important in the case of second-hand purchases, for example, where legal precedent permits waiver of guarantee but not waiver of avoidance for fraud; section 123 of the Civil Code is, to this extent, proof against general conditions of trade, cf. Federal Court of Justice NJW 1971, p. 1799.

(67) Cf. the details in Palandt-Heinrichs, Commentary on the Civil Code, 34A 1975, s. 123, note 2.

(68) First Prevention of Commercial Delinquency Bill, 1975, p. 18; according to this, s. 138 (II) of the Civil Code is for the most part maintained, particularly also the particular features concerning profiteering; extensive comment in Landau "Freedom in a social democracy" (Fifth SPD Legal Conference 1975), Collaborative I, p. 45.

(69) Palandt-Heinrichs, op.cit., s. 134, Civil Code note 3 b.

(70) Palandt-Heinrichs, op.cit., note 3 (b) bb); on the question as a whole, Honsell, "The Retroactive effect of immoral and prohibited transactions" 1974; idem, JZ 1975, p. 439.

(71) Cf. Federal Court of Justice NJW 1951, p. 397; BGHZ 51, p. 397; BGHZ 51, 55 with references Däubler, JuS 1971, p. 398; Reich, JuS 1973 p. 486.

(72) On this point, Berg, JuS 1973, pp. 550-1.

(73) On this point, Reich, JZ 1975 p. 553; contra, however, Sack, "Unfair Competition and Follow-up Contracts" 1974, p. 6 et seq..

(74) Sack, BB 1974, p. 1369; idem, NJW 1975, p. 1303; Schricker, GRUR 1975, p. 111; idem, ZRP 1975 p. 169 et seq..

(75) Palandt-Thomas, op. cit., s. 823 note 9b.

(76) Federal Court of Justice, NJW 1974, p. 1503; cf. criticism by the writers referred to in note 74.

(77) Op.cit. (note 74); also, Sack, op.cit. (note 73), p. 33.

(78) Benisch in "Community Commentary on the GWB" 3A 1973, s. 35 GWB, note 11; Emmerich, "Competition Law" 1975, p. 39, in each case with references.

(79) Federal Court of Justice, NJW 1975, p. 1223.

(80) Federal Court of Justice, NJW 1974, p. 901 with note, Emmerich. The Monopolies Commission in its first Special Paper deals with the ways and means of abuse controls on market-dominating undertakings since the coming into force of the 1975 Cartel (amendment) Act; item 63 et seq.. Criticism in Reich ZRP, 1975 pp. 162-3.

(81) Benisch, op.cit., note 20 et seq.. Mailänder, "Consequences in private law of illegal Cartel practices" 1965, p. 186; Koch, "Compensation for illegal restriction of competition under German and European law", 1967, p. 152; consumer aspect has not, however, been considered in the Cartel Law investigations as a

whole; the conclusions that follow in the text were not drawn by the writers.

(82) von Hippel, op.cit., p. 93 et seq.; cf. the report on American experience in Homburger, "Actions by private persons in the public interest", Work on Comparative Law 1975, Volume 68, p. 9 et seq.; Kotz, op.cit., p. 78 et seq., who adopts a sceptical attitude.

(82a) The following comments are intended only as an outline. Discussion on this point in legal doctrine is entirely inconclusive; little research is available in other disciplines; to some extent, experience in other countries is drawn on, e.g. U.S.A. and Sweden.

(83) Cf. Scherhorn et al. op.cit. (note 29), p. 111 et seq., 173 et seq.; for a German view, e.g. the militant writings of Menge, "The Purchaser Sold" 1971; Bluth "The Consumer Rebellion", 1974. The latter two works can hardly be described as scientific.

(84) Cf. the status paper by the trades unions in von Hippel, op.cit., p. 213 et seq., and the resolutions of the tenth German Trades Unions Conference, Hamburg 1975, minutes of 28.5.1975 p. 128 et seq..

(85) Cf. Scherhorn "Problems" op.cit., p. 192 et seq.. It should be noted, however, that such claims are often made in repudiation of trade union demands for co-determination; it would be contrary to the concept of the Paper, particularly the concept adopted of the consumer (s. 4 above).

(86) Cf. the proposals by the Socialist Jurists Association of Southern Bavaria in "Justice in the industrial society", 1972, p. 78 et seq., regarding approval of general conditions of trade by a Federal Consumer Protection Office.

(87) Däubler, op.cit., p. 58 et seq.; status paper by the trades unions, in von Hippel, op.cit., p. 221.

(88) On this point, and as regards the Ombudsman, Carsten, WuW 1973, p. 667 et seq., Bernitz, ZHR 138 (1974), p. 336 et seq..

SUMMARY

Dr Eike von Hippel of Hamburg gave an account of the problems raised by the judicial protection of consumers and went on to discuss how the USA, Sweden, Germany and the United Kingdom had tackled these problems.

He compared these countries' laws on the judicial protection of consumers.

In conclusion, he advocated :

- a network of public consumer protection offices;
- a simplified legal procedure for claims up to a certain amount;
- joint conciliation boards;
- fines to be paid to consumers in the event of flagrant breaches of standards by firms;
- "class action" and the granting of authorization to public departments or consumer associations to enforce the individual consumer's rights vis-à-vis firms.

COMPARATIVE STUDY OF MEANS OF CONSUMER PROTECTION BOTH IN AND OUT OF COURT

by Dr Eike von Hippel, Lecturer, Hamburg

I. The problem

All over the world efforts are being made to improve consumer protection, which hitherto has suffered not only from the inadequacy of many rules of substantive law but also from the fact that those rules which already exist to protect the consumer in practice all too often remain a dead letter because of the lack of effective control on the part of the authorities, associations or individual consumers. Particularly grave in this connection is the fact that most consumers do not enforce or enforce only to a limited extent their claims against suppliers (producers and dealers) under the rules to protect consumers, especially where the sums involved are small. There are a number of reasons for this : lack of legal knowledge, a feeling of inferiority, inhibitions about making contact with a court or a lawyer, fear of the expenditure of energy, time and money involved, risks of litigation, lack of faith in justice and/or lawyers, and a lack of interest on the part of lawyers.

If consumer protection is to be improved, therefore, it is important to ensure that claims by individual consumers are actually enforced. A first step in this direction was taken recently by the German legislature when it prohibited the previously widely-used clauses, whereby the place of hearing was determined by the location of the trader, which were disadvantageous to consumers.

Another, exemplary step has been taken by the legislature of the State of New York. Since 1 January 1970 it has empowered judges, in cases where there are several claims for negligence against a given firm, to examine whether the other claims made by the firm have really been made good or whether the consumers concerned have grounds for complaint against the firm. But these steps alone are not enough and the following further measures should be examined :

1. the supply of information to consumers,

2. the creation of material incentives for legal action,
3. the introduction of a "class action",
4. the creation of simpler procedures,
5. special institutions to support consumers.

II. Practice

1. Through the supply of information to consumers an attempt can be made to ensure that individual consumers know their rights, at least in the most important matters. A lot could often be gained thereby, but not too much faith should be placed in information alone. Firstly, the information offered is used by consumers only to a limited extent, and this applies particularly in the case of those socially disadvantaged consumers (e.g. immigrant workers) who are especially in need of protection. Secondly, it is likely that, for the reasons just stated, in many cases consumers will not enforce their claims even when they are informed as to their rights. Therefore, even though everything should be done to improve consumers' knowledge of the law (especially through the schools and the media), the supply of information alone is not enough.

2. The creation of material incentives is another way to encourage consumers to enforce individual claims. This already happens to a certain extent in the United States. In a growing number of cases the consumer concerned is recognized as entitled to the payment of compensation and this creates an incentive for both him and his lawyer. Some modern laws - e.g. the Consumer Credit Protection Act, the Uniform Consumer Credit Code and the Uniform Consumer Sales Practices Act - give the consumer concerned the right to payment of a minimum amount of 100 dollars in the event of certain violations of standards by the supplier. At all events, where there are serious violations such stiffened penalties are well worth considering. However, only in a relatively small number of cases will they constitute sufficient incentive for the individual consumer to enforce his rights.

3. The introduction of a class action, such as already exists in the United States, could give active individual consumers the possibility of enforcing claims on behalf of all consumers who are similarly affected. This is especially important in cases where numerous consumers suffer small damage which it would not be worthwhile for the individual consumer and his lawyer to claim separately. In the United States consumers' class actions are growing in importance. For example, the California Supreme

Court recently allowed a consumer complaint to take the form of a class action in a case where a producer had sold his goods on the basis of misleading information. The Court pointed out that consumers today were in the same difficult situation as shareholders three decades ago. The class action procedure which had originally been developed to protect shareholders therefore had to be used for the benefit of consumers. The procedure not only helped the consumers concerned but also had a therapeutic effect on fraudulent dealers, helped honest traders in their fight against unfair competition and reduced the burden which the actions of individual consumers would otherwise place on the courts. However, the class action is no panacea. Since it presupposes that a group of consumers is affected, it offers no help when only an individual consumer is concerned (e.g., where a single product in an otherwise perfect series is defective, where a single purchaser is deceived by a dealer or where goods purchased are not delivered to a single buyer). Moreover, even in cases where groups of consumers are involved it cannot always be assumed that one of them will be prepared to act as the representative of the group.

