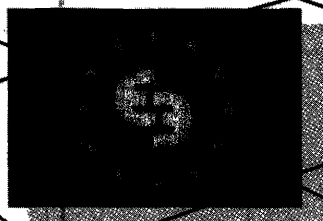
ECONOMIC AND SOCIAL
CONSULTATIVE ASSEMBLY

1993



The Consumer and the Internal Market

EUROPEAN COMMUNITIES

ECONOMIC AND SOCIAL COMMITTEE

Brussels 1993

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CONSULTATIVE ASSEMBLY

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Catalogue No. : ESC-93-003-EN

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PREFACE

As Commissioner for consumer affairs I wish to express my appreciation for the initiative taken by the Economic and Social Committee in undertaking a comprehensive review of Community consumer protection policy, based on the work of the Committee itself and on that of other EC bodies.

I would like to remind readers that consumer policy initiatives fall within the framework of the 1990-1992 Three Year Action Plan. In conceptual terms, this plan is linked directly to the internal market, and in particular to the impact of the single market on the consumer.

I wish to emphasise my appreciation of the ESC's work in recent years, culminating in the Opinion of 26 September 1991, which called for the incorporation of a chapter on consumer protection into the Maastricht Treaty. The additional Opinion issued on 24 November 1992 will be very useful in terms of future Commission action.

Moreover, the study on ''consumer protection and the internal market'' undertaken by a group of experts which accompanied the Additional Opinion, is an extremely comprehensive reference work covering all actions and initiatives undertaken from the outset within the framework of consumer policy.

All this work will undoubtedly give the Commission food for thought, in particular in the preparation of our new Action Plan, and I sincerely wish that this very constructive co-operation will continue and that in the years to come it will underpin our efforts to turn the Europe which we are building into a genuine Citizen's Europe.

Karel VAN MIERT

OPINION
of the
Economic and Social Committee

Consumer Protection and Completion of the Internal Market

CES 1115/91

O.J. C339 31.12.91 - p.16

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On 29 January 1991 the Economic and Social Committee, acting under the fourth paragraph of Article 20 of its Rules of Procedure, decided to draw up an Opinion on

Consumer Protection and Completion of the Internal Market.

The Section for Protection of the Environment, Public Health and Consumer Affairs, which was responsible for preparing the Committee's work on the matter, adopted its Opinion on 6 September 1991. The Rapporteur was Mr ATAÍDE FERREIRA and the Co-Rapporteur Mr PROUMENS.

At its 289th Plenary Session (meeting of 26 September 1991) the Economic and Social Committee adopted the following Opinion, by 44 votes to 2 with 10 abstentions.

1. Introduction

1.1. The present Opinion considers how far consumer interests can be genuinely promoted by the single market.

1.2. The specific character of the problems encountered by consumers on the market was recognized several years ago by the national governments, by the Community institutions [1] and by other international organizations such as the Council of Europe, OECD and the UN [2]. Five categories of basic consumers' rights have been recognized: right to information and education; right to protection of health and safety; right to protection of financial interests; right to protection of legal interests; and rights to representation and participation.

1.2.1. Consumers must be able to assert these rights in their dealings with all sectors. Accordingly this Opinion covers not only the problems encountered by the consumer vis-à-vis the private sector, but also those encountered in the public sector, even if traditionally most of the problems identified arise in dealings with private-sector enterprises.

1.2.2. Only recently have the public-service problems encountered by consumers attracted the attention they deserve.

1.2.2.1. In general terms, however, it is fair to say that Community consumers experience a number of difficulties with public services. The most important problems in this sector include the virtually obligatory contracts between users and suppliers of public services under which the users, if they wish to obtain certain - in some cases basic - goods or services, have no choice but to accept the standard clauses imposed unilaterally by the public services, whether the services are provided directly or via public enterprises or distributors [3].

1.2.2.2. These utilities and services (water, gas, electricity, public transport, etc.) are usually provided by the state or contracted out nationally, regionally or locally to semi-public or private-sector firms (generally monopolies). In neither case can competition operate to resolve infrastructure and other problems. Free from the pressure of competition, these enterprises need take less account of the expectations and requirements of users than private-sector firms.

1.2.2.3. Public-sector enterprises are rarely covered by the legal instruments adopted by the Community in the consumer interest. For this reason the Committee, alive to the inequalities which can be caused by the special status of public-sector enterprises, urges the Commission to make an immediate start on work and research to identify consumers' protection needs in this area and examine the steps to be taken to provide adequate remedies at Community level. A study is needed to ascertain whether and to what extent effective representation is provided for on the monitoring or supervisory boards of public-sector enterprises, and how such representation should be extended. The Committee will make its own specific proposals and observations on this matter.

1.2.2.4. The consumer wants access to efficient, clearly-priced public services. For their part the Member States must apply, at national, regional and local level, the same rules of consumer protection as are applied to private operators, whether the services are supplied direct or through public enterprises or distributors.

1.2.3. In addition, mention must be made of the difficulties which the consumer may encounter in dealing with the professions, in particular access to information, liability of providers of services and recognition of jurisdiction in the event of disputes.

2. Consumer policy action by Community institutions - conspectus and outlook

2.1. Prior to the entry into force of the Single Act

2.1.1. Although consumer protection and the promotion of consumer interests is not numbered explicitly among the Treaty's objectives, from the seventies onwards the Community institutions took a number of timid steps towards recognition of the Community dimension of consumer policy. The Commission was required to promote consumer interests by the Council, which adopted a number of resolutions [4] chart-

[1] Cf. in particular the first official recognition of these rights by the resolution of the Council of Ministers of 14 April 1975 on a consumer protection and information policy.

[2] Cf. in particular the work of the OECD Consumer Policy Committee, set up in 1969, and the numerous recommendations which it has adopted; Council of Europe Recommendation 705 (1973) on consumer protection; the Council of Europe's report on the protection of the economic and social interests of consumers (doc. 4920 of 3 June 1982); the guidelines for consumer protection adopted by the General Assembly of the United Nations on 9 April 1985 (resolution 39/248)

[3] The Commission has submitted a proposal for a Directive on unfair terms in consumer contracts (COM(90) 322 final) which would apply to public enterprises too. From the negotiations, however, it would appear that several Member States oppose such a broad field of application

[4] Preliminary programme for a consumer protection and information policy, 14 April 1975; second programme for a consumer protection and information programme, 19 May 1981; Commission communication to the Council on a new impetus for consumer protection policy, 23 July 1985; Council resolution on the future orientation of a Community consumer policy, 23 June 1986; Council resolution on the integration of consumer policy in the other Community common policies, 15 December 1986

ing the route for a Community consumer protection policy, and by the European Parliament [5] and the Economic and Social Committee [6], which clearly showed their awareness of consumer problems in resolutions and own-initiative Opinions.

2.1.2. As in other areas of Community action, the aforementioned initiatives have generated only a few legal instruments, several of which have fallen well short of the expectations of consumer representatives [7], mainly due to the unanimity rule and the lack of a legal basis [8] for Community action in this area. The absence of explicit powers in the consumer sector is a serious deficit in a Europe which wants to achieve not illusory but genuine integration and is aware that decisions can no longer be taken at national level; this is a deficit not only from the point of view of the single market, where the Community might find itself confined to a supply-side economic policy, but also from the point of view of a People's Europe, which needs to have a social consumer policy on the same footing as a workers' protection policy and an environment policy.

2.1.3. It is unrealistic to want to construct an internal market and, beyond that, a European Social Area without a specific policy to take account of the legitimate expectations of one of the partners necessary to its success: the consumer. Furthermore, against the background of a European Community keen to establish economic and social cohesion among its members, it is important to give the institutions the legal powers they need to create equal opportunities for everyone and to restore balance through measures to protect the weakest sections of the community. It is difficult to understand why consumers do not enjoy at Community level the same protection which they enjoy under national laws in some Member States.

2.1.4. It must be noted that the construction put by the Court of Justice on the provisions of the Rome Treaty, more specifically Articles 30 and 36, has contributed in some measure to the dismantling of national protectionist measures, in that it prevents the Member States from using the pretext of consumer protection to block imports and thus limit consumer choice [9]; nevertheless, these provisions have also prevented the Member States from adopting or retaining certain provisions aimed at protecting the consumer unless these can be justified by objective criteria. This has resulted in "negative integration" [10].

2.2. Changes resulting from the entry into force of the Single Act

2.2.1. The changes made to the Rome Treaty by the Single European Act - and more specifically Article 100a - seem to have opened the way for a more active Community policy on consumers, thanks in particular to the abandonment of the unanimity requirement. More initiatives have been taken on consumer issues in the run up to 1992 [11] And a number of Community measures have obliged the Member States - sometimes including those which have made the most progress in adopting legislation in the field of consumer protection - to adopt consumer protection measures which they would not otherwise have enacted [12]. In building a united Europe, the free movement of goods and services must not be an end in itself, but only a means of helping to raise the standard of living, which is one of the objectives of the Treaty listed in Article.

2.2.2. However, Article 100a only refers to consumer protection in connection with the establishment and functioning of the single market, which has to be based on a high level of protection for consumers. In other words, the Community institutions can only intervene to help consumers in cases where there is a link with completion of the single market; consumer policy remains subsidiary, secondary and indirect. There are many constraints on the approach set out in Article 100a, and some of them are fundamental.

2.2.2.1. The "high level of protection" for consumers prescribed by Article 100a only applies to Commission proposals and is not explicitly binding on the Council [13],

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[5] Cf. for instance the resolution on consumer protection policy in the European Community, O.J. no. C 10/1984; the resolution on access of consumers to justice, O.J. no. C 99/1987

[6] Study on harmonization of judicial means of consumer protection, CES 93/79; own-initiative Opinion on the producer-consumer dialogue, O.J. no. C 206/1984; own-initiative Opinion on general safety requirements for products, O.J. no. C 175/1988; own-initiative Opinion on consumer advice and information in the context of completion of the internal market, O.J. no. C 298/1989; Opinion on basic social rights in the Community, O.J. no. C 126/1989

[7] Cf. Directives on textiles (Directive on textile names, 71/307; amended by Directives 75/36, 83/623 and 87/140; Directive on textile analysis methods, 72/276, amended by Directives 79/76, 81/75 and 87/184, Directive on the quantitative analysis of textile fibres, 73/44), Directives on cosmetic products (Directive 76/768, amended by Directives 79/661, 82/368, 83/574, 88/667, 89/679), Directive 79/112 on the labelling and advertising of foodstuffs, amended by Directives 86/197 and 89/395, Directives on the indication of the prices of foodstuffs and non-food products (79/581, amend. 88/315; 88/314), Directive 84/450 on misleading advertising, Directive 85/374 on product liability, Directive 85/577 on contracts negotiated away from business premises, Directive 87/102 on consumer credit, amend. Dir. 90/88, Directive 87/357 on products which, appearing to be other than they are, endanger the health and safety of consumers, Directive 88/378 on toy safety, Directive 87/344 on legal protection insurance.

[8] Cf. the discussions surrounding the adoption of the product liability Directive, which lasted 13 years, or again the long history of the proposed Directive on unfair terms which has been under discussion for 15 years.

[9] Cf. in particular the Dassonville ruling of 11 July 1974, case 8/74, and the Cassis de Dijon ruling of 20 February 1979, case 120/78, which form the basis of the copious case law on this subject, and also the Buy Irish ruling of 24 November 1982, case 249/81, the Schloh ruling of 12 June 1986, case 50/85, the Reinheitsgebot ruling of 12 March 1987, case 178/84

[10] Principle that for measures impeding free trade, Member States must show objectively that these measures are necessary to protect the consumer and cannot be achieved by measures of equivalent effect: examples may be found above all in the field of consumer information and product composition: generally the Court seems to think that the rules on product composition may be easily replaced by rules on information and, especially, labelling. Cf. also the GB-Inno-BM ruling of 7 March 1990, case C-362/88; German Beer case -Judgement of the Court of 12 March 1987, Case 179/84 (Commission vs. Germany). However, where there are genuine concerns of public health, the Court has ruled that national barriers may be maintained, e.g. Nisin case, Judgement of 5 February 1981, Case 53/80 and Kampfmeyer case, 6 May 1986, Case 304/84.

[11] For instance, cf. the Directives and draft Directives submitted since 1990: Directive 90/314 on package travel, draft Directive on unfair terms in consumer contracts, draftDirective on the liability of providers of services, the Commission's work on consumer protection in connection with distance selling, ..

[12] In the case of product liability, for instance, several Member States would not have contemplated enacting specific rules if the Community had not taken the initiative.

[13] Cf. more recently the Directive on package travel where the Council has in several instances reduced the protection accorded to the consumer by the Commission's revised proposal (price increases, means of redress and settlement of disputes, guarantee funds); see also the work on general product safety where the Council intends to reduce the Directive's scope to consumer products, thus opening up the prospect of numerous borderline cases ..

the Court of Justice or the Member States. And as defined, the criterion means weakening consumer protection in Member States where protection exceeds that specified by Community legislation [14].

2.2.2.2. Article 100a does not provide a legal basis for consumer measures unconnected with completion of the single market, e.g. measures concerned with access to goods and services, access to the courts, certain aspects of public services, certain aspects of nutrition and food policy, housing and certain aspects of health policy. More generally, the single-market policy is an economic policy and cannot take sufficient account of the social aspects of consumer policy.

2.2.2.3. Besides integration through harmonization, it should not be forgotten that one of the integration mechanisms provided for in the Rome Treaty is mutual recognition: failing Community harmonization, a product or service legally marketed in one Member State may in principle, subject to the exemptions provided for under Community law, be marketed in all the other Member States. While legally nothing prevents a Member State from practising reverse discrimination [15], economically, in the long term, such a policy cannot survive the pressure exerted by the enterprises adversely affected.

2.3. Towards a Treaty chapter for consumers

2.3.1. It can be seen from the above that the Community does not have an adequate legal basis for a fully-fledged consumer policy. Experience has shown that this absence of a legal basis provides certain Member States and pressure groups with an ideal pretext for systematically criticizing Community consumer protection proposals. Many proposals have been killed, weakened or delayed because they fell outside the remit of the Community institutions, not because they were faulty in themselves [16]

2.3.2. The question of the explicit recognition of the Community's powers to protect and promote consumer interests is very much a live issue in the context of the negotiations and discussions on European political union, which are geared to even closer alignment of Member State policies.