4. The creation of simpler procedures could ensure that consumers were able to enforce individual claims, at least where the sum involved did not exceed a certain amount, more simply, more quickly and more cheaply than by means of the normal judicial process. This could be achieved either by simplifying the existing legal procedure a) or by creating a procedure out of court b).

   a) The solution which most recommends itself is a simplification of the legal procedure (such as already exists in Germany for minor cases involving up to DM 50), since in this way not only consumers but other persons also could be helped. This solution was adopted in the United States as early as the 1920's. Influenced by sharp criticism from personalities such as Roscoe Pound - it was "a denial of justice in small causes to drive litigants to employ lawyers" and "a shame to drive them to legal aid societies to get as a charity what the state should give them as a right" - from 1913 onwards a growing number of individual States set up small claims courts to deal with disputes involving sums which did not exceed a specified maximum amount. These courts, which exist today in most States, vary considerably in organization but have the following characteristics in common : the jurisdiction of the small claims courts is confined in principle to claims for compensation in contract and tort involving sums up to a specified amount, which varies between 200 and 1000 dollars in the different States. The judges are usually judges from the ordinary courts of first instance. Bringing an action is easy : it is sufficient to state that the defendant owes the plaintiff a certain amount. The clerks to the court are

obliged to help the plaintiff prepare his case. The costs of bringing an action are minimal (e.g. about 3 dollars in New York). Representation by lawyers is prohibited in many small claims courts. The judge's role is supreme : he is bound only by substantive and not by procedural law. He can thus conduct proceedings so that individual cases are dealt with as quickly as possible and without unnecessary expense. Appeals against judgments are not allowed in many States and in others they are confined to defendants or to questions of substantive law. The parties in small claims courts can make some use of conciliation and arbitration procedures. If the parties agree to a conciliation procedure there is nothing to prevent them from continuing proceedings if the conciliation does not lead to a settlement. Agreement to an arbitration procedure, on the other hand, implies that the parties submit themselves to an arbitral award which then has the effect of a final judgment.

In spite of some undoubted successes, the hopes which were placed in the small claims courts in the United States have not been fully realized. Critics point out that these courts have become too formal and today function mainly as places where traders collect debts.

A survey by the British Consumer Council has shown, however, that at least the best small claims courts in the United States still prove that a simplified legal procedure can achieve considerable successes in the enforcement of claims, not least those of consumers. The British Consumer Council proposed, in the light of American experience, to introduce into England too a simplified legal procedure for the enforcement of claims for compensation in contract and tort involving sums up to a certain amount (£100). This proposal and the details thereof are of great interest as regards reform in other countries, not least in the Federal Republic of Germany.

In Sweden too in recent years the creation of a simplified procedure for small claims has been discussed. A law which came into force on 1 July 1974 seeks to ensure that the parties in cases where a small amount is involved (up to about 4,000 kroner) can do without a lawyer, by requiring the court to assist the parties automatically. The successful party generally has no claim to reimbursement of lawyer's fees. Appeals are permitted only in certain special cases (see paper by Mr Nils Mangård).[8]

b) Instead of or in addition to the creation of a simplified court procedure, consumers can also be helped by the setting up of procedures outside the courts. Where such procedures already exist, previous experience has shown them to provide consumers with valuable assistance on the whole, especially

where consumers as well as traders are represented on the relevant bodies. A distinction can be made between conciliation procedures (1) and arbitration procedures (2).

(1) An interesting example of the conciliation procedure is provided by the "Schlichtungsstelle für das Kraftfahrzeughandwerk Hamburg" (Conciliation Board for Motor Repairs in Hamburg), with joint representation. It was founded in May 1970 by the Allgemeiner Deutscher Automobilclub (ADAC), representing drivers, and the guild of the Kraftfahrzeughandwerk Hamburg, representing repairers, with the aim of settling disputes between customers and repairers regarding the necessity, execution and cost of repairs objectively, unbureaucratically, at the least possible expense and without costs for the parties, and in this way both to improve the general climate of relations between customers and repairers and to provide information to prevent disputes. These aims seem to have been largely achieved.

Between May 1970 and the end of 1974 a total of 7,219 complaints reached the coordinating office (the technical department of ADAC in Hamburg which employs two persons, a technician and a secretary, for the purpose). The vast majority of these complaints were dealt with in preliminary proceedings, mainly by simply providing the customer with explanations but sometimes by means of an agreement between the customer and the repairer. Only in 423 cases, therefore, were there proceedings before the conciliation committee, which is composed of a judge who acts as chairman and one representative each from ADAC and from the repairers' guild. In more than 50% of cases the committee held the complaint to be fully or partly justified. In most cases the amount involved was less than DM 100.

The committee reaches its decisions in the light of substantive law and equity. Lawyers have no right of audience before the conciliation board. The costs of the conciliation board (at present about DM 1,800 a month) are borne in equal proportions by ADAC and the repairers' guild.

Proceedings last for an average of between 2 and 3 months. In order to terminate the proceedings, all that is generally required is a single oral hearing which lasts on average about half an hour. Where the proceedings do not result in a settlement between the parties, the committee's decision is generally announced immediately after the termination of proceedings.

Unlike the verdict of an arbitration tribunal, the decisions of the conciliation board do not have the effect of a conclusive court judgment as between the parties. Nevertheless, these decisions are scrupulously complied with by the repairers concerned. Following a resolution

of the Hamburg car repairers' guild all its members (i.e. about 80% of all Hamburg car repairers) are obliged to comply with decisions of the conciliation board. Up to now there have been only two cases where repairers have been expelled from the guild for non-compliance with such decisions.

The conciliation board tries as far as possible to prevent disputes between customers and repairers by supplying the public with information. It gives the following as the main causes of disputes :

1. insufficient technical information supplied to the customer by the repairer;
2. unclear instructions on the part of the customer;
3. too much labour expended by the repairer;
4. unclear estimates by the repairer;
5. the inability of the customer to appreciate the need for repairs carried out.

Meanwhile in a further 61 towns in Germany joint conciliation boards on the Hamburg model have been set up to deal with motor repairs. In the opinion of ADAC they have proved their usefulness. The Stiftung Warentest (Berlin) also approves them and has recommended that such boards, which work "with considerable success", should also be set up in other crafts where little use is made of the guild conciliation boards which already exist.

From here it is only a step to demanding the creation of joint conciliation committees for all sectors of industry. In Sweden similar demands have already produced results; in 1968 a public complaints committee was set up there, composed of representatives of the State, traders and consumers. The committee examines claims by consumers whose complaints to the trader have been unsuccessful. The only exceptions are those sectors where the industry itself has already set up complaints committees, e.g. the furniture industry.

The committee has six departments which deal with various sectors of industry (tourism, cars, textiles, electrical appliances, boats, other). It cannot make binding decisions but can only issue recommendations. However, a trader who does not comply with such a recommendation risks the committee publicising the fact.

Experience up to now has been on the whole encouraging. From its foundation in 1968 to the end of 1971 about 45,000 persons applied to the committe and the number of complaints increased steadily (1968 : 7,500, 1969 : 8,900, 1970 : 14,000, 1971 : 15,000). The committee itself had to deal with only a fraction of cases, for the vast majority

of complaints are dealt with by the committee's secretariat. The secretariat receives the complaints (about 75% by telephone), advises the complainants and tries to arrange a settlement between the parties. Thus the committee reached decisions in only relatively few cases (1968 : 201, 1969 : 448, 1970 : 828, 1971 : 963). In some 50% of such cases the committee considered the complaint to be wholly or partly justified.

A survey covering the period from 1 January 1968 to 30 April 1970 has shown that recommendations by the committee in favour of the consumer were followed by the trader in full in 50% of cases and in part in 9% of cases. It should be pointed out that many traders who did not follow the recommendations had already become bankrupt or had ceased trading when the recommendation was issued. Those firms which were still in business at the time of the recommendation followed the recommendations of the committee in 80% of cases.

(2) In some countries arbitration procedures exist for certain sectors of industry. In Switzerland, for example, associations of traders and consumers have set up a joint board to rule on claims for compensation by customers against dry-cleaners. This, however, is competent only provided both parties recognize it as an arbitration tribunal. The board's decisions are binding. Both the consumer who appeals to the board and the cleaning firm concerned must pay a fee. If the decision is in favour of the consumer his fee is refunded to him.

In 1970 the board in question examined 281 cases and issued decisions in 199 of them. Of these, 53 were in favour of the consumer and 146 in favour of the cleaning firm. These 146 cases, however, included 62 in which manufacturing defects were discovered and 53 in which the wrong symbol for textile care had been attached. In these cases the decisions of the arbitration tribunal were such as to encourage the consumers to make claims against the manufacturers.

In England in 1971 the Manchester Law Society set up an arbitration procedure by way of experiment - the Manchester Arbitration Scheme. The arbitration procedure applies only to claims in respect of breach of contract involving sums up to £150. This is so that its use will remain restricted to smaller consumer claims. The arbitrators are lawyers who perform this task on a voluntary basis. In addition, in England registrars of county courts have been empowered either to rule themselves as arbitrators in pending cases involving less than £75 or to refer them to a third party acting as arbitrator for a decision.

In the United States it has been proposed that traders should be obliged to submit to an arbitration procedure where a consumer so requests. In some cases American courts have handed down decisions imposing such an obligation on dubious firms.

In Ireland the Irish Travel Agents Association has set up an arbitration procedure of a special kind to deal with disputes between travel firms and tourists. The verdict is binding only on the trader, whereas the customer can choose whether to accept it or to bring the matter before the courts.

5. Lastly, we should consider the creation of special institutions to support consumers in the enforcement of individual claims. This solution is being increasingly adopted in a growing number of countries.

   a) As regards Germany, mention should here be made in particular of the consumer centres existing in each of the 11 Länder, which are run by consumers' associations and largely financed by public funds. The consumer centres provide advice to consumers, partly directly and partly through the creation and supervision of local consumer advisory offices.

      Although the support of individual consumers in the enforcement of individual claims is not officially or is only peripherally one of the tasks of the consumer centres, these institutions seek within the limits of their possibilities, by entering into contact with the firms concerned, to help consumers with complaints to obtain justice. According to its own estimate the Hamburg consumer centre achieved a satisfactory settlement for the consumer in approximately 90% of the total of 2,560 complaints received in 1971.

   b) In the United Kingdom, the Citizen's Advice Bureaux are estimated to have about the same rate of success in the settlement of consumer complaints. These Bureaux, which are run by voluntary organizations but supported by the State, were set up during the Second World War to provide information and advice to the population in the confused wartime situation. After the war the Bureaux turned increasingly to the problems of consumers and dealt with a growing number of consumer complaints. In 1970 the number of complaints dealt with annually was given as 120,000, and the Bureaux estimated that about 90% of these were settled amicably.

   c) Lastly, high success rates are also reported from the United States for individual institutions dealing with the settlement of consumer complaints. A particularly interesting

example is the Neighborhood Consumer Information Center in Washington D.C., which was founded a few years ago by the faculty and students of the Howard University Law School in order to assist low-income consumers in the District of Columbia. The Center, which is staffed mainly by committed law students, examines complaints by consumers from both a factual and a legal point of view and then tries to obtain redress either by writing to the trader or by negotiating with him. It is reported that in the vast majority of cases the Center is able to achieve a solution satisfactory to the consumer. One of the main reasons for the Center's high success rate is probably the fact that it has a public relations department which, amongst other things, publishes a news sheet called "Buyer Beware" which keeps the public informed. Lastly, the Center seeks to obtain better settlements for consumers on the basis of an assessment of the data collected.

Taking this as a model, the Consumer Affairs Committee of the Young Lawyer's Section of the American Bar Association has recently proposed to cover the United States with a network of Neighborhood Consumer Centers. The first Center of this kind is to be set up in Seattle (Washington). It is to be financed by the Ford Foundation or other private foundations, and it is expected that public and private funds will later finance the setting up of the planned network.

d) Recourse can be had not only to private institutions but also to State bodies in order to help consumers (at least in certain cases) to enforce individual claims. The first duty of the State is to protect consumers as a whole and to restrain unfair business methods. But this does not mean that the State should not assist - wherever possible - in the enforcement of individual claims by consumers, especially since in this way further infringements of the law may also be prevented. In the United States, therefore, 22 States have already empowered a State consumer protection board not only to require traders to refrain from unfair trading methods but also to order the compensation of consumers who have been the victims of such methods. In Maryland alone the State consumer protection board collected within two years more than 1 million dollars for consumers who had been wronged. In the vast majority of cases the amounts involved were less than 50 dollars. At national level the Federal Trade Commission has claimed the right, despite the lack of an express authorization by Congress, to seek to obtain compensation for consumers who have been the victims of unfair trading methods. In an amending Law of 1 April 1975 Congress expressly granted the Federal Trade Commission this right.

III. Conclusion

As this survey shows, there are certainly ways of dealing with the situation described at the beginning and of ensuring that individual claims by consumers are in fact enforced. The aim of any reform should be to integrate the various possibilities into an optimum system. In so doing, the following considerations should be borne in mind : a comprehensive solution to the problem presupposes placing at the disposal of the individual consumer an institution which is easily accessible to him, which he trusts, whose services cost him little or nothing and which on its own initiative takes all the steps required in a particular case in order to help him to obtain justice. For this reason, the network of local consumer advisory offices should be so constructed that it is possible for every citizen to visit an advisory office without great difficulty. Previous experience has shown that the intervention of such an office can in the vast majority of cases lead to a settlement which is satisfactory to the consumer who brings a complaint.

To deal with the remaining cases a procedure for the enforcement of their claims which is simpler than the normal legal procedure must be made available to consumers. At least for claims involving amounts up to a certain limit, therefore, a simplified legal procedure should be created, which need not necessarily be confined to consumer matters.

At the same time, where this has not already been done, joint conciliation boards should be set up in the various sectors of industry to deal with complaints by consumers. On the model of the guild of the Kraftfahrzeughandwerk Hamburg, associations in other sectors of industry should also ensure that their members undertake to comply with decisions of the relevant conciliation board. The legislature could give the decisions of the conciliation board even greater force by declaring them to be binding unless the case is brought before the ordinary courts within a given period. Such a rule would prevent dubious firms from simply ignoring the decisions of the conciliation board.

The measures mentioned (creation of a network of consumer advisory offices, simplification of the legal procedure, the creation of joint conciliation boards) would in all cases facilitate the enforcement of claims by individual consumers. They must therefore be in the forefront of any attempt to strengthen the legal protection of the consumer. However, this does not mean that the enforcement of claims by consumers should not in certain cases be stimulated by further measures,

such as the introduction of compensation to be paid to the consumer in the event of gross violations of standards on the part of the trader, the introduction of a class action or authorizing State agencies and/or consumers' associations to enforce the claims of individual consumers against traders, at least in cases where unfair trading methods have been used or in cases where a principle is involved.

Lastly, the following remains to be said : In many cases it is more sensible - and therefore more rational and more effective - than any attempts to help consumers to enforce individual claims to protect consumers by means of preventive measures, e.g. by the introduction of a requirement that general business conditions be approved, by the prohibition of unsolicited visits by salesmen and by means of a licensing system for certain professions (e.g. brokers and investment consultants).

CONSOLIDATED REPORT

by Roger Perrot

Professor at the Faculty of Law,
Economics and Social Sciences, Paris
Deputy Director of the Institute of Legal Studies

It is always a risk to submit a consolidated report; and all the more so when it has been preceded by such copious and productive exchanges of information and discussions so rich in substance. I undertake it with caution, with no other qualification than that of being somewhat familiar with one of the two parties that are joined in a problematical relationship - the consumer and the law.

Perhaps it would be useful to introduce both of them to you straight away if only to try to reveal the causes of their incompatibility.

1. The consumer is all and nothing.

a) On his own, the consumer is a defenceless being, for numerous reasons. First of all, for psychological reasons : he is afflicted with a kind of inhibition, connected with his lack of knowledge of legal matters, with a feeling of inferiority in the face of manufacturers who have powerful legal departments at their disposal, connected finally with the somewhat mysterious nature of the law which often appears to him like a grand old lady easily impressed by technical jargon. To these considerations must be added an economic reason which is more important than all the others : court costs. In consumer affairs, the material value of the object of the dispute is often small. If one takes into consideration the court costs, among which one should not forget the considerable fees charged when proceedings are brought, a reasonable consumer will soon realize that even if he wins his case, he will not recover the whole of his costs, and that, in these circumstances, it is wiser to keep his washing machine that does not work very well.

It is evident that some manufacturers play on this attitude of the consumer in order to exploit it with a clear conscience; and all the more easily where the counterbalancing effect of the free market economy is to a great extent distorted, in the sectors in which supermarkets are springing up.

b) Thus one is led quite naturally to believe that effective protection of the consumer must be achieved through collective defence and that it is essential, in order to fight on equal terms, to concentrate on joint rather than individual efforts. The Commission of the European Communities has grasped this in emphasizing, in its preliminary programme, the need to "lay the foundations of a complaints and advisory service so that consumers have a channel for submitting legitimate complaints".

Here, however, a serious problem arises in connection with the collective approach. Consumers, as a collective entity, constitute an extremely fluid concept which it is very difficult to provide with an organic structure, since, as Jean-Baptiste Say observed, "in any type of society everyone is a consumer", adding, mischievously, "however stupid they are assumed to be". Taken to an extreme, the concept of consumers merges with the whole community; not only with the national community but also with the European community.

The logic of this observation leads one to believe that consumer protection should be based on national or supranational structures, regarded in a democracy as the only means of safeguarding the interests of consumers. But it should be recognized that this Jacobin concept does not fit in very well with a free market economy or one which professes to be so. A desire for efficiency convinces us of the need for intermediaries, a role fulfilled by private or quasi-public bodies which generally take the form of associations.

However, the difficulty re-emerges, firstly because the consumer does not fit into any particular socio-occupational category and secondly because, as a result of their very diversity, consumers react individually according to widely varying motivations (*). In other words, it is difficult to find a common denominator with sufficient mobilising force to provide that vague entity made up of the mass of consumers with an organic structure.

A serious danger arises from this. There is the fear that consumer protection will be seized on and diverted towards other - personal or political - ends by dynamic minority groups who would, under the cover of associations and with a well organized publicity campaign, improperly assume a usurped power and become so many irresponsible pressure groups. Let there be no misunderstanding about this. I am not saying that there is a danger at the present time - I am merely saying that there is a latent danger of which we should be aware. It is this potential danger which, to a very great extent, explains the often surprising reactions of the French courts.

(*) Cf. on this point the interesting points made by Mr Gérard Cas in "La défense du consommateur" p.7 et seq. ("Que sais-je? series).

2. But here is the other party to the relationship, whom I must now introduce to you. All the reports are unanimous in noting the inability of our legal structures to adapt. In consumer affairs, the law makes one think of a grand old lady who goes lame when asked to join in a relay race to protect a community such as that of consumers.

The reason is easily understood. Our procedures reflect an individualistic and liberal society in which everyone defends his subjective rights through his personal interests. Although the idea of objective legal proceedings, the sole aim of which is to safeguard legal positions which are not widely understood and ensure respect for the rule of law independently of any individual support, has, to some extent, penetrated into administrative proceedings, it has not been accepted in civil proceedings. This accounts for the inability of our courts to adapt when asked to play a preventive role, to open their doors to the action of groups anxious to defend collective and impersonal interests. From this comes, also, an inability to adapt the punishment which is inevitably expressed in terms of compensation for the personal harm suffered by the plaintiff.

3. This Symposium has been of immense value, thanks to the quality of the reports presented and the ensuing comments, in helping us to become more aware of all these difficulties from three aspects : (I) prevention; (II) compensation, and finally (III) penal sanctions.

I. Prevention

4. It is clear -and the discussions have amply illustrated this fact - that prevention is of prime importance. It alone, by virtue of its permanent nature, permits checks to be carried out in depth at the level of the firm. It alone affords the consumer the complete satisfaction he is entitled to expect. Finally, it alone frees him from all legal bother. In a word, prevention is, for the consumer, the way of salvation.

But how can it be achieved?