2.3.3. As a result of the current, frequently criticized limits on Community action to help consumers, there have been calls in several quarters for the grant of explicit consumer-protection powers [17] to the Communities. In connection with the Treaty review launched by the intergovernmental conference on political union, some national delegations, supported by most Member States, have proposed mentioning consumer protection explicitly among the objectives of political union [18]. The institutions would be equipped with the powers needed to pursue a specific, active consumer protection policy and to take account of consumer interests in other policies of concern to them. The Committee regrets that the Commission has not taken any definite initiatives in this area [19], but is pleased that it is now moving towards acceptance of the principle of a specific provision on consumer protection.

2.3.4. Against the background of political union, it is important to foster a dynamic, forward-looking consumer policy. Hence it is essential that the relevant Treaty provision lay down a procedure for adopting measures by qualified majority voting and make it possible for the Member States to lay down a greater degree of consumer protection than the Community (minimum harmonization principle). In addition, recognition of the need to give a Community dimension to consumer protection policy would pave the way for a useful redefinition of the scope of Treaty Articles 30 and 36 under which the Member States can maintain, primarily for reasons of consumer safety, barriers to the free movement of goods, which in the last analysis runs counter to the construction of Europe.

2.3.5. The Committee fully endorses the explicit inclusion of the protection and promotion of consumer interests among the Treaty's objectives. It would also like to see the rights accorded to consumers in international instruments [20] cited in the Treaty: allocation by the new Treaty to the Community of powers in the consumer protection field is the only effective, long-term way for the Community to equip itself with an overall, specific consumer policy.

2.3.6. Given its composition and its consumer representation role in the Community, the Committee considers that it should be mandatory for it to be consulted on proposals adopted by the Commission in pursuance of the new powers.

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[14] The best criterion for the consumer would be the highest degree of protection; this would enable the Commission to take as its starting-point the legislation of that Member State which had made the most progress in adopting consumer protection legislation in a particular area.

[15] Reverse discrimination consists of applying stricter rules to national products and services than to imported products.

[16] Cf. for instance thDirective on contracts concluded away from business premises, where the proposal was submitted in 1977 but not adopted until 1985; cf. for instance the proposed Directive on unfair terms, pending since 1977 but still not adopted; cf. the proposal on general product safety; cf. also the work on the harmonization of insurance contracts, unanimously called for by the consumer movement, and replaced in Community Directives by complicated provisions regarding the law applicable to insurance contracts.

[17] Cf. the press releases of several consumer organizations; cf. the resolution of the Consumers' Consultative Council, adopted at its meeting on 12 March 1991.

[18] Cf. also the opinion adopted by the Consumers' Consultative Committee at its meeting on 12 March 1991, which calls for the new treaty on political union to include a specific provision on the Community's powers to protect and promote consumer interests.

[19] Cf. the gaps in the discussion paper containing its initial contribution to the intergovernmental conference on political union (SEC(91) 500).

[20] Cf. footnotes 1 and 2 above.

3. Consumer representation in Europe

3.1. Community machinery for taking consumer interests into account

3.1.1. The Commission

3.1.1.1. The Commission Consumer Policy Service

3.1.1.1.1. The Community institutions are structured to cover the consumer dimension of Europe. But the Commission is the only institution to have recently set up a unit specifically catering for consumer interests: the Consumer Policy Service. While it is regrettable that the Commission did not see fit to create a separate Directorate-General with responsibility for consumer problems [21], this is a major step forward, enabling specific, independent analysis of consumer issues; it should be wholeheartedly endorsed [22].

3.1.1.1.2. The funding and staffing [23] levels of this independent Commission unit are however insufficient in comparison with the work which it is called upon to do, either on its own initiative or in response to inquiries and consultations by other departments. It is regrettable that the Commission should not allocate itself the resources to carry out the policy it has drawn up. The lack of resources assigned to EC consumer policy (and there are 340 million consumers in the Community) is clearly illustrated by the appropriation allocated to this matter in 1991: 7,690,000 ECU, ie. 0.018% of the total budget [24]. Even worse, the Council decision approving the draft 1992 budget cuts the consumer budget to 4,300,000 ECU, which would represent, if agreed by the Parliament, 0.007% of the Community budget. The cuts particularly jeopardize the survival of the Consumers' Consultative Council (CCC) (see below), as well as the development of the consumer movement in the South of Europe and in Ireland. The Committee therefore urges the Commission, in its budget proposals, and the European Parliament, when considering these budget proposals, to take account of the need for the Consumer Policy Service to function effectively.

3.1.1.2. The Consumers' Consultative Council (CCC)

3.1.1.2.1. The Commission has also set up a Consumers' Consultative Council which brings together representatives of the four major European organizations concerned with consumer affairs (BEUC, COFACE, ETUC, EUROCOOP) and representatives of national consumer organizations. This body is extremely valuable since the Commission can use it to sound out the views of consumers on its work and plans. With the extension of the membership of the CCC to national consumer organizations, it is now possible to appreciate the regional and cultural diversity of consumer processes and gauge the profound differences between consumer protection systems in Europe. National systems will necessarily be the starting point for any Community action in the field of consumer affairs.

3.1.1.2.2. The Commission must be criticized for not consulting the CCC [25] systematically and in some cases for not referring proposals until it has adopted them. The Consumer Policy Service forwards - sometimes late, but mostly at the discussion paper stage - a dossier to the CCC for its opinion; the other Directorates-General, however, do not do this and some are not even aware of the existence of this advisory body. The Committee recommends that the Commission consult the CCC no later than the preliminary draft proposal stage, even in the case of proposals not emanating from the Consumer Policy Service, and that it forward the CCC's opinion, together with the text of the proposal, to the other Community bodies and institutions so as to assist them in the preparation of their opinions and decisions.

3.1.1.2.3. The work of the CCC is hampered in practice by a lack of resources and logistical support; accordingly the Committee recommends that the Commission, and more particularly the Consumer Policy Service, do everything in their power to enable the CCC and its members to fulfil their duties efficiently.

3.1.1.2.4. In addition, in order to promote the role of the consumer as a fully-fledged economic agent, the Commission should organize liaison meetings between the CCC and other advisory bodies, especially the Committee on Commerce and Distribution (CCD), and the corresponding EC industry and service committees. Provision of the secretariat of such meetings should be the responsibility of the Consumer Policy Service. This should help to promote a dialogue between consumers and other economic interest groups within society; such a dialogue is strongly recommended by the Economic and Social Committee.

3.1.2. The European Parliament

3.1.2.1. The initiative of the European Parliament, namely to organize, independently of its established machinery, the setting-up in 1990 of a parliamentary intergroup specifically for consumer problems, is to be welcomed.

3.1.2.2. In addition, the European Parliament is organizing public hearings devoted wholly or in part to the problems encountered by consumers in the EC [26].

3.1.2.3. The European Parliament's Committee on the Environment, Public Health and Consumer Protection deals with matters of special interest to the consumer. The Economic and Social Committee welcomes the efforts made by the EP Committee to also consider the many questions which, whilst not primarily consumer issues, are nevertheless obviously relevant to the consumers. Such topics include agricultural and competition policies.

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[21] It should, however, be pointed out that the Service is headed by a Director-General who ranks equally with the heads of the other Directorates-General.

[22] To this it should be added that other Directorates-General are frequently involved in the protection and promotion of consumer interests, as in the case of denied boarding compensation, which falls under the remit of the Transport Directorate-General.

[23] Although the number of staff has been increased over recent years, many are not established, ie the posts are filled by temporary staff, agency staff or national civil servants on secondment.

[24] By way of comparison, subsidies to Community tobacco growers account for 2.5% of the total budget..

[25] For instance, the CCC has not been consulted on the 3-year consumer action plan..

[26] Cf. for instance the public hearing organized on 7 and 8 November 1990 on 1992 and the consumer, by the Committee on the Environment, Public Health and Consumer Protection.

3.1.2.4. Past experience has shown that the administrative and procedural effort put into examining consumer problems is frequently out of proportion to the results obtained, and that perhaps in the future a less formal approach might be adopted.

3.1.2.5. The Committee thinks that it should continue to hold discussions with the European Parliament on all important consumer issues, especially if the relevant EP committee is in need of information.

3.1.3. The Economic and Social Committee

3.1.3.1. Within the Economic and Social Committee, the Section for Protection of the Environment, Public Health and Consumer Affairs is responsible for consumer issues. Over the years, it has developed into a body on which consumer and business representatives hold regular discussions. Although consumer representatives are in a minority, both on the Committee and the Section, the dialogue has proved useful and results have been achieved in a number of consumer policy areas.

3.1.3.2. The ESC numbers among its bodies a consumer sub-group and thus recognizes that this category of economic agent has its own distinct identity. The Committee has also adopted several own-initiative Opinions on the problems of protecting and promoting consumer interests. One can only regret that the Commission and the other Community institutions have so far failed to take these Opinions into consideration [27].

3.1.3.3. It is also regrettable that the consumer associations of some Member States still do not appreciate the importance of the Economic and Social Committee. Some Member States have not even appointed to the ESC anyone professionally engaged in the defence of consumer interests; this is also true of other interest groups. The Committee urges the Member States which have so far failed to appoint such a person to the ESC to do so, if at all possible, when the Committee is renewed next time round [28].

3.1.4. The Council of Ministers

3.1.4.1. The Committee wholeheartedly endorses the practice of certain presidencies of holding meetings specifically to deal with consumer affairs. But in the Council of Ministers matters of interest to consumers are frequently discussed at "Single Market" or even "Economic and Financial Affairs" meetings. As a result they are discussed by politicians from national ministries whose remit does not cover these subjects [29]. The Committee therefore calls on the Council to continue holding meetings specifically devoted to consumer interests.

3.2. Consumer organizations in Europe

3.2.1. The Commission and the other Community institutions must continue to acknowledge that, alongside the official representative machinery, both European and national consumer organizations have an important consultative role to play in the necessary dialogue on Community policies. The CCC, however, must not be recognized as the exclusive representative, all the more so as its composition is such that it does not fully cover the whole range of interests within the consumer movement.

3.2.2. Even more basic, because of the process of deregulation which goes hand-in-hand with European integration, in connection with standards especially, consumers are entitled to participate in the drawing-up of safety and quality standards for consumer products and services. They must be able to appoint experts to represent them in the machinery for formulating products standards. The Community must allocate consumer representatives the resources necessary to fulfil these new responsibilities stemming from the privatization of standards procedures. In its own-initiative Opinion on the social dimension of the internal market the Committee stated that the right of consumers and users to help define product safety and quality standards [30] must be recognized finally and clearly; this means that experts can be appointed by organizations whose sole aim or one of whose aims is to protect the consumer. For this, the organizations must, of course, be able to show that they really represent the consumer.

3.2.3. At the same time, one of the principal preconditions for the success of the single European market is that consumers be fully informed so they can make their choice from amongst products from all over the Community. The consumer organizations have a key role in providing this information. Here too it is essential, especially in those Member States where the consumer movement is still in its infancy, to equip these organizations with the resources to carry out their new duties effectively. The Committee therefore calls on the Commission to continue providing consumer organizations with means to inform consumers so that the latter can play their part in the single European market and reap the benefits.

3.2.4. The consumer movement in Europe is variegated. In the North the organizations have existed for several decades and have the funds to carry out their tasks of representation, information and defence. In the South, however, the organizations are in their infancy and have scant funding. Consumer interests must be represented and defended equally fiercely throughout all the regions of Europe. The Committee therefore calls on the Commission to continue attaching special importance to supporting the emergence of the consumer movement in the southern countries and Ireland. It therefore also urgently calls upon the governments of the Member States to revise the decision on the cuts in the budget which fundamentally endanger the development of this movement.

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[27] Cf. footnote 7

[28] Cf. also the recommendation put forward by the CCC in its opinion of 9 December 1986 on the integration of consumer policy in other common policies.

[29] Furthermore, on the exceptional occasions when a Council meeting is given over to consumer protection, we have to resign ourselves to the fact that the majority of politicians present come from ministerial departments (economic affairs, social questions, public health, etc.) not specifically concerned with consumer affairs, depending on the structure of each government.

[30] Cf. also ESC Opinion on Environment policy, a fundamental aspect of economic and social development, OJ C 56 of 7.3.1990 and ESC Opinion on the Commission Green Paper on the development of European standardization: action for faster technological integration in Europe (Rapporteur: Mr de KNEGT - OJ no. C120 of 6 May 1991)

3.2.5. One of the principal objectives of consumer organizations is to provide consumer information. However, for this information to be efficiently addressed to the consumer, there is a need for consumer education, primarily through existing pedagogic structures - i.e. primary and secondary schools. Consumer education programmes should be given sufficient attention by the relevant authorities in the Member States.

3.3. Finally, the Committee would point out that European consumer policy must be shaped more effectively and given support - and especially financial support - at all levels and in all institutions.

4. Integration of consumer policy in other Community policies

4.1. Leaving aside the initiatives which tend to specifically promote consumer interests at Community level, it is essential, as the Council recognized in its resolution of 15 December 1986 [31], that the "consumer" dimension be taken into account whenever new measures are proposed under other Community policies. Paying due attention to consumer interests, however, will only be possible if there is a global, horizontal approach and if all Commission departments are aware of their obligations when taking initiatives. Consumers are directly or indirectly affected by all Community policies, but particularly competition policy, the common agricultural policy, transport policy, etc. Particular attention must be focused on the interactions between consumer policy on the one hand and policies with respect to standards [32], the environment [33] and external relations on the other [34].

4.2. At the present time however the Commission's approach to consumer interests is fragmented. In the case of individual initiatives the extent to which consumer interests are taken into consideration depends to a large extent on the Directorate-General with overall responsibility for the area in question. It should also be noted that the way in which dossiers are shared out among Commission departments sometimes seems illogical to outsiders.

4.3. It should, however, be pointed out that changes in the Commission's organizational chart have led to the creation of the Consumer Policy Service with a right to monitor proposals emanating from other Commission departments. Nevertheless such an improvement must be kept in its proper perspective, given the limited scope for action of the CPS [35]. The Committee awaits impatiently the publication of the communication to the Council which the Commission is drawing up on the integration of consumer protection in Community policies.

4.4. More generally, it is important to note that whereas implementation of the single-market policy was preceded by a number of studies, of which the best known is the Cecchini report on the cost of non-Europe, no specific studies were devoted to the possible impact on consumers of the changes expected to result from the opening up of frontiers in 1993. The impact on consumers was considered to flow automatically from the impact on the economy and on the Member States. Early trends nevertheless would seem to indicate that these assumptions of automatic knock-on effects do not necessarily correspond to reality.

4.5. These comments show the need for a genuine horizontal policy, under which consideration is given to the consumer dimension of every single Community initiative. By way of illustration, the Committee suggests that draft Commission legislation should be accompanied by statements assessing the impact on consumers [36].

4.6. Consumer research

4.6.1. The Committee recognizes that there is a strong need to promote research into consumer affairs. Although such research is already carried out to some extent by existing bodies in the Member States and by the Community Institutions themselves, the Committee feels that a more specialized approach is necessary at Community level.

5. Single-market policy and consumer protection in Europe

5.1. Limits to the harmonization procedure in the context of consumer protection

5.1.1. Harmonization of the conditions for placing goods and services on the market is the principal objective of the Community's single-market policy. At the stage reached today, however, legislative harmonization has several important limitations.

5.1.2. Consumers do not expect the internal market to reduce the protection to which they are entitled under national law. This has been well understood by EC policymakers who on several occasions have applied the principle of "minimum harmonization"; this denotes, in Community jargon, that a Community text allows a Member State to opt out if it wishes to adopt or retain stricter consumer protection provisions [37], within the limits laid down by Community law.

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[31] Resolution on integration of consumer policy in other Community policies, OJ C 3/87.

[32] At the current time the consumer movement has a major stake in the transfer of competence initiated by the new approach policy, whereby the European legislator delegates the power to draw up technical standards to the relevant private sector; the consumer organizations are calling on the politicians and experts to recognize their right to participate in standards procedures, along with the allocation of the necessary funds to carry out these new responsibilities.

[33] Environmental policy may have a major impact on consumer interests (prices, taxes, diversity of choice, health and safety); consumer policy may also, through the choices it makes, influence the environment for the good or for the bad. Once this is realized, an integrated approach to these two policies is inevitable.

[34] Any policy of subsidizing European industry, whether by anti-dumping measures or direct production aids, will ultimately be paid for by the European consumer. This is why the latter insist on taking part in the negotiations on these matters. The same applies to agricultural protection.

[35] While the CPS is actually consulted, sometimes tardily, by other departments, it is not always able to respond because of a shortage of specialized staff. For further details see point 3.1.1.1. above.

[36] Cf. also the recommendations adopted by the CCC in its Opinion of 9 December 1986 on the integration of consumer policy in other Community policies.

[37] Cf. for instance the Directives on misleading advertising and package travel.

5.1.3. Whilst application of the principle of minimum harmonization, as advocated by the consumer movement, has its limitations, legislative harmonization is also faced with restrictions inherent in the Community's method of functioning. Criticisms of the way the Community operates could, more generally, be levelled at all the sectors covered by the EC.

5.1.3.1. Legislative harmonization does not in any way mean that the conditions under which goods and services are put on the market will in reality be harmonized [38], especially in non-technical areas. One and the same set of provisions may and does give rise to varying legislative interpretations in the different Member States, depending on legal and cultural traditions. A partial solution can be found to this problem. The Committee would suggest, in the interests of helping to achieve an acceptable level of harmonization of Community legislation, that the Community institutions should make extra efforts to provide clear definitions of rights and obligations, use precise terms and check in detail the concordance of language versions.

5.1.3.2. An important factor in the wayward implementation of European legislation is the delay in transposition into national law. It is also regrettable that those Member States which push hardest for Community legislation are among the slowest to transpose it into national law. Several pieces of legislation of importance to consumers have not yet been transposed by all Member States even though the deadline for incorporation into national legislation has long passed and in some cases the Member States concerned have been condemned by the Court of Justice of the European Communities [39]. It is equally regrettable that the Commission adopts a tolerant, laxist approach to the failure of certain Member States to meet their commitments, and drags its heels before instituting proceedings in the Court of Justice. The Committee appeals to the Member States to honour the commitments they have entered into at Council of Ministers' level. It recommends that the Community's political authorities draw up sanctions which will actually be imposed on Member States failing to meet the obligations stemming from the Treaty of Rome. It also suggests that the Community institutions should, as far as possible, recognize the direct applicability of Community consumer policy instruments whenever they contain precise, detailed rights and obligations.

5.1.3.3. The authorities responsible for implementing legislation need to coordinate their efforts if the conditions under which goods and services are placed on the market, on the technical side especially, are to be harmonized. In reality, however, checks and sanctions vary a great deal from one Member State to another, depending ultimately on national mentalities which themselves cannot be harmonized. The Committee therefore suggests that the Commission should step up its efforts to secure greater coordination and cooperation in the implementation of Community legislation, just as it has pursued efforts to ensure the official inspection of foodstuffs.

5.1.4. In accordance with the principles underlying the "new approach", a fundamental pillar of Community law (especially in fields where there is no Community harmonization) is the mutual recognition of national rules and regulations, which means in principle that authorization must be given to sell a product or service on the territory of an importing Member State if it is already legally marketed in another Member State. This "negative" integration is likely to pose a large number of consumer protection problems. For instance, in the insurance field the principle of mutual recognition, consolidated by a system of sole licences and monitoring of insurance undertakings by supervisory authorities in their country of origin, such as will be introduced once the proposals for third Directives on life assurance and other insurance have been adopted, means that insurance undertakings will be subject to divergent levels of supervision and supervisory criteria according to which supervisory authority they come under. The practical implication, particularly for consumers, is that their protection will depend on the powers of the supervisory authority in the state of origin - and at present this varies considerably from one Member State to another - and will certainly not be based on harmonized criteria [40]. There is a serious risk that because of this principle of mutual recognition of authorizations some insurance undertakings will choose to register their business in whichever Member State offers them the greatest freedom from supervision and to market their services from that Member State (control authority shopping).

5.2. The Community institutions and the contribution of the single-market policy to consumer protection

5.2.1. A number of draft legal instruments specifically designed to improve consumer protection have been produced in connection with the single market. Several have already been adopted by the Council, for instance the Directives on package travel [41] and on nutritional labelling [42].

5.2.2. On the basis of a Council resolution of 9 November 1989 identifying future consumer protection priorities, the Commission has laid down its three-year action plan for consumer protection policy in the EC (1990-1992). In addition to this programme, it is continuing its work on the integration of consumer policy into other common policies.

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[38] See also the principle of optional harmonization whereby Member States may choose between several options set out in a Directive, implying recognition that conditions for placing goods and services on the market may differ, e.g. the Directive of 25 July 1985 on liability for defective products, which may in fact give rise to eight different combinations.

[39] Cf. for example in the case of Directive 84/450/EEC on misleading advertising or Directive 85/577/EEC on liability for defective products.

[40] In fact the supervisory authority in the state of residence of the consumer can only intervene in very limit circumstances and in conjunction with the supervisory authority in the country of origin.

[41] Directive 90/314 of 13 June 1990, OJ L 158/1990.

[42] Directive 90/496 of 24 September 1990, OJ L 276/1990.

5.2.2.1. This action plan contains important consumer measures concerning safety [43], information, representation and transactions. Particular attention is paid to the need for a dialogue between producers, providers of services, intermediaries and consumers; such a dialogue is strongly supported by the Committee and is of particular importance for consumers in a period of liberalization and deregulation [44]. In this respect the effectiveness of the dialogue procedures introduced in the United Kingdom should be acknowledged. From the outset, however, it is necessary to draw attention to the practical and theoretical limits of the dialogue; although it is undoubtedly a useful tool for the practical implementation of the principles embodied in a law, it cannot dispense Community institutions from taking the requisite legislative measures.

5.2.2.2. The plan also recognizes the importance of consumer information for the completion of the internal market, especially in cross-frontier trade. It stresses the importance of coordinating the comparative testing carried out by consumer organizations. The coordination work already carried out by the European Testing Group (recently become International Testing), a coordination body set up by the consumer organizations, should be acknowledged however. For the consumer to truly benefit from cross-frontier trade, an effective information policy is needed: in particular, a wider choice of products may reduce transparency and ultimately work to the disadvantage of the consumer. The Committee would reiterate its own-initiative Opinion of 12 September 1989 [45] and urge the Commission to conduct an active campaign to inform consumers of the benefits to be derived from the completion of the internal market, as well as its drawbacks; at present such information is sporadic. For instance, the Commission's steps to create European consumer information agencies, as pilot schemes, are to be welcomed; but it is a pity that they have been established so late, and cover such a limited area. The Committee urges the Commission to equip itself to pursue a carefully-targeted, detailed campaign to inform consumers about the opportunities and risks of the single market which are of concern to them; in this way the principle of transparency will apply to all goods and services.

5.2.2.3. Two general criticisms can be made of the Commission's three-year plan. Firstly, there was no consultation with the Economic and Social Committee, the European Parliament or any other external bodies. Secondly, the underlying philosophy behind the plan is that its final objective is the achievement of a single market. The legal instruments proposed by the Commission are therefore justified by their contribution to that objective. Consumer policy is, as it were, considered a means of achieving the single market while, in reality, the reverse would be more justified. The action plan does not include consumer measures which do not promote the attainment of a single market. Concurrently, there is no reference to the need to integrate consumer policy in other Community policies. For instance, the action plan only covers cross-frontier consumer transactions, though consumer interests require proper protection for all consumer transactions.

5.3. The benefits and risks which the single market entails for consumers

5.3.1. There are many inherent benefits for consumers in the removal of obstacles to the free movement of persons, goods and capital and the creation of a single market: in general terms they should benefit from the increased competition brought about by the wider range of products on the market originating from all corners of the Community, with the lower prices which such competition implies.

5.3.2. At the same time, in order to protect the potential benefits for consumers of a Europe without frontiers, it is important for the Community institutions to pay particular attention to the risk of abuse which may come with the opening-up of the markets. There is no point in removing the regulations which act as obstacles if they are replaced by the commercial policies pursued by businesses: concentrations and agreements could, in the long term, eliminate small and medium-sized businesses and local production, thus reducing consumer choice. Nor is there any point in the Member States proclaiming European Union if their public authorities continue to apply rules inspired by national protectionism.

5.3.3. Moreover, achievement of the single market entails actual or potential risks for consumer interests for the following reasons:

- national monitoring of product conformity and quality will be more difficult because of the elimination of border controls;
- the harmonization of indirect taxes will be of benefit to consumers in some Member States because of the reduction of VAT on certain goods and services, but it will push up the cost of consumer goods for others;
- the concentration process which the single market is liable to generate might reduce consumers' choice, eg. through the disappearance of regional and local products;
- the external policy currently pursued by the Community institutions is liable to hamper access to the Community market of products from non-member countries, and thus reduce consumer choice while maintaining prices at an artificially high level (cf. evolution of anti-dumping policy or of the CAP).

The Committee thinks that the Community institutions can take the requisite measures in due course to eliminate these risks.

5.3.4. The internal market can only operate effectively if the consumer has confidence in the safety of the products on offer. To this end it is important to pursue a consistent product safety policy, one aspect of which is liability for defective

[43] Cf. in particular the attention which the three-year programme accords to the problems of the liability of providers of services.

[44] Cf. the proposals contained in the ESC's own-initiative Opinion of 24 May 1984 on the producer-consumer dialogue, OJ C 206 of 6 August 1984.

[45] Cf. Opinion on consumer information and advice (Rapporteur Hilkens), OJ C 298 of 27.11.89.

products. The Committee therefore asks the Commission to start work on extending the scope of the product liability Directive to include agricultural food products and development risks. The principle of the free movement of products further requires the setting-up of a Community fund to compensate the victims of defective products.

5.4. Shortcomings of the single-market policy with respect to promotion of consumers' interests.

5.4.1. In a number of cases, official statements do not reflect consumer realities. For instance, the idea of a frontier-free European area is difficult to reconcile with duty-free allowances for travellers, national quotas for certain products such as cars, obstacles to the provision of after-sales services and guarantees for cross-frontier purchases, or the problems encountered by consumers in cross-frontier banking transactions.

5.4.2. More fundamentally, the problems of access to the courts which the creation of a European area will pose are far from having been resolved. If there is a dispute, the single market will be replaced by twelve - or even more - legal systems, all jealous of their independence and sovereignty. European political leaders will have to address the problem of the settlement of cross-frontier disputes if they are not to produce an imperfect, inconsistent economic system. The Committee urges the Commission to carry out as a matter of urgency the work needed to identify possible solutions to the problem of settling cross-frontier disputes. As a first step, the Committee urges the Commission and the Member States to press for action to make the Rome and Brussels Conventions, which at least provide the beginnings of an appropriate solution to this problem, applicable throughout the Community. Similarly, the powers of representation of consumer organizations in both national transfrontier disputes have to be recognized if consumers are to have effective legal protection.

5.4.3. More particularly, the Committee regrets the failure to turn to good account the pilot schemes launched by the Commission with a view to fostering the introduction of simplified settlement and arbitration procedures for consumer disputes. The results of all these schemes have been promising. The Committee therefore urges the Commission to make full use of the results of the pilot schemes carried out under its supervision, to follow them up and, if appropriate, to take steps to further their general introduction.

6. Conclusions

6.1. The Committee, having regard to the completion of the internal market and the intergovernmental conference on political union, makes the following recommendations:

6.1.1. The Committee calls on the governments of the Member States, meeting in the context of the intergovernmental conference on political union:

- to incorporate in the Treaty on Political Union a provision devoted specifically to the Community's consumer policy and to list basic consumer rights therein;
- to stipulate that the Committee, bearing in mind its composition and the role which it plays in the Community as consumer representative, must be consulted on Commission proposals concerning the protection and promotion of consumer interests.

6.1.2. The ESC calls on the Council of Ministers:

- to hold regular meetings devoted specifically to dossiers concerning the protection and promotion of consumer interests;
- to adopt a Community consumer budget which takes effective account of the budgetary requirements of a sound consumer protection policy at EC level.

6.1.3. The Committee calls on the Commission, the Parliament and the Council:

- to respectively initiate, prepare and adopt legislative instruments which clearly define rights and obligations so as to facilitate the uniform interpretation of such instruments and promote the direct applicability of Community legislation.

6.1.4. The Committee calls on the European Parliament:

- to take into consideration, in its work on the Community budget, the budgetary requirements of the Consumer Policy Service and the other resources made available to the Commission in order to support an effective consumer information and protection policy.