One thinks immediately of the classic means which, in the framework of our traditional economic structures, consist of playing the game of competition, by organizing what our German colleagues call, in a very evocative phrase, a "countervailing force".

a) The first idea which comes to mind is the education of the consumer thanks to associations and groups who, with powerful publicity methods, urge him not to give up safeguarding his

rights too easily. Periodicals, newspapers and television, if necessary, can contribute towards making the consumer a mature person aware of his rights, if, at least, it is possible to overcome the "publicity barrier" to which reference has been made during our discussions.

b) One could also consider the setting up of rival distribution networks organized by consumers themselves. This is the method on which the "Chambre de consommation" (Consumers' Chamber) of Alsace is based. Here we see the rebirth of the old cooperative dream, which is wide in conception but necessarily limited in practice.

All these methods are far from insignificant; they should certainly be encouraged. To be completely efficient, however, they presuppose a situation in perfect competition and for this reason, their scope is not always in keeping with the energy expended. Experience shows that it is necessary to go further by devising specific preventive measures, which are more dynamic and more coercive.

5. During the discussions, it has been suggested that, from this point of view, the law can be of no help since it comes into operation after the event. There is some truth in this observation : it is true that, viewed traditionally, the law intervenes to make good loss or, to put an end to a disturbance or to punish an offence but not to prevent it.

It would, however, be an exaggeration to overlook any legal contribution. Action by the court can have a dual effect even at the preventive level.

a) Firstly, a direct effect. It should not be forgotten that in most of our modern laws a place (still small it is true) is reserved for preventive action. We have been given an example by Mr De Caluwé, Advocate at the Brussels Bar, who in his report emphasized the importance of "the action for an injunction in respect of acts contrary to fair practice," the scope of which has been considerably extended by the Belgian Law of 14 July 1971. The same observation may be made in respect of the United Kingdom : under the Fair Trading Act of 1973 the Director-General of Fair Trading can ask the court to prohibit particular businessmen or traders from acting in a way which would be detrimental to the interests of consumers; if the court order is not obeyed, the trader concerned is guilty of contempt of court which is severely punished.

b) The law can, however, also contribute still more, in a more indirect and diffuse way, through the dissuasive effect inherent in any court judgment, especially in criminal proceedings. Once it used to be natural to insist on exemplary punishment.

Nowadays, since our colleagues who pass sentence regard themselves as doctors, the subject has become taboo. Ultimately, however, whether we like it or not, the fact remains that, at a certain level of respectability, fear of punishment influences behaviour. If a consumers' association succeeds in getting a dishonest manufacturer convicted on two or three different occasions, then these successive convictions will not only give cause for second thoughts, but will also, at the same time, give greater weight to the group which obtained them, provide it with increased authority and, indirectly, assist it in its preventive efforts.

For all these reasons, it would be unwise to write off the court at the preventive level. What is true is that in this field the courts cannot do everything. They can only play a secondary role in reinforcing preventive action which must be developed at two other levels : a contractual and a statutory level.

6. It has been observed that most bodies concerned with consumer protection - whether they be private bodies or official institutions such as the Swedish Ombudsman - are all anxious initially to establish a policy of concerted action to cause certain manufacturers to give up voluntarily those practices giving rise to complaint.

Sometimes these bodies act on an individual basis in certain specific cases to secure an amicable settlement which will avoid court proceedings. We have been given an example of this in the " Chambre de consommation" of Alsace which, with the authority it commands by virtue of its 45,000 members, intervenes, we are told, by telephone, by letter or through visits which hint at possible court proceedings. Let us say that this is concerted action on an individual and very forceful basis.

But preventive action can also take a more general form, with a view to developing ethical rules. An example of this can be found in the United Kingdom - the Director-General of Fair Trading encourages traders' associations to draw up codes of practice intended to provide better protection for consumers, and it has been observed that this action has already borne fruit, with good results in the domestic appliance and tourism sectors.

The idea is interesting. It could open up the way to a system of model contracts reminiscent of the collective agreements drawn up by the large trade union groups. In the long-term, there is nothing to prevent the hope that this policy of concerted action will manage to gradually trace the mysterious paths of a law in the process of being evolved, and aimed at producing statutory solutions.

7. Consumer protection has now given rise to preventive action at statutory level. This was necessary. It is a fact that very often - too often - the consumer is the victim of contracts which he signs without paying attention to oppressive terms contained in them. In the euphoria surrounding the new acquisition (of the TV set bought on credit or the new dishwasher which cleans everything with no trouble at all) these Draconian clauses usually go unnoticed, and no one pays any attention to them if nothing happens. However, if the slightest dispute arises, the full extent of the danger is revealed when the court recalls that the agreement has the force of law as between the parties. This demonstrates the need to protect the consumer by examining the wording of contracts (in particular general conditions of sale) and, if necessary, prohibiting by statute certain clauses likely to prejudice seriously the interests of consumers.

Many European systems of law have already taken steps in this direction. Thus, in the United Kingdom, the Fair Trading Act of 1973 prohibits clauses which stipulate that the purchaser will not be allowed to institute proceedings if the goods should prove defective. For its part, the Federal Republic of Germany rules out clauses governing the court of jurisdiction which, in the event of a dispute, stipulate that the court that covers the place where the registered office of the selling company is situated shall have jurisdiction; this would, of course, be likely to discourage the purchaser, faced with the prospect of a long and costly journey. You will no doubt be interested to know that the French legislature has adopted a similar solution, since the new Article 47 of the Code of Civil Procedure (which is to come into force on 1 January 1976) lays down that clauses governing the court of jurisdiction are valid only in contracts concluded between traders. I can tell you that this provision was adopted precisely because of the abuses which are too often observed in connection with credit sales.

Perhaps one could go even further and, in particular, as has been suggested by our Scandinavian colleagues, make the conclusion of certain contracts conditional upon a period of reflection, to allow the consumer to ascertain the exact scope of the clauses in the proposed contract.

It must be said that there is still much to do at the level of statutory prevention. Law, however, is the result of a slow sedimentation process which develops as defects are revealed; and they are revealed generally in connection with claims for damages which should now be dealt with in greater detail.

II. Compensation

8. This is the preferred field of the court and I hope you will allow me to go into this aspect in greater detail. The traditional arrangement is well known; the consumer who is the victim of loss or damage brings the matter before the competent court in order to obtain compensation for the loss or damage he has suffered through the fault of the manufacturer.

When applied to consumer law, there are obvious weaknesses in such a system from two points of view :

a) Firstly, from a procedural point of view; it has already been stressed that all litigation gives rise to costs of which, at the very least, an advance has to be made and to which legal aid is only a very imperfect solution. This may discourage the plaintiff, i.e. in practice, the consumer.

b) Secondly, as regards the substantive issues. The three traditional factors (fault, loss or damage and the chain of causation between fault and the loss or damage) often do not apply in consumer matters. In particular, it is often difficult to prove the causal relationship between, on the one hand, an act which produces harmful effects in an impersonal way throughout the whole of society and, on the other hand, the loss or damage complained of by an individual consumer. Therefore there is a risk of failure.

It is all too clear that traditional arrangements are unsuitable. This is the reason for the suggested changes which, to varying degrees, appear in all the national reports and which, if we synthesize the overall trends, must apparently develop in three different directions. The first change (the most modest) concerns access to the courts, so as to open them up to collective actions (A). Other changes are aimed at simplifying rules of procedure to make them more suitable for the protection of consumers (B). Finally, the most daring changes consist in taking the resolute step of calling into question the judicial structures themselves (C).

We will consider them in turn, having first of all noted that the various changes proposed are not mutually exclusive and, in some cases, may even complement each other.

A. Access to the courts and collective actions

9. If individual action is an unsuitable tool for consumer protection, the first idea that comes to mind is to organize this defence on a collective basis by authorizing consumer groups to bring

collective actions designed to defend the interests of all those concerned. Although this solution seems to have been accepted without difficulty in the United States where "class actions" may be brought, it gives rise here in Europe to very serious reservations connected with our concept of civil law proceedings.

We are more than ready to take the view that court proceedings, the aim of which is to defend our subjective rights which have been individually and personally encroached upon are not designed to give the first Don Quixote who comes along the satisfaction of flying to the aid of injured legality. It should moreover be noted that this consideration has even greater weight in those legal systems under which anyone who claims to be the victim of a criminal act can initiate criminal proceedings (see 21 below). The fact that the action is brought by an association alters nothing - quite the reverse. It is no secret that associations have always prompted distrust on the part of public authorities, a distrust which is still caught up in a confused mass of memories of the past : to have an impartial objective, which is that of associations, seems to be against human nature and must conceal dubious ulterior motives. If therefore the right to form an association for any purpose whatsoever is entirely free (and it is essential that it should be so) it is considered that in turn the right to bring legal action to defend collective interests should be closely watched in order to avoid unwarranted interference by enterprising people who, without any real authority, seek to set themselves up as would-be censors.

This explains the need for a check to be made on the representativeness of associations. The Italian rapporteur has contested the desirability of this. On the other hand, such a check is permitted in the Federal Republic of Germany in the form of a verification process carried out by the court in each case and in France in the more stringent form of special authorization.

10. More especially, as regards consumer affairs, French law has just started on this path with the law of 27 December 1973, more commonly known as the "Royer Law" after the name of its originator. Under this Law, supplemented by an implementing Order of 17 May 1974, consumer associations may bring legal proceedings to defend collective interests, on condition that they have been authorized to do so; and such authorization can be granted, at national level, only to associations whose membership is at least 10,000.

There is no mistaking the scope of this provision. There is nothing to prevent several consumers who have been injured by the same acts from individually forming a group to bring jointly individual proceedings to which each of them personally is entitled, possibly by forming a defence association which would then appear as their

joint authorized representative. The collective bringing of individual proceedings is one thing; quite another is the bringing of collective proceedings by an association to safeguard the interests of consumers in general. It is in this latter case, and this case only, that authorization is required under the "Royer Law".