6.1.5. The ESC calls on the Commission:

- to start work immediately on identifying what needs to be done to protect consumers in their dealings with public services and what should be done by the Community. In particular, a thorough study should be made of the feasibility of systematic representation of users on the monitoring and supervisory boards of public enterprises;
- to provide in its budget proposals the funds necessary for the Consumer Policy Service to operate effectively, for consumers to participate in the standards process, and for the support of consumer organizations in the southern Member States and Ireland;
- to consult the Consumers' Consultative Council (CCC) systematically, in the early stages of the preparation of proposals, on dossiers of direct or indirect concern to consumers;
- to forward the CCC's opinion to the European Parliament and the Economic and Social Committee for information;
- to provide the CCC with the requisite funds to carry out its duties efficiently and promptly;
- to organize joint meetings between the CCC and the Committee on Commerce and Distribution (CCD) as well as other industry and service committees with a view to improving the integration of policies;
- to submit the results of its work on the integration of consumer policy in other common policies;

— to attach to all its proposals a statement assessing the impact on consumers;

— to continue its efforts to secure greater uniformity and coordination in the implementation of Community legislation;

— to step up its efforts to provide consumers with more effective protection in cross-border disputes and to work towards the signing and ratification of the Brussels and Rome Conventions by those Member States which have not yet done so;

— to study the feasibility of introducing, at Community level, power of representation for consumer organizations in consumer disputes;

— to make full use of the results of the pilot schemes on access to the courts which it has funded;

— to work towards the protection of consumers in respect of guarantees and after-sales service in the wake of the opening-up of Community frontiers and the internationalization of consumer contracts;

— to start work on extending the scope of the Directive on liability for defective products and to study the feasibility of setting-up a Community fund to compensate the victims of defective products.

6.1.6. The Committee calls on the Member States:

— as part of their national policy for protecting and promoting consumer interests, to apply the rules of consumer/user protection to the products and services of public and private sectors alike;

— to appoint, wherever possible, one or more persons professionally engaged in the protection and promotion of consumer interests to the Economic and Social Committee when the Committee is next renewed;

— to implement Community laws and initiatives within the prescribed deadline and in accordance with the principles and provisions contained therein, and in particular with the 1986 Resolution on consumer education in primary and secondary schools [46].

[46] OJ No. C 184 of 23 July 1986.

OPINION
of the
Economic and Social Committee

The Consumer and the Internal Market

CES 1320/92

O.J. C 19 25.1.93 - p. 22

On 26 November 1992 the Economic and Social Committee decided, in accordance with Article 24 of its Rules of Procedure, to draw up an Information Report on

The Consumer and the Internal Market

The Committee instructed its Section for Protection of the Environment, Public Health and Consumer Affairs to prepare its work on the matter.

At the request of the abovementioned Section the Committee decided, at its Plenary Session on 1 and 2 July 1992, to issue the Information Report in the form of an Opinion, in accordance with the third paragraph of Article 20 of the Rules of Procedure, with a view to complementing its Own-initiative Opinion on consumer protection and completion of the internal market.

The Section for Protection of the Environment, Public Health and Consumer Affairs adopted its Opinion on 4 November 1992. The Rapporteur was Mr ATAÍDE FERREIRA and the Co-Rapporteurs were Mr de KNEGT and Mr PROUMENS.

At its 301st Plenary Session (meeting of 24 November 1992) the Economic and Social Committee adopted the following Opinion by a majority vote, with 3 abstentions:

Introductory remarks

On 26 September 1991, the Committee adopted an Own-initiative Opinion on consumer protection and the completion of the internal market [1]. In view of the constraints imposed by the procedure for adopting its Opinions, the Committee opted to give priority in its Opinion to the political aspects of promoting consumer interests in the run-up to the single market. The content of the common policies which have a bearing on consumers are not looked at in detail.

In its Opinion of 26 September 1991 the Committee urged the Member States to give explicit recognition, when adopting the Treaty on political union, to the right of the EC institutions to take action in the field of consumer policy. The Committee also emphasized the need for systematic consultation of the Economic and Social Committee (ESC) on consumer policy in view of the fact that the ESC by virtue of its membership and the way in which it operates, constitutes an ideal venue for dialogue between representatives of industry and consumers.

The Committee welcomes the reflection in the Maastricht Treaty, signed on 17 February 1992, of the concerns expressed in its Own-initiative Opinion. Article 3 of the Treaty lists a number of measures to be carried out by the Community with a view to achieving the aims which it has set itself and indent (s) of this Article specifies "a contribution to the strengthening of consumer protection". This contribution is defined in the new Article 129a of the EEC Treaty which authorizes the Community to take specific action in the field of consumer policy, thereby placing EC consumer policy on the same footing as the other common policies, in particular the single-market policy. Article 129a also stipulates that when it adopts these specific measures the Council is to follow the joint decision-making procedure involving the European Parliament and to consult the Economic and Social Committee. Article 129a reads as follows:

1 *The Community shall contribute to the attainment of a high level of consumer protection through:*

   a) *measures adopted pursuant to Article 100a in the context of the completion of the internal market;*

   b) *specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.*

2 *The Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, shall adopt the specific action referred to in paragraph 1b).*

3 *Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.*

The Committee points out that the Community must give priority, when carrying out the measures provided for under Article 129a, to establishing the conditions which will enable consumers most effectively to fulfil their role as the arbiter of the market. A market economy can only function effectively if such conditions exist. In this context consumer policy is to be regarded as an accompaniment to economic policy since it provides mechanisms to correct the possible inadequacies, imbalances and shortcomings of the market. These mechanisms are as follows:

- the provision of consumer information in order to enable the market to operate effectively;
- a competition policy which takes account of the interests of consumers, particularly in the context of anti-dumping policy and the establishment of advertising standards, and is designed to improve the operation of the market;
- from a general point of view, the incorporation of consumer policy into all the other common policies which have a bearing - direct or indirect - on the interests of consumers, in particular: agricultural policy and the policies with regard to financial services, tourism, public services, telecommunications, pharmaceutical products and food products;
- legal protection for the consumer, and, in particular, access to the courts in order to enable the consumer to ensure that his rights are respected;

[1] OJ No. C 339 of 31 December 1991, page 16.

— the establishment of the necessary conditions for a dialogue; this is only the logical consequence of the recognition of the consumer as a market partner. If these conditions are to be established, however, certain efficiency criteria have to be met. These criteria were defined by the Committee in its Own-initiative Opinion on the matter issued in 1984 [2].

Aims of the present Additional Opinion

In its Own-initiative Opinion the Committee looked at a number of issues **linked to** the promotion of consumers' interests, such as: representation of consumers, the need to improve the legal basis provided by the Treaty and a whole series of issues directly relating to the completion of the internal market. Following on from this Own-initiative Opinion - which dealt with the broad issues involved in relations between the internal market and consumer policy - and given the new situation created by the signature of the Treaty of Maastricht, the Committee intends to consider more specifically the question of the content of an EC consumer policy in the present Additional Opinion.

The preliminary work on the Own-initiative Opinion highlighted the lack of comprehensive studies on the promotion of consumer interests by the EC. This gap is mainly attributable to the rigid nature of the EC policies which have a bearing on consumer interests and protection. Such a comprehensive study would be very useful when work commences on defining the future guidelines for EC consumer policy, particularly in view of the recent developments linked to the signing of the Treaty on political union. For this reason the Committee has commissioned an in-depth study on consumers and the internal market [3].

On a more general level, the recommendations which the Committee made in its own-initiative Opinion to the other EC institutions and the Member States have lost none of their pertinence and they should be read in conjunction with the observations set out in the present Additional Opinion.

General comments

One particular point needs to be made at the outset: the EC institutions have introduced a whole battery of measures to protect consumers' interests and there is a large array of legislation in this field. What is noticeable, however, is the considerable imbalance between the large number of measures introduced to protect the health and safety of consumers, the smaller number of measures designed to protect their financial interests and the almost complete absence of measures to provide them with greater legal protection.

It has become apparent that in order to assess the role played by EC law in promoting the interests of consumers it is not enough simply to make a formal study of EC laws. In order to produce this assessment it is of vital importance to make a survey of the extent to which EC law has been transposed into national law and, above all, into national practice. A single legal concept, such as "default" is interpreted in different ways by national courts. An approach geared more to what happens in practice - which is the only proper way of judging the impact of laws on the target groups - has not yet been adopted by the EC institutions, at least not systematically. As a result the information available to economic operators is seriously flawed and false assessments are made of the level of legal harmonization. The Committee notes that no accurate, up-to-date, realistic survey has been carried out into the extent to which EC provisions have been transposed into national law and brought into effect; the Committee therefore deplores the shortcomings in the information available to those working in politics and business. The failure to adopt a sufficiently pragmatic approach is illustrated by the Commission's 9th annual report to the European Parliament on Commission monitoring of the application of Community law - 1991 [4].

A further point which should be noted is that in several sectors involving the economic or legal interests of consumers (financial services, legal remedies) the EC institutions have quite frequently opted for non-mandatory instruments, such as resolutions or recommendations addressed either to the Member States or to those working in the sector concerned. Experience has shown how extremely difficult it is to implement the principles set out in these instruments. Codes of conduct or good practice and voluntary agreements, advocated and drawn up by those employed in the sectors concerned, should be introduced whenever progress is being sought in fields where laws or regulations are not readily applicable, even though such codes or agreements are not held to be binding by the courts which sometimes make reference to them. Consultation of consumer associations before such codes or agreements are drawn up is desirable and even necessary.

From a more general point of view, and given the process of liberalization which is under way, regulation is increasingly the responsibility of the economic agents concerned. In its own-initiative Opinion the Committee drew attention to the need for a dialogue between industry and consumers [5]. However, attempts to establish institutionalized forms of dialogue between industry and consumers have all too frequently ended in failure. There is a need to carry out an in-depth study into the reasons for the failure of the current forms of dialogue, so as to make it possible to establish the conditions required for realistic and effective dialogue in respect of all levels of regulatory activity.

The Committee welcomes the fact that, thanks to the perseverance of the European Parliament, the 1992 appropriation for consumer protection policy is twice the amount initially asked for by the Commission. The Committee hopes that the Commission will submit a detailed report on the allocation of funds

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[2] OJ No. C206 of 6 August 1984.

[3] Study on Consumer Protection and the internal market - Evaluation and Prospects - publication planned for the beginning of 1993. The Study will be available in French, English, German and Spanish.

[4] OJ No. C 250 of 28 September 1992.

[5] OJ No. C 339 of 31 December 1991.

to alert consumers to their rights. The study of EC consumer law revealed that regulatory measures are rarely accompanied by auxiliary instruments for informing consumers of the changes made to their rights and obligations. There is no point in formulating protective legislation if the beneficiaries of such legislation are unable to take advantage of it because of a failure to inform them [6]. The public authorities should provide consumer associations with the means to fulfil the role of providing information, in the absence of appropriate legal instruments for this purpose.

The facilities provided by Article 129a of the new Treaty must be exploited to the full. In this context the principle of subsidiarity set out in the new Article 3b of the Treaty, although providing a point of reference guaranteeing that the Community will act more efficiently and be closer in touch with the general public, might be abused and might jeopardize any EC initiative whose specific aim is to promote consumers' interests. The Committee recognizes that correct interpretation of the subsidiarity principle will improve the functioning of the Community; however, unilateral interpretation of this principle might hold up any Community initiative not dictated by the requirements of the Single Market. Although the general principles of the Treaty considerably restrict Member States' freedom of action, such a unilateral application would make it impossible to make any progress towards an EC consumer policy. As the Committee pointed out in its Own-initiative Opinion, this situation is likely to lead to a "regulatory gap". The Committee welcomes the fact that the European Parliament has started to look into this issue, defining both the content and limits of the subsidiarity principle in detail.

Findings of the survey of EC measures having an impact on consumer protection

The study of the legislation in the various fields which has a bearing on consumer policy demonstrated that the EC has introduced a number of measures which have helped improve the position of the consumer in his dealings with the world of business. These measures include the Directives on product liability, misleading advertising, toy safety and package tours and the proposal for a Directive on the protection of the purchaser in contracts for timeshare properties. The study did, however, also highlight the inadequate nature of a number of the approaches being pursued by the EC in order effectively to promote the interests of consumers. This shortcoming may be explained, inter alia, by the fact that consumer protection is often neither the sole nor the main objective of the measures being taken. This problem illustrates the difficulty in reconciling the completion of the internal market, on the one hand, and consumer protection, on the other hand. This point was made in the own-initiative Opinion. The main shortcomings are identified in the paragraphs set out below.

In the field of product regulation, the new approach to technical harmonization has led to the establishment, with a view to protecting the safety of consumers, of an EC-mark "passport" system. The certification process does, however, need to be subject to safety and quality inspections carried out by official or approved bodies.

Furthermore, the definitions of essential requirements set out in the "new approach" Directives are not always precise. This may lead to the establishment of grey areas - a phenomenon which could be dangerous from the point of view of consumer safety. It is acknowledged that the setting of standards plays an extremely important role in the process of establishing safety requirements; in view of this, qualified consumer representatives should be much more involved in the standardization process. In its own-initiative Opinion the Committee called for consumers to be given an enhanced level of participation in the standards process by allowing their representatives to participate effectively in the process of defining precise safety standards for consumer goods.

Despite the large number of regulatory provisions on food, no detailed common provisions have yet been introduced covering the official inspection of food. It is only by introducing common rules in respect of the official inspection of food that real guarantees can be provided to consumers as regards the observation of the Community standards which replace national standards. This observation confirms the justification of the Committee's request that common rules be introduced with regard to the qualifications of inspection personnel, quality standards to be met by inspection laboratories and the exchange of experience between national authorities [7].

The Committee notes the lack of uniformity in the approach pursued by the various Commission departments and it calls upon the Commission to streamline the work of its departments and to take account of the need for greater involvement on the part of its consumer policy department. Additives and contaminants (pesticides, extraction solvents) are covered by a variety of regulations and draft regulations, which highlights the conflicting claims of consumer protection policy, the internal market policy and the CAP. The same problem arises with regard to certain information given to consumers (protection of proprietary names [8], nutritional claims [9], etc.).

In the field of medicinal products, the Committee welcomes the establishment of a European Agency for the assessment of medicinal products; this agency must play an increasingly important role. Furthermore, the Committee draws attention to the economic policy being pursued in respect of medicinal products; this policy fails to take adequate account of the interests of consumers, particularly with regard to parallel imports and generic substitutes. The Committee calls upon the Commission to submit proposals for promoting parallel imports and generic drugs, in accordance with the decisions of the Court of Justice of the European Communities [10]. Such

[6] See also the survey in the Euro-barometer dated September 1991 which indicated the degree of consumer distrust of the internal market (52%).

[7] Opinion on the Proposal for a Directive on the official inspection of food - OJ No. C 347 of 22 December 1987.

[8] Regulation No. 2081/92 on the protection of geographical indications and designations or origin for agricultural products and foodstuffs; OJ No. L208 of 28 July 1992.

[9] Proposal for a Directive amending Directive 79/112/EEC - OJ No. C 122 of 14 May 1992.