Everything there is to say about this law has been said, excellently, by our colleague Mr Jean Maury of the Faculty of Law of Montpellier. I shall take care not to allude to it further, except to say that it is not a panacea. As soon as we move from an individual to a collective basis, a new difficulty awaits us : it concerns compensation. It is customary for associations to ask only for the symbolic one franc damages to show their impartiality. Mr Maury asks them to go beyond this symbolic gesture and demand more substantial sums to enable them, if necessary, to finance "counter-advertising" campaigns and to meet all the costs involved in effectively defending consumers' interests. We should agree to this. However, this shows one thing : that there is not, and cannot be, any overlap between a collective action, useful for instituting proceedings that the individual consumer would no doubt hesitate to bring, useful also insofar as the court judgment obtained under these circumstances can have a preventive effect (see 5b above), and an individual action. Each of them moves in different spheres and corresponds to loss or damage which are not of the same nature. For example, it is not because a consumers' association has obtained compensation to organize a counter-advertising campaign in connection with a harmful foodstuff that the individual consumer in Nevers or Bordeaux, whose health has been impaired, will obtain the damages to which he is entitled. In other words, a collective action does not exclude an individual action which, in the final analysis, remains the only effective way for the consumer who has been personally injured to obtain compensation.

If this is the case, however, the protection of the consumer requires in turn that access to the courts should be accompanied by an easing of the rules of procedure.

B. Easing of the rules of procedure

11. Under most legal systems there are courts which are specially competent to judge minor cases in which the material value at stake is minimal, the "small claims courts" in the United States, the "Kantongerecht" in the Netherlands, the "County Courts" in the United Kingdom, the "Amtsgericht" in the Federal Republic of Germany, the "Tribunaux d'instance" in France, etc.. Disputes concerning consumers generally find their way to these courts

where the procedures are simplified.

Many of you, however, consider that this is still not sufficient and that a further step should be taken by making the procedure even quicker and simpler and above all less costly and less formal, in order not to frighten off the consumer who complains that his little washing machine does not work properly.

Some very useful suggestions have been put forward, such as that of holding hearings in the evening in new and comfortable buildings outside the law courts before judges who are more concerned with conciliation than passing judgment. These are interesting suggestions which should command our attention insofar as they are capable of demystifying the work of the court and rendering the dispute less thorny.

Another more fundamental proposal has, however, been made concerning the role of lawyers. Please allow me to deal with this in greater detail.

12. It is a striking fact that almost all the reports ask for the exclusion of the lawyer. Not only is it conceded that it is not compulsory to be represented by a lawyer (which is the case in many of these small courts); there is a desire to take the further step of compulsorily excluding lawyers, who are considered to be nuisances. A great deal needs to be said about this fashionable subject, which might well carry with it ulterior motives, the dangers of which will perhaps one day be realized.

To keep to the subject of consumer protection, it must be noted that lawyers are already excluded in Sweden and in the United States in the "small claims courts". Without going so far, the same idea is gaining ground in the United Kingdom where everything is done to encourage the consumer not to call on the services of a lawyer by the crafty incentive of not including lawyer's fees in the legal costs which can be recouped.

If this step is to be taken, the consequences should be considered. Two of them are immediately obvious.

13. The first consequence is that, as nature abhors a vacuum, the consumer groups would accordingly be called on to play the role of counsel, directly or through intermediaries, in order to help the consumer to become aware of his rights, to prepare his case and, perhaps, to coordinate all the actions brought.

Several projects of this nature can already be seen - the "Chambre de consommation" in Alsace which undertakes to advise consumers

who apply to it, the "Verbraucher-Zentrales" in the Länder in the Federal Republic of Germany. In this connection, the most original products are the "law shops" in Hamburg and Bremen which have been spoken of at length during our discussions.

The idea is courageous and has appeal. It must be agreed, however, that it is not without risk for the consumer himself; everything ultimately depends on the quality of the persons called on to provide such counsel.

14. The second consequence is infinitely more serious - it concerns the role of the judge. With such a system, the judge almost inevitably becomes a giver of advice who takes it upon himself to assist those involved in the dispute in order to help them to draw up their statements of claim and pleadings. Finally, several reports have shown that, through a completely natural tendency, the judge is generally endowed with extremely wide powers of investigation which may even extend to his being granted the power to reach a moral judgment. In short, all the stigmas of a typically inquisitorial procedure are found in such a context.

In his remarkable report, Mr Gordon Borrie, Dean of the Faculty of Law in Birmingham, states that "the impartiality of the judge is not called into question for all that". This is all to the credit of English justice, and no-one, moreover, would be surprised by it. However, I will not hide my scepticism. The giving of judgment, however rudimentary, is an act of authority which certainly does not exclude a certain simplicity which is all the more essential where the litigants are of humble background, but which implies a necessary detachment on the part of the judge, a detachment which is difficult to reconcile with the role of counsellor. Personally, I am very concerned about this confusion of roles which is likely to turn our courts into confessional-boxes, our judges into confessors and our lawyers into sextons who pass round the plate!

We see here the beginnings of a form of justice very different from the one we know, which inevitably leads us to consider a possible calling into question of traditional legal structures.

C. Calling into question of legal structures

15. The process is more radical here. Starting from the idea that national courts are not perfectly adapted to the specific nature of cases involving consumer law, one comes round to thinking that the best solution lies in setting up from scratch separate judicial or quasi-judicial bodies outside the traditional legal structures.

Thus, one turns quite naturally towards systems which have something in common with arbitration, the kind of arbitration which probably constitutes the original form of justice; one which, in any event, makes it possible to compensate for the deficiencies of a form of justice imperfectly adapted to modern requirements.

In this respect, the national reports describe interesting experiments which seem to be based on two different conceptions :

a) Some of them are to be found in the context of a specific trade or profession. These include in particular the committees on disputes (Klachtenkommissie) in the Netherlands; in Switzerland, the Joint Board in the dry cleaning industry which settles claims for damages lodged by customers; finally, in the Federal Republic of Germany, and more specifically in Hamburg, the conciliation board for vehicle repairers (Schlichtungsstelle für das Kraftfahrzeughandwerk Hamburg) the beginnings of which are promising, since in the space of 4 years the majority of the 7,200 complaints brought before this body by customers have been settled by amicable arrangements.

b) Other experiments are more ambitious. Going beyond the confines of a specific trade or profession, efforts have been made to set up arbitration bodies generally responsible for settling all disputes concerning consumers, whatever the business sector in question. Several countries have already taken steps in this direction : the United Kingdom for example, with the Arbitration Centres in Manchester and Westminster which are specially reserved for consumers who can bring actions for damages not exceeding £250. Mention should also be made of the Complaints Board in the Scandinavian countries and more especially in Sweden, the consumer's Ombudsman (Konsumenten-ombudsman).

16. All these experiments deserve to be continued and examined in detail and with great care. In the present state of affairs, however, it must be accepted that all these institutions suffer from a congenital weakness which is inevitably reflected in the binding effect of the judgments given. One of two things applies :

Either these judgments are binding in the same way as arbitration awards (however, in the absence of any statutory institutionalization, this presupposes the consent of all concerned and also a relatively strict procedure if one wishes to safeguard the rights of the defence: - the British and Swiss approach - with the disadvantage that the scope of such procedures is of necessity limited to those who agree to being judged by arbitrators); or, the consent of those concerned is not essential, the procedure remains flexible and informal, but then the binding effect of the decision is inevitably lost owing to the impossibility of enforcing a judgment given by a quasi-judicial body which sacrifices

procedural safeguards for the sake of simplicity.

This latter problem is not, however, irremediable. It is possible to provide the judgment given with, if not de jure, at least de facto authority through contingent means of bringing pressure to bear. Where the arbitration body is established within a corporative framework (as is the case with the conciliation board for vehicle repairers in Hamburg) the solution is obvious; it is sufficient to exclude from the corporative body anyone who does not voluntarily comply with the judgment given. The problem is obviously more acute if there is reluctance to accept a corporative system. It is not, however, insoluble; one could, for example, brandish the threat of making the judgment public, a threat which would perhaps cause the recalcitrant firm to comply with it immediately rather than be judged by public opinion.

17. However, it should be acknowledged that this empirical approach is not very satisfactory to an academic mind, above all to Latin minds for whom pragmatism is not always the dominant virtue. In an extreme case the trial of strength is postponed without a genuine solution being found to the extent that the initial victory of the consumer is very likely to be a Pyrrhic victory without tangible results in the long term.

It is nonetheless true that all these experiments are worthy of consideration insofar as, by their very boldness, they stimulate the imagination of jurists and compel them to emerge from traditional concepts in order to map out, perhaps falteringly, the beginnings of what could in future be a consumer's court.

Meanwhile, the weakness inherent in all these solutions based on arbitration makes it necessary not to neglect the reinforcement of criminal law, regarded as the ally of the dark days.

III. Penal sanctions

18. With the use of penal sanctions we plunge back into a more traditional but also more rudimentary system. The fact is that in all countries there is an arsenal of penal sanctions which vary in their effectiveness; itinerant trading, unlawful canvassing, misleading advertising, credit sales, price marking and indications of origin can give rise to criminal charges to which penal sanctions of varying severity attach.

Opinions vary as to the desirability of a system of penal sanctions. Some are against it : one such person is Mr De Caluwé who

concludes his report by stating that "one should avoid a return to penal sanctions which are detestable and useless in this connection". On the other hand, the British report states that since 1968 criminal charges have been on the increase; and the author of the report does not seem to voice any criticism of this increase. France, for its part, has experienced a similar development : it is a fact that since 1960 criminal legislation has increased.

The problem has not been decisively tackled during the last few days. Please allow me, therefore, as your general rapporteur, to express a personal opinion. It appears that one should not scorn the support of criminal legislation; it is important, less in itself, than through its dissuasive and potential effects. The threat of proceedings, provided that it is not used on every possible occasion, can facilitate amicable settlements. This consideration alone, more preventive than repressive, leads one to conclude that it would be unwise to demote criminal law to the level of a superfluous extra. We should keep this weapon in reserve for the benefit of consumers.

19. Beyond this controversy as to the advisability of abandoning or returning to penal sanctions, there is the problem of whether such sanctions are actually effective, since there is no point in having a carefully honed system of penal sanctions if it is no more effective than a wooden sword or a scarecrow.

Unfortunately, it has to be acknowledged that public prosecutors do not always act with the necessary speed. There are many reasons. The excessive workload imposed on public prosecutors partly explains the situation. Added to this is the fact that economic offences are not always well known and that too often they are regarded as minor "white collar" offences which should not really be covered by criminal law as such. In any event, there is, for whatever reason, a real "lethargy" on the part of public prosecutors when it is a question of prosecuting for offences concerning consumer law.

What can be done to remedy the situation?

20. Certain indirect methods can be used :

a) Action by consumer bodies should not be forgotten. They can play a considerable role in this connection by carrying out unofficial enquiries and preparing a case which is sufficiently detailed to stimulate the interest of the prosecutor.

b) Among the indirect methods one could also suggest specialization by Public Prosecutors. This idea was put forward by the Belgian

rapporteur who, in this connection, proposes the institution of public prosecutors for economic matters, attached not to the normal public prosecutors office but coming directly under the Ministry of Economic Affairs. Thus one could hope, through such specialization, for a better knowledge of economic offences and through this improved exercise of penal sanctions as a result of better preparation.

21. Under some legal systems, however, a more direct means is available to the consumer : this is the right enjoyed by any victim of a criminal offence to bring a prosecution himself by lodging a complaint and at the same time commencing a civil action, or by issuing a direct summons to appear before a magistrate's court.

It should also be added that this powerful weapon - which is unknown in Anglo-Saxon countries - is two-edged, and its ambiguity has been denounced on many occasions. It certainly has the immediate advantage of overcoming any failure to act on the part of a Public Prosecutor who, exercising his right as to expediency (in France at least), may refuse to institute proceedings. Having said this, however, it should be acknowledged that, under the cloak of obtaining compensation, the factor that really motivates the victim is, in most cases, to be associated with the imposition of penal sanctions. The victim assumes the role of censor. This inevitably leads to de facto and de jure obstacles.

a) The most serious de facto obstacle is that resulting from the deposit of an often considerable sum. The principle is understandable. It is necessary to discourage malicious prosecutions and to protect the accused by providing him with a guarantee to cover the eventuality, if the charge is dismissed, of his claiming damages in respect of the harm suffered as a result of the false accusation. It is nonetheless true that the amount of the deposit required by some examining magistrates is such that individual consumers, and even associations whose resources are limited, cannot provide it and therefore do not bring criminal proceedings (*).

b) The de jure obstacle is connected with the points made at the beginning of this report (see the concluding remarks in 1 above); one reason why the decisions of the French Court of Cassation have always exhibited a degree of reticence with regard to actions brought by associations on behalf of the collective interest they claim to represent, is precisely that there is a reluctance to allow private groups which are formed

(*) See on this point the Written Question submitted by Mr Daillet, MP, to the Minister of Justice, and the latter's reply (Official Gazette, Parl. Deb., Nat. Ass. 6 September 1975).

freely for any object whatsoever and which sometimes represent only those controlling them to take the place of the public prosecutor and thus bring criminal proceedings despite him. This is the real problem; and it is highly probable that the opposition found in French case law to the bringing of actions by associations would be less vigorous if the victim were not able, at his discretion, to bring criminal proceedings. In these circumstances, it is not difficult to understand why a special law, such as the "Royer law", is necessary to enable consumers' associations to institute proceedings, at least where they can prove that they are representative; and, to this extent, they are still not allowed to bring all actions which might result from economic offences (Art. 45 of the Law of 27 December 1973).

The time has come to conclude.

At the beginning of this report, we asked ourselves what was wrong with the troubled relationship between the consumer and the law. Now, following this Symposium, we have the answer : the demands of the consumer are too great for any body of law that is outmoded. There are only two ways to reestablish harmony in the relationship; either temper the demands of the consumer or ask the law to turn a blind eye if he seeks satisfaction elsewhere.

Temper the demands of the consumer? That is out of the question. We live in an age in which, as Mr le Doyen De Cambiaire so rightly said when opening this Symposium, the consumer wishes to stop being a means and become an end. We can, however, at least make an effort to help him become aware of himself and to make him more mature so that he does not become the helpless plaything of ambitious leaders.

On the other hand, we have to urge the traditional approach of the law to understand the attempts of the consumer to seek satisfaction elsewhere. One of the rapporteurs grasped this with determination when, speaking from a personal point of view, of course, he stated that one of his wishes was the nationalization of the profession of lawyer. Let us not go that far, but let us take note that this horizon is becoming visible with the setting up of quasi-judicial bodies through which one can glimpse the outline of what might be the justice of tomorrow adapted to the needs of the consumer.

SUMMARY

Mr Toledano-Laredo, Mr Scarascia-Mugnozza's Chef de cabinet, described the Community's role, past and future, in the field of consumer protection.

He enumerated the five principal objectives of the Community's preliminary programme for a consumer protection and information policy, placing particular emphasis on advice, help and redress.

CLOSING SPEECH

by Mr A. Toledano-Laredo
Chef de Cabinet of the
Vice-President Mr. C. Scarascia-Mugnozza

Ladies and Gentlemen,

On behalf of Mr Scarascia-Mugnozza, I should like to thank Mr de Cambiaire, Professor Calais-Auloy and Professor Goyard, and all chairmen and rapporteurs for the very valuable help given by them to the Commission of the EEC in this Symposium on "Judicial and quasi-judicial means of protecting consumers".

During the three days we have heard papers of the greatest importance to our subject, prompting heated and fascinating discussions between the representatives of the various Community countries and to a discussion on means of protecting consumers in Europe (and even in the United States) which was necessary and which, I am sure, will not fail to bear fruit.

Having heard the excellent summary of your work presented by Professor Perrot of the Faculty of Law in Paris, a specialist in civil procedure, I feel that there is nothing more to add to the overall picture which has been painted perfectly before your eye!

I prefer to describe the Community's role - past and intended - in the field of consumer protection.

The decision, taken by the Council on 14 April 1975, to adopt a preliminary programme of the European Economic Community for a consumer protection and information policy ended a long period of preparation and constituted the start of intensive work aimed at implementing a programme as soon as possible.

The preamble to our Treaty quotes, as one of the Community's fundamental objectives, "the constant improvement of the living and working conditions" of the peoples forming the Community.

This idea is developed in Article 2 of the Treaty which requires the Community to promote harmonious development of economic activities, a continuous and balanced expansion. an increase in stability, and

an accelerated raising of the standard of living.

Article 39 of the Treaty mentions the need to ensure that supplies reach consumers at reasonable prices.

As far as the rules on competition are concerned, Article 85 makes the authorization of certain agreements between undertakings conditional upon consumers being allowed "a fair share" of the resulting benefit.

Article 86 quotes as an example of abuse "the limitation of production, markets or technical development to the prejudice of consumers". It is therefore in this connection that the Community has already adopted a number of measures, on the basis of the Treaty, which are beneficial to consumers.

I shall mention, by way of example : the greater choice enjoyed by consumers on account of the free movement of goods, the respect for consumers' interests (particularly as regards their health and safety), the harmonization of rules; consumer information, particularly with a view to correcting the imbalance between producer and consumer power; their representation. A Consumers' Contact Committee was set up and met during the period from 1962 to 1972; following its dissolution the Commission set up a Consumers' Consultative Committee on 25 September 1973.

Finally, in 1972, the Commission sent to the Council a general communication on consumer protection and information policy.

In October 1972 the Heads of State or Government met in Paris and confirmed the fact that the improvement of the quality of life is one of the Community's tasks which involves the protection of consumers' health, safety and economic interests, and asked the Community institutions to step up and coordinate consumer protection measures and to present a programme by January 1974.

When preparing the final version of the programme, the Commission also took the opinions of the European Parliament, the Economic and Social Committee, and trade, employees' and employers' organizations into consideration.

The programme was approved by the Council on 14 April 1975, as I said before.

It comprises five principal objectives :

- protection against hazards to consumer health and safety,
- protection against damage to consumers' economic interests,
- advice, help and redress,
- consumer information and education,
- consultation with and representation of consumers.

I shall now deal with the third objective of that programme, with which you are most concerned.

The Commission has laid down the principle that consumers should receive advice and help in respect of complaints and of injury or damage resulting from purchase or use of defective goods or unsatisfactory services. They are also entitled to proper redress for such injury or damage by means of swift, effective and inexpensive procedures.

To this end, the Commission will study :

- systems of assistance and advice in the Member States,
- systems of redress, arbitration and the amicable settlement of disputes existing in the Member States,
- the laws of the Member States relating to consumer protection in the courts, particularly the various means of recourse and procedures, including actions brought by consumer associations or other bodies,
- systems and laws of the kind referred to above in certain third countries.

This shows the importance which we have attached to these three days of work which have given us an exceptionally good general picture of the systems and laws to be found in the various Member States, and during which we have heard a large number of interesting suggestions for improved legal and quasi-legal means of protecting consumers.

Although the Symposium is far from being an end in itself, it provides a launching pad for the studies which we shall now undertake on the basis of the reports presented here. The various systems will be compared, the suggestions will be studied in greater detail, and certain matters which are still rather unclear will be clarified.

When the Commission has completed its studies, a number of proposals will be put to Member States' experts and will, I hope, rapidly lead to an improvement in consumer protection in the EEC countries.

Finally I should like to express the hope that I have helped to bring together here an impressive array of specialists on matters concerning the legal and para-legal means of protecting consumers.

Over the past three days many of you have become acquainted, and others among you have met earlier acquaintances. It would be a shame if such contact were lost once each one of you leaves to catch his train or plane.