[10] See Case no. 215/87, Schumacher, Judgement of 7 March 1989, and Case no. 347/89, Eurim-Pharma Judgement of 16 April 1991.

measures are necessary following the introduction in the EC of an additional protection certificate which enables pharmaceutical companies to extend the duration of the patent and, consequently, the monopoly granted to them in respect of a specific pharmaceutical product. This additional protection enables European companies to finance their research out of their own funds. There is therefore a need for corrective mechanisms, including measures involving a system of reimbursement, in order to offset the economic consequences of such monopolies by providing greater scope for competition after the expiry of patents (measure to promote generic drugs, giving chemists the right to issue substitute products, etc.).

On the subject of consumers' trans-frontier purchases of motor vehicles, the Committee believes that this freedom is still all too frequently impeded, either by the Member States or by private enterprises, thereby preventing consumers from taking advantage of the considerable price differentials existing in this sector. In the Committee's view the EC Institutions do not systematically take action against infringements of the Treaty by the Member States or by private enterprises.

In the field of road safety, the Committee notes that there is considerable scope for improving the safety of road-users; despite the achievement of some progress, the rate of progress has been very slow for reasons relating, inter alia, to the technical harmonization of vehicles. The Council is also very slow in adopting Commission proposals - already endorsed by the ESC - to improve the behaviour of road users (level of alcohol in the blood, the wearing of helmets by motor cyclists, the wearing of safety belts, etc.) owing to the lack of a specific legal basis in respect of road safety. The debates on the technical harmonization of vehicles have proved to be extremely laborious. The authorities in the Member States, working together with bodies set up to protect road-users, should launch campaigns to encourage road-users to observe measures such as the wearing of safety belts, the wearing of helmets by motor cyclists and abstention from alcohol when driving, prior to the entry into force of the requisite laws.

As regards the EC Regulations governing product liability and liability in respect of services, the Committee draws attention to the fact that the revision clause in Directive 85/374/EEC expires in 1995. There is a need to carry out a detailed assessment of the impact of the Directive on compensation awarded to victims, particularly in view of the options open to Member States under the Directive. As regards the draft Directive on the liability of persons providing services, the Committee points out that, whilst it is in favour of affording better protection to the victims of defective services, it rejects the approach adopted by the Commission [11].

The Commission has let it be known that the building sector and the medical sector are to be excluded from the field of application of the Directive. In the Committee's view these exclusions are acceptable only on condition that the Commission at the same time prepares specific Directives in respect of these two sectors in order to ensure that victims of defective services in these sectors are not left without protection. In this context the General Directive should stipulate that, pending the adoption of specific Directives, the provisions of the General Directive would be applicable. The principles underlying the provision of compensation to victims in the sectors excluded from the General Directive must also not differ significantly from the compensation principles set out in the General Directive. The EC must introduce an overall policy on safety and, as a corollary, an overall policy on liability, covering both products and services.

Turning to the protection of the economic interests of consumers, a number of inadequate approaches should be highlighted:

In the field of advertising, only misleading advertising - and not unfair advertising [12] (racial and sexual discrimination, etc.) - is subject to regulation. The rules have proved to be ineffective as a means of combatting misleading cross-frontier advertising, one of the reasons for this being that consumer associations do not have a clearly recognized right to take action under the existing rules, let alone in Member States other than that in which they are based. It is also not possible under the existing rules to award compensation to consumers who have entered into contracts based on misleading advertising. A recent proposal to authorize comparative advertising has been presented as an instrument for informing the consumer. Even though some consumer information may indeed be improved by this type of advertising, the fact does, however, remain that the main aim of all advertising is to promote, either directly or indirectly, sales of products or services.

In the field of televised advertising, the Committee notes that responsibility for supervising advertising rests with the state of origin of the advertising, whereas the consumer expects to be protected by the state in which he is exposed to the advertising.

On a more fundamental issue, the Committee notes that the Community has so far failed to adopt an overall approach to regulating commercial practices. The adoption of a measure specifically in respect of certain sales methods involves the risks which are attendant upon a vertical approach, e.g. limited scope. EC rules laying down general provisions applicable to all commercial practices would constitute a better means to regulating these practices.

Turning to the subject of consumer contracts, the Committee notes the Council's common position and points out that, although the common position does take account of a number of the points put forward by the Committee, it does have a very much narrower scope than the Proposal for a Directive referred to the Committee. It is a matter of regret that the EC consultation process applies to texts which at a later stage are radically amended when they are discussed at intergovernmental level, and as a consequence, bear little resemblance

[11] Opinion of 3 July 1991, OJ No. C 269 of 14 October 1991

[12] Unfair practices in the field of comparative advertising are, to a certain extent, subject to regulation - see the Proposal for a Directive in OJ No. C 180 of 11 July 1991.

to the basic texts originally drawn up by the institution which initiated the draft document. The Committee also recognizes the need to regulate various distance selling practices (teleshopping, video-text, mail-order sales, telephone selling and the use of automatic calling machines) and welcomes the fact that the Commission has just referred to it an Opinion on the Proposal for a Directive on contracts negotiated at a distance (distance selling) [13]An EC proposal in this field is necessary given the potentially international nature of distance communications techniques.

In this field, too, an overall approach to contract law would be a more effective way of meeting consumer protection requirements in the Single Market (rules in respect of the form of the contract, the law in respect of proof, implementation of the contracts, time limitation, etc.). Particular attention should be paid to the establishment of an EC system - which would be effective throughout the Community - to provide consumers with guarantees in respect of hidden defects. Furthermore, given the fact that there are several national and EC instruments under which guarantee funds are established to assist consumers, there is a need to ensure that the rules governing the operation and management of these funds do, in practice, meet the needs of the consumers for whom the funds have been set up.

The EC has introduced a large number of measures governing financial services. The EC measures specifically designed to protect the consumer are, however, not mandatory and it is apparent that they are not being respected. Examples which may be mentioned in this context are the Recommendation of 17 November 1988 on relations between bodies issuing payment cards and the holders of such cards and the Recommendation of 14 February 1990 on cross-frontier financial transfers. In this context the Committee has noted the publication by the Commission of a charter for users of cross-frontier payment systems. The Committee deplores the fact that, after many years considering the issue, the Commission has been unable to make substantial progress with regard to the definition of consumers rights in this field and has, by opting for a charter, availed itself of an instrument which does not have the slightest legal value in the context of the EEC Treaty. Such a step is tantamount to merely calling upon the banking sector to endeavour to comply with the requirements of an internal market from which it is the first to benefit in other respects. In the Committee's view it is essential, if the EC institutions are to retain their credibility, for the Community to carry out a systematic review of the non-mandatory instruments which have been introduced and, where necessary, to replace them by mandatory instruments. Furthermore, with a view to the satisfactory completion of the internal market, it is essential that cross-frontier payment systems do not penalize users. It is particularly necessary that the financial institutions treat payments in ecus on the same basis as payments in national currencies.

Although the Community has paid some attention to consumer credit, it does not intend to intervene on mortgages. And yet important consumer protection issues are involved here, particularly as mortgage repayments represent a major part of household budgets. It is therefore essential to have common consumer protection rules which enable consumers to take out mortgages with foreign lenders safely. More fundamentally, whilst excessive levels of consumer indebtedness have been identified and made the subject of legislation in some Member States, there have not as yet been any Community legislative initiatives in this area, although there is a Community dimension to the problem.

What needs to be done therefore, in the context of a social economy, is to introduce a system for protecting the least well-off consumers. In the same general context the fact that a number of people are not covered by the banking system - which is a further example of social marginalization - makes it necessary to carry out a radical appraisal of the concept of the "basic service" which financial institutions should be obliged to provide to the public as a whole. There is also an EC dimension to this issue in view of the fact that the diversity of national laws in this field may lead to distortions in competition which are incompatible with the Single Market.

Turning to the question of insurance, the third generation of Directives is designed to introduce freedom of movement with regard to life and non-life insurance services. These Directives will not, however, produce a system sufficiently harmonized to enable those insurance companies which avail themselves of the freedom to provide services, to enter into contracts with consumers in other countries and to enable the consumer to take out such contracts with full confidence. The Directives will lead rather to the establishment of a rigid and complex system for determining the law applicable to insurance contracts and this system will not provide any legal security for the parties involved. Recent surveys have shown that companies are hesitating to enter into contracts under the freedom to provide services because of their lack of knowledge of the provisions of the laws which would apply and because of the attendant risks. For this reason the Committee calls upon the Commission to put forward proposals with a view to introducing harmonized, minimal rules applicable to insurance contracts (rules governing the conclusion of contracts, certain risks covered, procedures with regard to claims notices, the production of proof, reasons for loss of entitlement to compensation, etc.) in order to enable insurance companies and their clients to enter into cross-frontier contracts drawn up on the basis of comparable conditions.

Competition policy is characterized by the limited ability of consumer representatives to intervene, given the financial constraints on consumer organizations and the large number of files lodged (or not as the case may be) with the Commission. The problem is compounded by the fact that the Commission (acting in accordance with competition rules) informs the public of certain cases only very late, which makes it difficult to assemble a complete dossier within the required deadline.

EC external trade policy, and in particular the CAP and the anti-dumping policy, fail to take adequate account of the in-

[13] OJ No. C 156 of 23 June 1992. ESC Opinion: CES 1339/92 (Rapporteur: Mr BONVICINI).

terests of the consumer, despite the fact that it is the consumer who has to pay the increased prices and taxation attendant upon these policies. The Committee deplores the inconsistency in the actions of the EC institutions which, on the one hand, advocate the liberalization of trade within the EC, whilst at the same time protecting EC industry against foreign competition. Such an attitude fails to take adequate account of the growing internationalization of world trade and also shows a lack of confidence in competition as a tool for promoting the competitiveness of businesses. EC external policy must, moreover, be implemented in a spirit in keeping with GATT agreements. It has never been proven that protectionism is a better means of developing and promoting EC industry than the stimulus provided by foreign competition. The Committee urges the Commission to give more specific recognition to the interests of the consumer when assessing the interests of the Community in order to ensure that its decisions are fairer to the tax-payer and the consumer.

Furthermore, the CAP has hitherto encouraged intensive farming methods which are much less respectful of the environment than are more traditional methods. Protection of the environment is, however, one of the aims set out in Article 2 of the EEC Treaty as amended at Maastricht. In view of the fact that the initial goals of the CAP have been achieved (the EC is self-sufficient in food), the policy must now take account of changing expectations on the part of the consumer and reflect the demand for higher quality products to protect the health of the consumer and prevent certain illnesses.

Environmental policy, for its part, takes account in many respects of the expectations of consumers. A number of decisions in the environmental field, such as the tax on CO_2 emissions and measures in respect of packaging waste, may have an important effect on consumers. The Committee calls upon the Commission and the other EC institutions to involve consumers' representatives - and in particular the Commission's own Consumer Policy Department - in their work in the field of environmental protection in order to enable the interests of the consumer to be identified and taken into account when measures and instruments are being formulated.

The Committee endorsed [14] the Community programme of policy and action in relation to the environment and sustainable development, in which an attempt is made to link environmental and consumer policies - a matter to which greater thought must be given.

The Community energy policy currently being drawn up must take account of the specific features of domestic consumer demand, and in particular of its captive nature (no mobility, no elasticity of demand). Price transparency measures must be extended to domestic uses and pricing policy must not penalise domestic consumers who lack the economic muscle of industrial users. Particular attention must be paid to the supply needs of disadvantaged consumers, particularly families with small children and the elderly. Moreover, the energy conservation initiatives taken by the Community must be reinforced and go further than printing consumer information on labels. They should take the form of tax or tariff incentives.

Specific account should also be taken of the needs of domestic consumers in the context of Community telecommunications policy. The Committee notes that, whilst the Community is heading towards greater competition in this sector, the equipment and services which interest the domestic consumer most may continue to be provided by monopolies. The concept of public service urgently needs to be delineated, particularly with regard to telephone services. Community quality criteria for telephone and postal services are essential to enable domestic consumers to benefit from technological innovation [15].

Questions arising in connection with the protection of the legal rights of consumers have been commented on briefly in the Own-initiative Opinion [16]. The Community's interventions with regard to legal remedies have been timid out of concern for Member States' sovereignty in organizing their judicial systems. It is however possible, without compromising this sovereignty, to ensure that the legal interests of consumers are better protected. The Committee feels that there is a need for simplified, rapid and inexpensive procedures, applicable either in or out of court, to deal with "small claims" - the category into which the majority of consumer disputes fall. As far as cross-border disputes are concerned, there is a great need for specific training and information for persons providing legal assistance to consumers involved in legal disputes; disputes involving manufacturers, suppliers, etc. based in other Member States are occurring with increasing frequency. The Committee would therefore draw attention to the fact that, in its Opinion on the Citizens' Europe [17], it underlined the need to "provide the citizens of the Community, in their capacity as consumers, with improved access to courts throughout the Community".

Final comments

The Own-initiative Opinion, complemented by this Additional Opinion, presents the Community Institutions with the Committee's views on the shape which the social partners feel that the Community's future consumer policy should take. The Committee regrets the gaps in the Community-institution information on the process of transposing Community law into national law.

The Commission's legislative programme for 1992 does not take adequate account of the issues highlighted by the Committee in its Own-initiative Opinion. The programme fails to address the distrust and fear voiced by consumers with regard to the completion of the internal market. The programme is geared solely to the completion of the single market, rather than demonstrating a balanced approach with a view to making the establishment of the single market more acceptable to consumers and more credible in their eyes.

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[14] Opinion of 1 July 1992 (Rapporteur: Mr BOISSEREE) - OJ No. C 287 of 4 November 1992.

[15] This point is illustrated by the fact that whilst local calls cost less than ECU 0.10 in the Netherlands, Italy and Spain, they can cost up to ECU 0.82 in the UK. Likewise an international call from Berlin to Dublin may cost as little as ECU 2.12 whereas the same call carried out in the opposite direction would cost ECU 3.11.

[16] OJ No. C 339 of 31 December 1991.

[17] Committee Opinion of 23 September 1992 (CES 1037/92), point 1.2.6.

In the light of the achievements and shortcomings identified by the Committee, 1992 will be the time for the Community Institutions not only to finalize the programme for completion of the internal market but also to identify the first malfunctions of the measures adopted. They will also have to draw up the policies arising from European Union leading to greater integration in the economic, social and political fields. All these policies require that account be taken from a Community perspective, of the issues raised by the protection of consumer interests, which goes beyond the free movement of goods and comes under the Social Europe and the Citizens' Europe. The Committee notes that consumer policy has not yet been incorporated to an adequate degree in the other EC policies, despite the plans to that effect which have been announced by the Commission. The Committee underlines the need to find appropriate solutions whereby the interests of consumers are more effectively taken into account in decisions which concern them.

Consumers enjoy rights as citizens of the Community; better consideration will therefore have to be given to problems relating to access to justice if consumers are to have the means to ensure that these rights are respected. In this context the Committee welcomes the appointment of a mediator at the European Parliament following ratification of the Maastricht Treaty; the Committee awaits with interest the results of the European Parliament's deliberations.

The Committee urges the Commission to consider introducing more far-reaching measures, based on the proposals put forward by the Committee in its earlier Own-initiative Opinion and the present Additional Opinion, once the new Treaty on European Union has been ratified. The aim of these new measures should be to give a new impetus to EC consumer policy in 1993. In this context the Council Resolution of 13 July 1992 [18] on the future priorities for the development of consumer protection policy is an interesting step on the road towards an EC system providing a high level of consumer protection in the single market. The Committee regrets the fact that the Council failed to make any reference to its Own-initiative Opinion.

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[18] OJ No. C 186 of 23 July 1992.

REPORT
of the
Section for Protection of the Environment,
Public Health and Consumer Affairs

The Consumer and the Internal Market

Rapporteur: Mr ATAÍDE FERREIRA
Co-Rapporteurs: Mr de KNEGT and Mr PROUMENS

CES 894/92

On 29 January 1991 the Economic and Social Committee decided, in pursuance of the fourth paragraph of Article 20 of its Rules of Procedure, to draw up an Opinion on

The completion of the internal market and consumer protection.

The Section for Protection of the Environment, Public Health and Consumer Affairs, which was instructed to prepare the Committee's work on the matter, adopted its Opinion on 6 September 1991. The Rapporteur was Mr ATAÍDE FERREIRA (Co-Rapporteur: Mr PROUMENS).

The Committee adopted its Opinion [1], by 44 votes to 2, with 10 abstentions, at its 289th Plenary Session (meeting of 26 September 1991).

On 30 June 1992 the Committee's Bureau authorized the Section for Protection of the Environment, Public Health and Consumer Affairs to draw up an Additional Opinion on the same subject. The Rapporteur for the Additional Opinion is Mr ATAÍDE FERREIRA and the Co-Rapporteurs are Mr DE KNEGT and Mr PROUMENS. The Drafting Group was helped in its work on drawing up the Additional Opinion by two experts: Mrs Monique GOYENS (Rapporteur's expert) and Mrs Alma WILLIAMS (expert for the Co-Rapporteur, Mr PROUMENS).

The aim of the abovementioned Own-initiative Opinion was to assess the extent to which the completion of the internal market could make a real contribution towards enhancing the promotion of consumers' interests.

The preparatory work leading to the adoption of the Own-initiative Opinion highlighted the lack of overall studies [2] on the subject of the promotion of the interests of consumers by the Community in its internal market policy.

The Committee's secretariat was therefore asked to draw up an up-to-date study [3] which would both provide a source of information and suggest a number of lines of approach.

The Committee's Studies Division instructed three specialists in EC consumer law to draw up the study. The three experts were Eric BALATE, a lawyer based in Mons, Belgium and Pierre DEJEMEPPE and Monique GOYENS, who are both specialists in consumer law; these three specialists drew up the study with the help of the Rapporteur, Mr ATAÍDE FERREIRA. The study assesses the various EC measures having a direct bearing on consumers' interests.

The following constraints did, however, have a bearing on the scope of the study:

- *chronological constraints*: the study applies to the situation as of 30 June 1992. Unpublished draft measures are not covered by the study except in the case of high priority measures;
- *subject-matter constraints*: a number of subjects are given special attention because of their importance. Some subjects which require particular expertise have, however, not been considered in depth;
- *organizational constraints*: it was not possible to devote sufficient space to a number of controversial issues and a number of detailed aspects.

The authors of the study take sole responsibility for their work. The views and conclusions set out in the study do not necessarily reflect the opinions of the Economic and Social Committee and are in no way binding upon the Committee.

The study was submitted by the Rapporteur, Mr ATAÍDE FERREIRA to the conference on consumer protection policy and the development of the single market held in Madrid on 11-13 March 1992. This conference was organized by the Spanish Ministry of Health and Consumer Affairs, in collaboration with the Spanish Consumers' Association (ASGECO) and under the auspices of Mr VAN MIERT, Member of the EC Commission. The conference, which was attended by a delegation from the Committee, was part of World Consumers' Day, 15 March 1992.

The Section drew up its Additional Opinion, which it adopted on 4 November 1992, in the light of the abovementioned study and the views expressed at the Madrid Conference. The aim of the Additional Opinion was to take the observations set out in the Opinion of 26 September 1991 a stage further and to pinpoint the main measures which will have to be taken with a view to achieving the optimal EC consumer policy.

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1 OJ No. C 339 of 31 December 1991.

2 Attention should, however, be drawn to two important works on this subject: L. Krämer, EWG-Verbraucherrecht, Nomos Baden-Baden, EEC Consumer Law, Collection Droit et Consommation, Brussels, La CEE et la protection du consommateur, ibid. (1985): and P. Deboyser, le Droit Communautaire relatif aux Denrées alimentaires, Brussels, 1989. (Study on EC food law).

3 Study on Consumer Protection and the Internal Market - Stocktaking and Outlook for the Future; copies of this document, in the form of a brochure, will be available in French, English, German and Spanish..

STUDY

on

CONSUMER PROTECTION AND THE INTERNAL MARKET

EVALUATION AND PROSPECTS

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This study was undertaken on behalf of the Economic and Social Committee, but the opinions expressed therein are those of the authors.

(updated to 30 June 1992)

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INTRODUCTION

Will completion of the internal market effectively contribute to the growing recognition and promotion of consumers' interests? Attempting to answer this question may seem ambitious, the factors to be taken into consideration are numerous, but also uncertain.

Several Community initiatives must guide the study. The European Member of Parliament Jacques Vernier submitted in 1991 a report entitled "Europe and Consumer Protection". This report points both to the insufficiency of the resources at the Commission's disposal given the importance of the matter and to the relative failure of the Member States in general to meet their Community obligations. The European Parliament, following a public hearing of the Committee for the Environment, Public Health and Consumer Protection which considered a report by Siegfried Alber, adopted a Resolution on consumer protection and public health standards in the run-up to the completion of the Internal Market which identified several necessary measures to be taken in order to bring about an internal market which takes adequete account of consumer interests [1]. On 25 September 1991, the Economic and Social Committee adopted an own-initiative opinion on "Consumer Protection and Completion of the Internal Market" [2]. This opinion is addressed to all the Community instances responsible for consumer policy and calls for the allocation of more resources and energy to this area.

1. Historical background

Although hardly mentioned in the Treaty of Rome, it is the consumer whose needs must be satisfied according to the economic model it enshrines, namely that of free exchange. Moreover, it is in this context that the consumer appears sporadically as a point of reference for a wider policy, which it is generally agreed must contribute to "constant improvement of living conditions and employment"

However, it was not until the 1972 summit meeting of the heads of state or government in Paris that consumer policy was recognised in its own right.

In 1973, in the wake of the Paris summit, the "Consumers' Consultative Committee" [3] was created, to represent consumers' interests within the Commission and to advise it during the design and implementation of policies and actions in the field of consumer information and protection, either at the request of the Commission or on its own initiative.

At the same time the Commission created an independent service responsible for the "protection of the consumer and the environment", with the responsibilities of a directorate-general, and which in *1981* became Directorate-General XI.

Similarly, in the aftermath of the Paris summit, the Council of Ministers on 14 April 1975 [4] approved the first preliminary programme for a consumer protection and information policy. This programme has already been widely discussed and still remains a useful reference document.

In 1976 the European Parliament established a Committee for the Environment, Public Health and Consumer Protection.

In the first half of the 1980s numerous projects which had long been gestating were brought to completion. For example, there was the very controversial text on product liability, the first drafts of which date back to 1973.

This was followed by resolutions and programmes which channelled and reoriented the policy of the European Communities:

- on 19 May 1981, the Council of Ministers adopted a second programme, (OJ n° C133 of 3 June 1981);
- on 23 July 1985, the Commission transmitted to the Council a communication which proposed giving a new impulse to consumer protection policy between 1986 and 1992 (ISBN document 92-825-5668-91); on 23 June 1986, the Council of Ministers adopted the objectives contained in this new impulse (OJ n° C167 of 5 July 1986).

However, an event of great moment has intervened since then: the adoption by the Member States of the Single European Act, which entered into effect on 1 July 1987. The Single Act fundamentally modified the procedure for drafting Community law, and introduces an important concept: Article 100A contains an express reference to consumer protection and removes the unanimity rule in the adoption of directives in numerous matters relating to consumer protection.

Nonetheless, the consumer movement regretted that consumer protection policy was not listed among the priorities.

- in March 1990, following the Council Resolution of November 9 1989 on future priorities for the invigoration of consumer protection policy (OJ n° C294 of 22 November 1989), the Commission elucidated a triennial scheme for consumer protection which provides for the principal measures to enable consumers to benefit from the internal market.
- on 13 July 1992, the Council adopted a Resolution (OJ n° C186 of 23 July 1992) concerning the future priorities for the development of consumer protection policy which takes account of the progress achieved by the signing of the Maastricht Treaty in particular (see below), but which equally identifies the additional measures necessary to give consumers confidence in the workings of the single market, in particular the problems related to the access to the courts.

Let us conclude this overview by recalling the main actors. The Community institutions involved in shaping the Community's consumer policy are:

- the Commission, with an independent service (Consumer Policy Service). Since 1973 the subject matter has been

[1] OJ No C94 of 13 April 1992
[2] OJ No C339 of 31 December 1991
[3] OJ n° L283 of 10 October 1973
OJ n° L341 of 10 December 1976
OJ n° L320 of 27 November 1980
[4] OJ No C92 of 25 April 1975

the responsibility of a Commissioner who also has other functions. Moreover, numerous questions of consumer interest fall within the remit of Commission departments;

- the European Parliament, which since 1983-1984 has become more active in this area, no doubt because of its enhanced role as later reflected in the Single Act;
- the Economic and Social Committee, responsible for assisting and advising the Council and the Commission, and one of whose sections is specifically responsible for questions relating to protection of the environment, public health and consumer affairs;
- the Consumers' Consultative Committee;
- the Court of Justice, whose role (see glossary) is fundamental in promoting consumers' interests;
- finally, the Council, which met for the first time on 12 December 1983 wearing the "consumer's hat". One drawback is that none of the national governments have ministries responsible for consumer affairs. Moreover, the organisation of "Consumer Council" meetings largely depends on the policy pursued by the Presidency, which is not always coherently pursued from Presidency to Presidency.

2. Objectives of Consumer policy

The policy of encouraging competition between undertakings must lead to better satisfaction of consumer needs. This is a Treaty imperative: agreements between firms are permitted only after authorisation, state aids are severely limited and above all Member States must ensure that their borders remain open. The Treaty thus affirms certain freedoms: the freedom to provide services and the free movement of goods, capital and persons. And yet, this does not mean that anything goes: once acknowledged and recognised, these freedoms may be channelled, tempered, limited or suspended when they are at odds with established traditions.

But other priorities have been developed and imposed. They call for restrictions. If the market does not itself eliminate unsafe products, it is up to the law to ensure that it does.

However, the model of the free market and the restrictions which it imposes or which are imposed upon it has helped shape consumer policy at European level.

In the first place, the product or service launched within the internal market must meet harmonised standards - consumer safety and health will thus be the priority concern of a policy designed ultimately to ensure a general safety obligation.

The second keynote is the way in which the products or services are offered. Advertising, better defined sale and service contracts, and banking services or insurance services are dealt with in turn. In terms of consumer policy, it is the consumers' economic interests that are at stake. Another essential for free competition is transparency and this means that consumers must be informed. If this cannot be achieved by voluntary activity on the part of industry, it will have to be imposed.

Finally - and here too because competition does not necessarily mean the elimination of unsatisfactory firms - it must be possible for consumers to have recourse to a system, judicial or otherwise, allowing them to penalise the firm which has caused them damage or is susceptible of doing so.

The adoption of the Single Act has highlighted the need to decompartmentalise consumer protection policy. This is nothing really new, since one objective of Article 39 of the Treaty (agricultural policy) is to ensure that supplies reach consumers at reasonable prices. However, new imperatives have arisen. There is a need to determine new tradeoffs between competing values in this area. The quality of water and air and of our lifestyle have a direct bearing on consumer health. However, there are also other areas which intersect with consumer policy: taxation, cultural policy, tourism, health, foreign policy. Why, in our concept of product safety, should we continue to ignore exports outside the territory of the single market? Admittedly, the European Free Trade Association is now covered but the changes in Eastern Europe equally lead to reflection on the international dimension of consumer policy. We must exploit the legal instruments of this vast market and should not hesitate to criticise European behaviour with regard to the General Agreement on Tariffs and Trade (GATT). Above all, however, we must clarify the issues at stake without, at any price, swallowing liberalism.

3. The Maastricht Treaty and the consumer

To strike a balance, it is also necessary to examine the new instruments which the European Community has given itself. In this regard, one must welcome the adoption at Maastricht of Title XI of the new Treaty of Political Union, which in its current version runs:

1. The Community contributes to realising a high level of consumer protection by:
   a) the measures it adopts in application of Article 100A in the context of realising the internal market
   b) specific actions which support and complete the policy followed by the Member States with a view to protecting the health, security and economic interests of consumers and to ensure that they are adequately informed.
2. The Council, acting in conformity with the procedures set out in Article 189B and after consulting the Economic and Social Committee, shall take specific actions as provided for in paragraph 1(b).
3. The actions adopted in the application of paragraph 2 shall not prevent a Member State from maintaining or establishing stricter protection measures. These measures must be compatible with this Treaty. They shall be notified to the Commission.

Certainly, this text is strictly subordinate to the principle of subsidiarity which, if taken to extremes, could lead one to believe that the Community's scope for action is severely

circumscribed. Thus, we warn against such a trend. Similarly, the term "action" should cover acts having a normative character, plans and recommendations.

Finally, the Maastricht Treaty confirms that Member States may go beyond Community law, provided the measures taken are compatible with the Treaty (principle of minimal harmonisation). But the kernel of title XI is that it aims at clearly enshrining the emancipation of European consumer law and freeing it from subordination to other common policies.

4. Methodology

Most source texts referred to are regulations, directives and recommendations published in the Official Journal and adopted by 30 June 1992. Proposals that have already been published are also referred to in the analysis.

As regards the keynotes, certain topics have been given more attention than others wherever their relevance to consumer relations justifies such a treatment. Product liability is an example. The vast amount of commentary this has engendered is but a pale reflection of the passions which these texts have stirred up. Moreover, certain Community policies which have had an undoubtedly important impact on consumer interests, but which require specific expertise, have not been discussed in the context of this technical document other than in summary. Common agricultural policy, the EC foreign trade policy, anti-dumping policy, environment policy, tax policy and social security policy have not been analysed. Other policies, such as transport policy, have been tackled from the consumer angle, but have not been elucidated globally.