I hope, on the contrary, that you will continue to work together, to exchange ideas, to tell us them and promote them in your own countries, for although laws and rules are certainly necessary, experience has

proved that without personal conviction, good will and a long struggle for men's minds they unfortunately remain - far too often - a dead letter.

SUMMARY OF THE DEBATE AT THE SYMPOSIUM

Note of debate in morning of 10 December 1975

Mr ELLIOTT (UK) - Referred to the simplified procedure in U.K. whereby consumers could conduct their own case. Arbitration procedure was used in small courts. In U.K. legal aid was available for those unable to afford full costs. Advice could be given up to a cost of £25 and legal aid certificates are granted in appropriate cases to cover proceedings. Litigants may also be reimbursed their costs.

Mr BIHL - Stated that there was a free advice system in France but a certain level of education was necessary to be able to understand how the system worked. There were objections to a complete self-help procedure.

Mr BIRKS - Explained how court costs were awarded in English County Courts. The costs were assessed by the court itself, the loser paying court fees, advocates' costs and witnesses' expenses. The costs were fixed by a judge who decides what steps in the proceedings were actually necessary and how much should be paid to the successful lawyer for his work. A successful litigant could recover 70-80% of his outlay. In simple cases all costs may be assessed as a lump sum.

There are a number of legal aid centres in some of the larger towns in England. They give advice, write letters and prepare claims. One problem is lack of money and no career structure. They are usually manned by young lawyers, who move on after a certain period, creating frequent changes of staff and lack of continuity. The Registrar of a County Court can send litigants to these centres if legal advice is needed.

There is a danger of lawyers being influenced by politics. It then becomes difficult for a court to have confidence in them.

As to dispensing with lawyers, Mr BIRKS spoke with 2 years experience of so doing in his court. It is possible for litigants to conduct their cases in person. They have always had this right in English courts. It does, of course, place a burden on the judge who, in such a case, has to act in an inquisitorial manner. 90% of all claims in Registrars' courts involve little law but depend on the facts of the case. Court staff should instruct litigants what they can do but not what they ought to do.

It is always open to a judge to make a personal inspection of the goods or property in dispute so that he can see their condition for himself. Expert opinions are not usually necessary. Consumers' Association research into 94 cases dealt with in this way gave a general opinion in favour of such procedure. A booklet outlining court procedure had just been published.

Mr CARPENTIER - Asked for procedure to be simplified. Ways to save money should be found. There was a danger that if too many cases were brought to the courts there would be a pile-up which could not be handled unless procedure were simplified.

Mr BIHL - Had no objection to simplified procedures.

Mr FOURGOUX - Drew attention to the penal aspect and referred to hidden faults and the help given by consumer organizations. The level of legal costs was too high.

Mr BIHL - Agreed that costs were too high and that the problem was the same for both penal and civil costs.

Mr REICH - Maintained the need to take a political view and look for the faults in the system. He posed two questions :

1) What are the specific aims and requirements for consumer protection?

2) Where are they different from social problems?

Rental problems should also be taken into account. There is need for more information and clarity of expression in documents. Real consumer protection exists when the interests of consumers are so taken into account that there is no need for recourse to the courts. The real problem starts

further back, in the failure to solve disputes at an early stage.

How can consumers best organize themselves. Individual protection should not really be dealt with subjectively. The Civil Code differs from the Social Code, which is subjective, and a balance must be struck.

Mr DE CONINCK - Explaining how his journal Test-Achats, could be of assistance, stressed the need for self-help. In Belgium, the courts sometimes sent litigants to Test-Achats for advice. There was thus an exchange of views between consumer organizations and the courts. There was a danger in all advice being given by lawyers.

Mr BIHL - Agreed that there should be more effective protection for consumers before recourse to law. His paper dealt with the situation when the law was needed.

Mr BOURGOIGNIE - Called attention to the question of reimbursement of costs. In Belgium this could be introduced in contracts between suppliers and consumers. All the costs of the winner were normally paid by the loser. But if the consumer is the loser, it might be left for the judge to decide by whom and how the costs should be borne. Also, under the product liability theory of absolute liability, the producer might pay costs, which would be covered by a slight addition to the cost of the goods.

Mr BIHL - Confirmed that the judge could always apportion costs, including those of the lawyers but in practice this was not done in France.

Chairman (Professor SCHNURR) - As a representative of public law, he could see where the problems existed for civil lawyers. These were difficult questions to deal with at political level. Other interests have greater power than consumers. The 20th century problem is one where legal relationships are changing from a kind of pure formalism. They stem from days when craftsmen, farmers and shopkeepers had conflicting interests, an intra-mercantile law, as it were. There is now a collision between citizens and other organizations. There is a need for new thinking in terms of consumer law. Political and social changes would, however, come first.

Afternoon session of 10 December

Mr HUSSEY - Stressed the importance in consumer affairs of the conjunction between civil and criminal law.

a) The minority of ill-doers gave a wrong impression of industry, the majority in which were fair traders.

b) The dissatisfied customer did not often have to go to court. Only rarely would a reputable manufacturer or retailer allow a case to go that far.

Dr ARNOLD - Stated that small court procedures were not a new idea. As to costs, 54% of civil suit costs was paid for by the State. There was a need to solve problems before cases started. The advice system should be improved. All cities should have legal advice offices at low fees. These already existed in some places.

Chairman (Mr BIRKS) - Interposed with some reflections. He asked whether the state should intervene and whether (consumer) associations should too. What about the question of costs in these cases? How far can criminal and civil proceedings go forward in one action? Should damages be paid to an association which itself has not suffered loss? Can an action on behalf of unidentified consumers affect the rights of an individual consumer?

Prof. MAURY - Replied that in civil cases, association action was limited to individuals except in exceptional cases. It was mostly for criminal cases.

Mr John WALLER - Explained the role of the Institute of Trading Standards Administration in the U.K. as enforcement officers and consumer advisers. He warned of the danger of multiplicity of different advisory centres, stressing that enforcement bodies and advice centres must have the confidence of consumers, the courts and industry, and must be impartial.

Mr REICH - Asked how preventive action is taken. In Germany there was a warning system. He asked if a balance could be drawn up on the success rate of legal actions.

Mr MAURY - Replied that only three or four collective actions had been brought so far. Action by consumer organizations before action certainly had a preventive effect. Where there are many standard contracts, one should go to the heart of the matter and check the standard form itself.

Mr LORENZO - Explained that the criteria for consumer organizations were very strict and the organizations had to follow the rules laid down. So far 6 national and 11 local organizations had been approved.

(Following the speeches of Mr FISCHER and Mr STOUP certain detailed questions were asked concerning the Alsace Consumer Chamber).

Mr ELLIOTT - Said that satisfaction had to be obtained for the individual and class actions did not achieve this.

Mr STOUP - Replied that satisfaction is obtained for the individual as well as others. Cases are made into examples to dissuade others.

2nd Day (11 December) - morning

Maître de Caluwé's address was followed by discussion.

Mr LORENZO - Made a statement in amplification of his remarks of the previous day.

Mrs HINTZER - Remarked that the prosecution of consumer affairs was more prevalent in Germany than in Belgium. It should be noted that there was criminality among consumers, particularly by shoplifting which caused great loss each year. She stressed the use of the criminal code which was more necessary for compensation for damage suffered. If arbitration did not work, the courts should be open to all. There was a need for more consumer information and education rather than making bad blood between consumers and traders.

Mr DE GRAVE - Referred to the use of injunctions. The cost of the only class action injunction brought so far in Belgium and the time taken (for a hair-growing product) was disproportionate. All that had been done was to warn media. There were no damages or penal action for misleading advertising.

How could one deal with a lottery conducted by a magazine established outside the country? A real ombudsman would be more effective. He thought it necessary to change the burden of proof in these cases.

Mr DE CALUWE - Acknowledged the difficulty for consumer organizations to find the time and the money for class actions. Criminal law was no quicker than civil law. The injunctive procedure was no easier although the courts did want to reach a quick decision.

Mr ELLIOTT - Could not accept that what the consumer wanted was a long procedure at the end of which he got nothing but a certain satisfaction that the trader would change his ways. There was a need for a quick and cheap remedy for the individual.

Mrs BESSER - Stated that the lack of consumer organizations was due to lack of means. More interest is taken in consumer organizations which are voluntary. She feared that judgments of the Courts were not taken realistically.

Mr DARY - There was a clear need to provide the means for all to exercise their rights. He agreed with the remarks of Mr ELLIOTT and emphasized the role of the judge. Collective action was effective in the defence of consumer rights, as was shown by the Pradal case in France. The aim of the EEC consumer protection and information programme is to put consumers in a position of equality in the market place. There are different definitions of consumers - that contained in the programme itself and others in certain areas of the economy. The real need is to examine the imbalances in the system.

Mrs JACQUOT - Outlined the difficulties for consumers in individual and class actions. Different means of redress merely confuse. The real problem is one of information and simple explanation. One would need to analyse the disadvantages of civil class actions. This could be done as a certain number of cases have been brought before the courts.

Mr GUENET - Raised the question of the time taken by court procedures. There was also a need to reduce costs, as outlined by Mr BIHL. One difficulty

lay in the relationship between judicial and parajudicial methods.

(There followed the adress of Mr HONDIUS). The debate then continued :

Mr FISCHER – Asked if consumer representation was effective in the self-disciplinary committees.

Mr HONDIUS – Replied that this was difficult to answer because the different committees varied considerably. They also had different functions. In some cases there was adequate consumer representation; in others, not so.

Mr STAPLETON – Outlined the way in which misleading advertising was dealt with in the United Kingdom. There were three lines of action :

1) the operation of the self-disciplinary system whereby the Code of advertising practice was supervised by the Advertising Standards Authority, a body financed by the advertising industry but independent in the action, having an independent chairman;

2) criminal prosecutions under the Trade Descriptions Act 1968;

3) procedures under the Fair Trading Act, whereby the Office of Fair Trading could recommend legislation and in individual cases obtain undertakings for good behaviour from traders, breach of which could give rise to legal sanctions.