5. Glossary of basic concepts

To help the reader, we have prepared a glossary of frequently used terms.

Consumer

In most texts of Community law the consumer is defined as: *"a person who concludes a contract for a purpose which can be regarded as being outside his trade or profession"*.

The undertaking

An undertaking is any person who is involved in economic activity in connection with the production, transformation and distribution of products and services. [5]

The new approach

Rather than trying to harmonise highly detailed national rules applying to production and marketing, the new approach requires that directives be confined to setting out, for very wide categories of products, the essential safety requirements, viz. protection of human health and safety, to which the products must correspond in order to be marketed without restriction throughout the Community. It is up to the organisations responsible for standardisation to lay down practical standards. Thus, CEN (European Standardisation Committee) and CENELEC (European Committee for Electrotechnical Standardisation), which represent the national standardisation organisations, adopt European standards on technical specifications applicable to marketable products.

Harmonisation

Harmonisation consists of the approximation of national legislation with a direct impact on the establishment or functioning of the common market. It may be total, partial, optional or minimal.

Harmonisation is:

- total, when the Community rule is binding for the Member States, who may not maintain in force any national provisions in this area, even if the products do not leave the national territory (cf. foodstuffs sector);
- partial, when certain options are not covered by the scope of the directives (cf. product liability);
- optional, when producers are free to market the products either in conformity with national standards or in conformity with Community standards;
- minimum, when the Member States may adopt more restrictive provisions to ensure better protection, while respecting Community law (cf. directive on doorstep selling) [6].

Mandatory requirements and the general interest

In a judgment of 20 February 1979 [7], the Court of Justice of the European Communities specified the conditions in which obstacles to the free movement of goods resulting from the disparities of national legislation relating to the naming, composition and marketing of the products were permissible. It developed in this context the concept of mandatory requirements. The list of such justifications was not enumerated. An examination of the idea of mandatory requirements leads to the progressive integration of this concept into Community law.

A Member State which advances a mandatory requirement must prove the existence of a causal link between the relevant rules and the objectives pursued. The rules must be commensurate with the requirement in question and there may not be an alternative solution which constitutes a less important obstacle to inter-Community exchanges.

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5 CJEC, 25 November 1971, Béguelin, *Rec* 1971, p.940

6 cf. INC HEBDO, 24 June 1988 No 599

7 Case 120 :78, Rewe, *CJEC* 1979, p. 649, known as "Cassis de Dijon"

Articles 100 and 100A of the Treaty

Article 100 empowers the Council, acting unanimously on a proposal from the Commission, to issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

This provision has been interpreted broadly and flexibly. The Court of Justice has ruled that this Article permits approximation of national provisions relating to sectors which are not expressly covered by the Treaty.

Introduced by the Single Act in 1987, Article 100a provides that the Council may, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. In matters relating to consumer protection it will take as a base a high level of protection.

Preliminary rulings

In a dispute before a national court, the judge may refer to the Court of Justice any measures with a bearing on European law. In particular, the Court may examine the possible incompatibility of a national provision with Community law or the interpretation which should be given to such law. Subsequently, the national procedure may be continued, and the national court, on the basis of the interpretative criteria provided by the Court of Justice, must resolve the dispute in conformity with the solution indicated by the Court.

Subsidiarity principle

In matters which do not fall under its exclusive competence, the Community may intervene only to the extent that the objectives of the action envisaged cannot be realised adequately by the Member States. This Principle is established in Article 3B of the Treaty on European Union.

Reverse discrimination

Whenever Member States treat their own nationals or national situations in a manner which is less favourable than that reserved for nationals of other Member States or situations originating in other Member States, we have what is called reverse discrimination. This is not in principle prohibited by the Treaty of Rome, but it can be opposed when discrimination compromises the objectives of the Community [8].

The direct effects of directives

Article 189 of the Treaty provides that directives shall be binding, as to the result to be achieved, upon each Member State to which they are addressed, but shall leave to the national authorities the choice of form and methods.

When a directive contains sufficiently precise, clear and unconditional provisions, and when the beneficiaries are in a position to know their rights fully, and to avail of them, they may take action against a Member State which has not correctly transposed the directive into national law within the given time limit or has not transposed it correctly. This is known as the direct vertical effect of directives. Directives do not have any direct horizontal effect. Recently, the Court of Justice has widened the consequences of Member States' negligence, and henceforth the beneficiary of the directive may render his Member State liable. The Member State's fault lies in its failure to respect the Treaty provisions [9]

Failure to meet an obligation

It is up to the Member States to bring their legislation into line with the obligations deriving from the Treaty. The Commission can take action against a Member State that fails to meet its obligations.

SECTION 1

Protection of the health and safety of consumers

Introduction

Protection of the health and safety of consumers has always been a priority objective of Community consumer protection policy. For this reason it has given rise to a large number of very detailed regulatory texts.

It is not easy to identify the real causes of accidents. In certain cases it is the objects used, but in other cases it may be incorrect use which gives rise to the accident. In the latter case it is also necessary to distinguish between accidents due to a fault of the consumer and those due to inadequate information, the absence of instructions for use, or an ambiguous presentation of the product.

According to the EEC's estimates [10], the number of accidents is considerable: 45 million "private" accidents per year (excluding traffic accidents and accidents at work) which require medical intervention, and between 50,000 and 80,000 fatalities. Forty to fifty percent of these accidents involve children and adolescents (up to the age of 19).

These accidents cause suffering which no compensation can totally make up for. They lead to considerable expenditure which everyone must pay for and cause severe commercial damage to the firms held responsible. In the EEC, three million workers are absent from their workplace because of a household accident, and the average duration of absences caused by this category of accident is 17 working days per year.

8 CJEC, 7 February 1979, Case 115/78, Staatssecretaris van economische Zaken, Reports 1979, p. 399

9 CJEC, Judgment of 19 November 1991, Case C-6/90 and C-9/90, Francovich and others versus Italian Republic, not yet published.

10 Communication from the Commission on safety of consumers in relation to to consumer products (COM(87) 209 final, Brussels, 8 May 1987).

With an eye to completion of the single market in 1993, free movement will not be truly effective unless it can, where necessary, be restricted in the case of dangerous products. This is a measure necessary for the smooth functioning of the internal market.

According to the philosophy of the "Cassis de Dijon" judgment, any product legally manufactured and marketed in a Member State must be allowed to circulate freely in the territory of the other Member States. However, in the absence of complete harmonisation, restrictive measures may be acceptable if they are necessary to satisfy mandatory requirements relating, in particular, to the effectiveness of fiscal supervision, protection of public health, fairness of commercial transactions and consumer protection, provided the measure is proportionate to the objective and that there are no less obstructive measures to achieving the objective (Articles 30 and 36 of the Treaty).

In the context of the new approach, harmonisation is limited to laying down essential requirements for categories of products and leaves the elaboration of technical specifications to the standardisation bodies.

On 23 July 1985 - some months after its note on the "new approach" - the Commission (DG XI) published a document which concerned a new impetus for consumer protection policy. This document emphasised the prevention of risks associated with consumption. It affirmed that "products sold in the Community must comply with acceptable health and safety standards," and defined four methods for achieving this objective:

1. A regulatory programme clearly specifying requirements in respect of health and safety which with which products must comply, aimed at those professionally involved (producers and suppliers).
2. A programme of measures for cooperation between the national authorities responsible for the safety of consumer goods.
3. The creation of Community mechanisms to monitor and control risks.
4. Actions to inform and educate consumers on behaviour which will allow products to be used with full safety.

Chapter 1 — Legislation

1.1. The "new approach" directives

Under the new approach (see glossary), EEC legislation is limited to drawing up the essential requirements with which products must comply to ensure public health or safety at environmental or consumer level. The European standards are developed for each directive with a view to supplying the manufacturer with a set of technical specifications which are recognised by the Directive as providing a presumption of conformity with the essential requirements. The European standards are voluntary; manufacturers are free to place on the Community market products that comply with other standards or indeed do not comply with any, provided they satisfy the conformity assessment procedures specified in the directive.

The Council has adopted several directives based on the new approach [11]. By way of example, we will discuss one of the directives which has had a major impact for the consumer - the "toys" directive.

The objective of the *"toys" directive* is to encourage the free movement of toys within the EEC. Free movement is accorded to toys which are presumed to conform with the essential safety requirements defined in the Annex to the Directive. This presumption takes the form of the EC mark, the passport for European products. This EC mark, which must be affixed to the toy, must be so placed by the manufacturer who himself tests that his toy conforms with the health and safety standards, or, placed on the toy after a model toy has been submitted for examination. The name of the firm, the trademark and address of the factory or the responsible person established in the European Community must be affixed to the label or packaging. If a toy does not comply with the safety standards, or if a toy still presents a danger for the health and safety of consumers, it may be withdrawn from the market by the authorities.

The toys must comply with well-defined physical and mechanical quality requirements. Thus, for example, toys and their parts must offer sufficient stability to avoid falls during usage. The parts must be designed so that they cannot cause injury. Small or detachable parts must be sufficiently large so that they cannot be swallowed by children aged under three years. The toys must be designed so as not to cause drowning, suffocation, burns or other physical injuries. The toys may not be easily flammable. The toys must not have any chemical characteristics which could harm a child's health.

Finally, toys must not contain elements or radioactive substances in forms or proportions likely to be detrimental to a child's health. Users of toys must be duly informed. Labels or packaging must provide clear and legible advice on use and must draw attention to potential risks so that they can be avoided. For example, use of protective equipment is recommended in the case of skates or skateboards.

This directive illustrates the ambiguities of the new approach. The contradictions between the free movement of products and the protection of consumer safety cannot be resolved by excluding one of these elements.

The EC mark is a passport for the product and not a guarantee for the consumer.

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[11] Toys - 88/378 (OJ No L 187 of 16 July 1988), Simple pressure vessels - 87/404 (OJ No 220 of 8 August 1987), Construction products - 89/106 (OJ No L 40 of 11 February 1989), Electromagnetic compatibility - 89/336 (OJ No L 139 of 23 May 1989), Machinery - 89/392 (OJ No L 183 of 29 June 1989), Appliances burning gaseous fuels - 90/396 (OJ No L 196 of 26 July 1990), Personal protective equipment - 89/686 (OJ No L 399 of December 1989), Non-automatic weighing instruments - 90/384 (OJ No L 189 of 20 July 1990) and Active implantable medical devices - 90/385 (OJ No L 189 of 20 July 1990).

The definition of the scope of application and the wording of these essential safety requirements are so imprecise that professionals have already discovered gaps (e.g. foam toys, children's bicycles and fun articles).

The exclusion of certain particularly dangerous toys (darts, weapons, explosives) restricts the free movement of these products but does not in any way prevent their availability on national markets, a presence which is all the more dangerous in that they are located in a State which does not have statutory instruments to restrict the danger.

1.2. Standardisation

Council Resolution of 4 November 1988 on the improvement of consumer involvement in standardisation, OJ No C 293 of 17 November 1988

Resolution of the European Parliament on consumer safety as part of a new approach by the EEC in relation to technical harmonisation and standards, OJ No C 12 of 16 January 1989

Commission Green Paper of 8 October 1990 on the development of European Standardisation, OJ No C 20 of 28 January 1991

Opinion of the Economic and Social Committee of 20 March 1991 on the Commission Green Paper on the development of European standardisation, OJ No C 120 of 6 May 1991

Standardisation is a technique based on the respect by professionals of rules designed to improve the productivity of the industrial system through rationalisation in the production and distribution of goods and services.

The standardisation institutes are private organisations which have grouped together to form powerful international institutions. The decision-makers are, *de facto* or *de jure*, industrialists.

The role of the consumer is extremely limited both for institutional reasons (little representation in decision-making bodies) and for financial reasons (lack of funds to pay competent experts). The consumers need more say because the point of departure for standardisation is, strictly speaking, their needs. From now on consumer organisations will be involved. To the extent that the public authorities delegate their powers to private organisations, they must see to the preservation of the general interest within these organisations, and thus ensure effective representation of consumers.

In its Resolution of 4 November 1988 on the improvement of consumer involvement in standardisation, the Council invited the Member States to provide consumers with the appropriate means to achieving this end.

The European Parliament in its resolution on consumer safety as part of a new EEC approach to technical harmonisation and standards, tackles the problem in a far more concrete manner. It emphasises that the recommendations in this field addressed to the Member States are insufficient and:

- calls on the Commission to take specific implementing decisions in order to enable recognised consumer organisations to set up and maintain a planning or coordination committee and in order to ensure that only guaranteed standardised products are put onto the market;
- demands that the financial preconditions for this be created at European level, so that consumers' representatives may be able to refer, at the standardisation phase, to the work carried out by experts with a high level of technical ability and specific competence in the various sectors;
- calls on the Commission to make available, for specialised standardisation work, financial resources to consumers' associations, so that they may join forces with university research institutes competent to deal with the complex problems involved in technical harmonisation and standardisation;
- demands that these financial resources should enable consumers to secure the assistance of independent experts to work on the standardisation bodies.

In its Green Paper of 8 October 1990 on the development of European standardisation the Commission proposes widening consumer representation. But no concrete measure is envisaged to render this participation effective. This viewpoint is taken up again and expanded in the Communication from the Commission to the Council of 27 November 1991 on the follow-up to the Green Paper on standardisation.

In its opinion of 20 March 1991, the Economic and Social Committee expressed regret at the almost complete absence of the social partners in the standardisation process, most particularly those representing consumer interests. For this reason it calls upon the Commission and the Member States to pay more attention to strengthening the role of all interested parties.

1.3. Legislation on general product safety

Council Directive 92/59/EEC of 29 June 1992 OJ No L 228 of 11 August 1992

Initiative Opinion of the Economic and Social Committee (OJ No C 175 of 4 July 1988) and opinion on proposal (OJ No C 75 of 26 March 1990)

The directive on general product safety

I. Scope

Complementarity with European sectoral legislation

The general directive is applied in the context of product safety when there are no specific provisions under Community legislation.

Does this mean that a specific directive (toys, for example) totally precludes the application of the general directive? No.

The above only applies if the specific directive does not contain measures pursuing the same objective as those contained in the general directive.

At all events, if the specific directive lays down safety obligations for those products at which it is aimed, the provisions concerning safety (Art. 2 - 4) contained in the general directive do not apply.

For example, the "toys" directive provides for safety measures and only these provisions apply in this context, to the exclusion of those provided for in the general directive

The products targeted

Is it necessary to include all products or only consumer products? This is one of the thorniest problems to resolve. The solution is an intermediate one and is not at all clearcut.