Mr MAKINSKY – Referred to the difficulty in dealing with multinational companies and thought there should be a form of international legal control. Sometimes offences which were dealt with in one country continued unhindered in others. This led to a play of intellectual games between legal experts but consumer protection tended to get lost. Many consumers were afraid of going to court because of the cost.

Mr HONDIUS – Saw few difficulties in dealing with multinational companies under national laws or under private international law, but considered that it would be almost impossible for parajudicial settlement when voluntary systems existed in some countries but not in others.

Mrs ERKELENZ - Asked if there were legal difficulties preventing consumer organizations from giving legal help to consumers or to represent consumers in court. In Germany, only lawyers were permitted to give legal advice. As to the decisions of arbitration bodies, what happened if there was no agreement?

Mr DE CALUWE - Replied that there was no monopoly of consultation in Belgium. Any consumer organization could give legal advice. Radio programmes were also used for this purpose. Associations could represent any individual in court provided that the person was present in the court and the representation was by a lawyer. There were no arbitration committees as such in Belgium. All legal arbitrations had to follow the International Convention.

Mr HONDIUS - Added that the position was similar in the Netherlands. Consumers could be represented in lower but not the higher courts.

Mr BOURGOIGNIE - Asked how far a complaint committee made up jointly of members of trade associations and consumer organizations could agree together.

Mr HONDIUS - Replied that committees were not set up for such purposes in the Netherlands but for arbitration. The Ombudsman for insurance companies had published a report calling for a change in the form of standard policies.

Mr MAKINSKY - Considered that a complaints committee could provide a useful means for consumers to meet producers.

Mr ESTINGOY - Drew attention to the French informative labelling association on which consumers and producers met together and had agreed over 10,000 labels covering 50 product sectors. The French National Consumer Institute also provided a forum for consumers and producers to meet.

Mr GUENOT - Asked whether the decisions of complaints committees were followed and where there is a difference of opinion so that one party follows the decision and the other does not, can the latter be penalised ?

Mr HONDIUS - Replied that he had no figures but generally the decisions were followed. As to the second part of the question, a more severe penalty would be applied to producers by their trade association. (by expulsion even).

2nd Day - afternoon

Messrs GHIDINI, PEDERSEN and MANGÅRD presented their papers.

Discussion :

Prof. REICH - Asked, what possibilities have consumers in Italy :
a) To participate in actions?
b) To have legal advice?
c) Is it not true that consumers are trying to gain their way by non-payment of debts and rents?

Mr GHIDINI - a) There is no way of acting collectively under unfair competition laws.
Associations can only act so long as they represent manufacturing or professional interests.
b) There is no free advice system. No consumer association is equipped to help on a nation-wide basis.
c) Yes, as a way of protest.

Mr GUENOT - Is not the problem of consumer protection based on a lack of understanding? Consumers are not a single social class like workers.
What is needed is a two-level action - protection of consumers and strengthening of legislation.
At the second level more exact protection is necessary for the weaker classes.

Mr GHIDINI - Agreed that more attention should be focused on the lower social classes. In Italy the main focus for many years should be on the lower classes.

Mrs LUZZATTO-FEGIZ - Magistrates have ruled on self-action by non-payment of bills. Corporate action can only work when membership of an association is large enough. Do consumer associations work only for their

members, or for non-members also?
Some consumer questions are answered in radio programmes. All media could help more.

Prof. REICH – Pre-publication checking of advertisements by an FTC type body would be useful. Also more consumer education would strengthen consumer protection in the market place.

Mr GHIDINI – It might be a good plan to make chambers of commerce responsible, province by province, for pre-publication checks on advertisements and corrective advertising.
It is difficult to see how consumer education can be accomplished without the help of media.

Mrs FEDERSPIEL – Was of the opinion that consumer organizations were not as bad as some had expressed them to be. They would not have had to come into being if laws had been adequately enforced. (She then gave a brief account of consumer organizations in Denmark).

Mr DUMONT – Synthetised the Scandinavian/U.K. ideas, with particular reference to pre-trial administration systems and conciliation procedures. Such procedures could settle 80-90% of cases, helped by codes of practice. He saw a need for a change in the character of the courts. We now had a chance of looking at the consumer laws of the EEC as a whole, taking whatever was best, wherever it might be.

Mr DE POLIS – Consumer reactions have been more directed towards remedying wrongs. The preventive aspects of law had not been fully explored. There was a lack of supervisory staff in general. What was there in Scandinavia?

Mr BIRKS – Asked whether there was a procedure for the consumer to have a complaint dealt with where a finance company sued a consumer who was not satisfied with goods bought in hire purchase.

Mr MARCUS-STEIFF – Asked if there was any Scandinavian law on consumer rights to information and how such a right could be utilised? What was the position regarding mass-media?

Mr MANGÅRD – Replied that so far, there was no Swedish law.

In Denmark the Consumer Commission issued a report in labelling but Parliament took no action on it.

3rd Day - morning

Prof. BORRIE - Presented his paper, making the following points :

- the weakness of the individual consumer had been recognised in the United Kingdom;
- it had been th o ught preferable to give powers to trading standards offices rather than to give it in the police. Most work is preventive rather than repressive.
  All this was done at the public expense, with no fees and no charges;
- the exclusion of rights in contracts was to be subject to legislation in 1976.
  The Manchester and Westminster small schemes had been useful but traders were not bound to use them;
- the newly created National Consumer Council was beginning to work.

Prof. REICH - Then presented his paper, taking as his parameters :

1) control system;
2) information;
3) counter-power possibilities;
4) individual protection.

Debate

Mr BIRKS - Saw the key to the problem of small claims as partially one of administration and staffing. The "huissier" was unknown in England, the nearest equivalent being the bailiff. He made a number of observations on small court procedures :

- where the parties were in different places, there was a right of transfer to the (consumer) plaintiffs area;
- the registrar (judge) acts as an inquisitor where the parties are unrepresented;
- small claims lawyers get little encouragement.

If necessary the registrar can request the presence of lawyers;

- written replies of experts are permissible, thus saving costs;
- 50,000 cases have been dealt with mostly on the facts, making it difficult to built up jurisprudence and precedents. Points of law may always be dealt with by trial;
- when codes of practice are invoked, one has to ascertain who are the signatory parties and what is the value of the codes.

Prof. GOYARD – Explained some of the difficulties regarding "huissiers"and suggested a committee for licensing through chambers of commerce.

Prof. REICH – Explained the problem of legal advice under German law. The answer seemed to be to reform the court system, penal and civil rather than to have informal courts.

Mrs LUZZATTO-FEGIZ – Asked how many information centres there were and how they worked, whether all consumers could have free access to the courts and if a charge was made, how much was it? What was the role of the unions? Apparently they have only recently been concerned in Germany.

Mr TRICOT – Asked about the relationship in the U.K. between the Office of Fair Trading, consumer protection offices and County Court procedures.

Mr DE CALUWE – Referred to the territorial scope of County Courts – the greatest distance from each other is 31.5 miles. In Belgium there are 150-170 cantonal courts. Perhaps their jurisdiction could be extended to small claims. Anglo-Saxon judges tended to come closer to the litigants than their Continental colleagues. Latin countries applied a Cartesian logic which prevents the use of small court procedures. He asked whether the setting up of special courts was in order to get the lawyers out of the way. How do lawyers react? It would appear that new procedures have not taken work away.

Prof. REICH – The right of lawyers raises a political issue in Germany.

Mr MC LAUGHLIN - Made an intervention on Ireland.

Mr PIZZIO - Referred to the operation of counter-power. Was there a possibility of creating an arbitrary body following particular regulations to protect the consumer?
Consumers should have the power to cancel unsatisfactory contracts. Did German consumers already have such a power?

3rd Day - afternoon session

Mr GALGANO - Introducing the session, looked upon consumer protection in their role as citizens. There should be a coordination of interests as between the rights of consumers and the interest of producers. There was national and supra-national protection.

Prof. von HIPPEL - Then delivered his paper.

Discussion followed :

Mr RICHARDSON - Briefly referred to the work of the U.K. Office of Fair Trading and mentioned specifically the forthcoming licensing system for consumer credit. He questioned whether such a system would work at EEC level.

Prof. von HIPPEL - Replied that it would be a good idea to try. There were already authorisation systems for pharmaceutical and medical products.

Mrs DOYERE - Had taken note of the need to take new steps. Increasingly products were crossing frontiers and consumers did not know their source, nor the name of the producer. The whole gamut of credit, responsibility, illicit products and sharp practices was under scrutiny. Each country was trying its own solutions. Had not the time come to have a meeting of lawyers to list the problems at international, national and local level? Harmonization of long-standing problems is difficult. The evolution of new consumer law is a great chance.

Prof. von HIPPEL - It was the task for jurists and arbitrators to work out certain priorities. Some of these were already set out in the EEC programme.

Mr DE CONINCK - Asked what impetus there had been to create the English initiatives? What was the value of arbitration schemes? (reply to the 1st question - the Molony Committee report and the work done by the Consumer Council).

Mr HUSSEY - Saw a half-way solution. He thought it necessary to separate the two themes of prevention and compensation.

- Judicial methods need improving. Civil and criminal procedures should be speeded up. States should give enough money for the legal systems to work properly. Conciliation boards may take up even more time than the courts.

Mr BIRKS - Referred to class actions in the U.S. and the possibilities of actions by consumers' associations. The costs of such actions is high and the amount of damages for each consumer is small. How can associations risk taking such actions?

Prof. von HIPPEL - Class actions are an endeavour to make claims for a number of persons.
The system would function in Europe. Lawyers would be paid in accordance with the contested amount.

Dr ARNOLD - Explained the German laws on representation. There was need for consumer protection against "shyster" lawyers, which is still the case today. He had doubts about law shops run by students but had no objection to proper consumer organizations. Is there a danger of getting too big fees from class action?

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