The general directive covers every product aimed at consumers or liable to be used by them, whether subject to payment or free, new, second-hand or reconditioned (Art. 2a). All products offered for sale (or for hire, or given away as free samples) to consumers by professionals are covered by the scope of the directive. All professional equipment used by consumers such as launderette machines and lifts are equally covered. Uncertainty reigns with regard to certain categories of product used by consumers - medical dressings and hairdressers' dryers for example. Should not these be considered as aimed at the consumer?

Production installations, capital goods and any products used exclusively in the context of a professional activity are excluded. Even though services are excluded, to compensate, the directive applies to those products integral to services. Thus, an escalator or a heater could both be made the subjects of measures envisaged by the present text. However, the work of the fitter does not fall within the parameters of the directive.

Finally, second-hand goods (at least those which have been repaired or reconditioned before being supplied) will be excluded from the directive from the moment at which the supplier presents them as such. This exception, introduced in the common position, is astonishing in its generality. Dangerous second-hand goods can be sold as long as their real or potential risks are mentioned! Thus it should be admissible to sell a second-hand heater which poses health and safety risks to the consumer, risks which are all the greater given that the person who uses the equipment is not necessarily going to be the one who was informed of the potential risks involved in doing so.

II. "Safe" products

Safe products are defined as all products which, under normal or reasonably foreseeable conditions for usage, are durable and do not pose any risks or only low risks in keeping with the use of any given product.

These risks are seen as acceptable in the context of a higher level of health and safety protection for the consumer, taking into account the following factors :

- the characteristics of the product (composition, packaging);
- the effect of the product on other products;
- the presentation of the product (labelling, usage, etc.);
- the categories of consumers , children in particular, who fall into a serious-risk category with regard to the usage of these products.

This last criterion permits better account to be taken of the needs of children, the elderly and disadvantaged groupings of society.

Article 4 establishes a presumption of "step-by-step" safety. A product will be considered "safe" if it conforms to Community regulations, or, in the absence of same, national regulations.

In the absence of the latter, conformity will be evaluated with respect to general safety requirements, taking into account European standards or technical specifications, codes of good conduct, the rules of the craft and, finally, the level of safety that consumers can reasonably expect, in that order.

However, most fundamentally, the conformity of a product with the abovementioned rules does not prevent a Member State from taking expedient measures if a product proves to pose a threat to consumer health and safety.

III. The obligations of the parties

Producers are bound to market only safe products. They must inform consumers of all possible risks associated with a given product (how it should be used or precautions for use, for example). They must ensure the follow-up of their products, and, in the case of risk, they must take all necessary measures to withdraw the offending good. Member States must take all necessary measures to ensure that safety is respected.

The directive states a list of (non-restrictive) measures which include the following :

- appointment of authorities charged with monitoring the conformity of products and setting up inspection procedures, (taking samples, requesting information, etc.);
- broadcasting of warnings on the risks associated with a certain product;
- prohibition of the supply or sale of a product;
- organisation of the withdrawal of a dangerous product.

IV. The urgency procedure

If the Commission becomes aware, as a result of information supplied by a Member State, of a serious and immediate risk, it can demand that the Member States take the requisite measures to eliminate the danger.

Several Member States have expressed fears of losing their powers to the Commission, as a result, a series of safeguards are to operate in order to limit the intervention of Community authorities.

It is necessary that one or more States have already taken steps to restrain the sale of a good or to withdraw it. Furthermore, it ought to be established whether or not Member States cannot agree on the measures to be taken or whether it is impossible to eliminate the risk other than by Community intervention.

The Commission is assisted by an Urgency Committee made up of representatives from the Member States who give their opinion on the measures proposed by the Commission.

This opinion must be delivered within a month. If the Committee does not agree with the Commission or if it does not give its opinion within the time allowed, the Council rules on the matter. The Commission's decisions are not addressed directly to professionals, but to the Member States who have ten days to implement them.

V. Assessment

The adoption of a regulation on product safety can only be noted with satisfaction.

The skeleton must be fleshed out to allow it to move with ease. Such ought to be the role of a committee for safety at European level.

The absence of a body for coordination and impetus may well hamper the objectives to be pursued. Despite the fact that it has both the power and the resources to monitor competition in the European market, why does the Commission greviously fail to monitor product safety?

The collection of data on domestic accidents has not been addressed by the text. All experts in the field of safety know that such data is an indispensible key in the context of preventative action. The disinterest on the part of Community authorities is equally significant.

Finally, no measure is envisaged to prevent the exportation of dangerous products to third countries.

VI. Towards a Consultative Committee on the safety of products and services

The draft Commission decision on the creation of a consultative committee on the safety of products and services is part of a package of measures designed to ensure consumer safety at European level. The proposal for a directive on general product safety is the cornerstone, and it also includes the sectoral directives (e.g. toys) and special instruments (the EHLASS system and the procedure for the rapid exchange of information on dangerous products).

In light of the criticisms levelled at the bureaucratic nature of the existing or envisaged procedures, according to which only administrative bodies are involved in examining product safety, the Commission proposed the creation of a forum for dialogue on the question of safety between all the involved parties. The function of this Committee is to issue an opinion, at the request of the Commission or on its own initiative, on all measures designed to improve hazard prevention concerning products and services.

It is made up of representatives of professional organisations and consumers, as well as qualified specialists. It is chaired by a Member of the Commission. The Commission may invite experts.

Before issuing an opinion, the Committee gives firms and professionals concerned an opportunity to present their viewpoint. The Committee may request any test or experiment whose results are likely to be useful in formulating the opinion. Finally, if investigations are liable to affect manufacturing secrecy, measures are provided to preserve it.

1.4. Monitoring and control of risks

Council Decision No 84/133/EEC of 2 March 1984 introducing a Community system for the rapid exchange of information on dangers arising from the use of consumer products, OJ No L 70 of 13 March 1984

Council Decision No 86/138/EEC of 22 April 1986 on a demonstration project with a view to introducing a Community system of information on accidents involving consumer products (OJ No L 109 of 26 April 1986)

Established by a Council Decision of 2 March 1984, *the system for the rapid exchange of information* applies to all products intended for consumers, except for products which are reserved for professional use and products which under other Community instruments are subject to equivalent notification procedures.

The decision stipulates the setting up of a system for the rapid exchange of information between the competent national authorities to establish and trigger an "alert" in the event of the appearance on the territory of a serious and immediate risk associated with a product or product batch.

The Commission relays the information to the other Member States via a network of contact points.

Evaluation of the rapid exchange system

The effectiveness of this system has been criticised in various respects:

- few notifications have been registered (approximately 30 per year) which is far smaller than the number of dangerous situations present in the EC;
- the notifications are not exact and precise enough;
- the notification system does not provide for any coordination or, a fortiori, any harmonisation of measures adopted by the Member States that provide and receive the information.

Moreover, in 1986 the European Community decided to establish a demonstration project called "EHLASS", an information system on domestic accidents. This system is based on the collection of information from hospital emergency

services. The information is later coded and stored with a view to electronic processing. The data concern "anonymous" data on the victim, the type of injury and the circumstances of the accident: the nature of the products when they are involved in an accident, the respective roles of the product, the victim and their environment. These data are of major importance for health protection. EHLASS is in this respect a fundamental tool for drawing up "targeted" prevention policies. It also enables one to evaluate the efficacy of the measures adopted.

But this system is underused both by the Community authorities and by a large number of national authorities. It should be the source of preventive actions, statutory measures and actions in the field of information or education. Moreover, its viability is regularly questioned.

1.5. Certification

Communication from the Commission on a global approach to certification and testing quality measures for industrial products, OJ n° C 267 of 19 October 1989

Economic and Social Committee opinion on the "Procedures for the evaluation of the conformity intended for use in the technical harmonisation directives," OJ n° C112 of 7 May 1990

The *global approach* supplements the new approach: indeed, free movement cannot be achieved without ensuring the *reciprocal recognition of conformity tests*, both in the regulatory and the non-regulatory field. The global approach aims at creating the necessary conditions for implementing the *principle of reciprocal recognition.*

The Commission Communication, accompanied by a proposal for a Council decision, sets out the different instruments to be used to achieve this objective, in particular those relating to European standardisation, Community legislation and cooperation at European level between the national structures responsible for certification, testing and inspection. According to the Commission, the global approach which it sets out, and which is based on the most modern techniques, will not only eliminate technical obstacles to trade in industrial products, but may also become a powerful factor in promoting industrial quality and thus the competitivity of European firms, both in the internal and external market.

The communication defines the role and importance of tests, certification and inspection and specifies the objectives of a global approach.

Finally, it lists and describes the measures necessary for applying this new global approach and draws attention to its external aspects.

Evaluation

For the consumer, certification systems must satisfy the following requirements at least:

a) the meaning of a certification mark must be clear and unequivocal for the consumer;
b) national certification marks must be as harmonised as possible;
c) certification marks must be based on a wide range of conditions covering as many aspects of product quality as possible;
d) certification marks must be based on objective standards; this includes the test of the product itself and the producer's quality assurance system;
e) an independent third party must supervise the conformity assessment procedure;
f) after awarding a certification label, the third party organisation must verify (e.g. by random sampling) whether the products offered to the consumer satisfy all the necessary conditions;
g) the certification service itself, as well as the laboratories concerned, must also comply with certain objective standards.

These objectivity and transparency requirements are not sufficiently taken into consideration by the Commission's Communication.

Council Decision N° 90/683/EEC of 13 December 1990 concerning the modules for the various phases of the conformity assessment procedures which are intended to be used in the technical harmonisation directives, OJ n° L 380 of 31 December 1990.

Proposal for a regulation on the EC certification mark, OJ n° C 160 of 20 June 1991

ESC Opinion on the proposal for an EC mark, OJ n° C 14 of 20 January 1992

The objective of the Council Decision on *modules* is to establish harmonised means for assessing conformity and the adoption of a common doctrine as regards to their application, so as to facilitate the adoption of future technical harmonisation directives concerning the placing on the market of industrial products, with an eye to completing the internal market. In this respect the decision defines the modules relating to the different phases of the conformity assessment procedures which must be used in the technical harmonisation directives. Numerous modules are defined (a dozen in all), which range from self-declaration by the producer to certification by an independent third party.

Most of the modules have no real meaning for consumers, because of the freedom they leave to the manufacturers.

For this reason consumers consider that products recognised as "sensitive" constitute a minimum basic core of products in respect of which certification by a third party should be mandatory at Community level.

Moreover, the purpose of the proposal for *a regulation on an EC mark* is to ensure the conformity of a product with the

protection levels laid down in the directives and to indicate that the economic operator is subject to all evaluation procedures provided for in Community law concerning his product. After all, it is a Community passport.

As the Economic and Social Committee points out in its opinion, consumers will not believe that a certification mark simply means that the product in question meets minimum legal requirements. They assume it implies a higher level of safety and quality, and that these parameters have been verified by a third party in accordance with recognised criteria of independence and competence. It is to be feared that the multiplicity of the modules proposed will lead to confusion amongst consumers and to a lack of transparency in the market.

The EC mark, in the form currently proposed, does not provide any supplementary quality guarantee or any encouragement to improve quality. It should be possible to identify all types of quality marks for products which represent a genuine "plus" vis-à-vis the essential criteria in the EC legislation.

A European Organisation for Testing and Certification (EOTC) has been created. Its objective is to encourage the promotion of reciprocal recognition agreements in regard to certification and testing, mainly in the non-regulatory field. The EOTC includes consumers' representatives.

The importance of certification and accreditation for the consumers

Community and national policies do not always clearly delimit the responsibilities between public authorities and private actors on the one hand, and between national and Community actors on the other.

In view of the privatisation of certification, Member States are responsible for supervising the organisations concerned as well as for the safety and health of their citizens.

What will happen if the national authority, in the face of an emergency remains inactive or does not take adequate measures? What are the implications vis-à-vis the European Community? Is there not a need for specific rules on surveillance conducted by the Member States?

The essential requirements described in the "new approach" directives are very often highly elastic; the standards remain optional.

The EC mark, considered to be a visible sign of conformity with European legislation, is affixed to the products irrespective of the confirmity assessment procedure applied - which may be anything from a self-declaration by the producer to a certificate awarded by a third party. It is not a guarantee of quality.

The reference to the EN 45000 and EN 29000 standards (modules and certification) is presented by the Community as a must but remains, as is general for reference standards, voluntary.

1.6. Consumer education

Commission Communication on a Community information and awareness campaign on child safety, COM(87)211 final of 11 May 1987

Independently of any regulatory activity aimed at limiting the dangers linked to the use of products, it is important to implement, in parallel, a policy to influence consumer behaviour with a view to reducing the number of accidents caused by the incorrect use of consumer goods.

To this end the Commission, in 1988, launched an information and awareness campaign on child safety, which defines four priority action areas: poisoning, burns, falls, and drowning. It is in these domains that user behaviour may play an important role in preventing accidents.

The Commission has financed numerous actions and research projects which have revealed many possibilities for measures in this field. Privileged target groups for awareness campaigns have been identified, in particular the parents of young children and teaching staff. Unfortunately, these initiatives have not yet given rise to concrete measures on the Commission's part, and the results linked to risk factors independent of behaviour (unsuitable material) have not yet been exploited. Thus, we do not yet have legislation on safety of childcare products, or on playground safety, despite the high number of accidents that have been recorded in these two sectors.

Chapter 2. Sectoral Legislation

2.1. Foodstuffs

General principles of the Community approach

The principles on which the Community approach is based as regards foodstuffs regulation derive from several communications from the Commission, which in turn are based on the significant case law of the Court of Justice following the Cassis de Dijon judgment (see glossary):

- *Commission Communication on the consequences of the Cassis de Dijon judgement,* OJ No C 256 of 30 October 1980;
- *Commission Communication on the completion of the internal market: Community legislation on foodstuffs,* COM(85) 603 final (not published in OJ);
- *Commission Communication on the free movement of foodstuffs within the European Community,* OJ No C 271 of 24 October 1989;
- *Commission Interpretive Communication on the names under which foodstuffs are sold,* OJ n° C 270 of 15 October 1991.

The strategy is to combine the adoption of harmonised rules at Community level, applicable to all foodstuffs marketed within the Community, with mutual recognition of national rules and standards, in regard to questions which do not require

the adoption of a Community legal instrument. The Commission declares in its communications that the adoption of harmonised rules is limited to questions relating to the protection of public health, consumer protection, fair trading and environmental protection.

Most of these provisions are horizontal ones (i.e. they apply to foodstuffs in general) but there are also sectoral provisions.

It follows from this approach that much of the initiative is left to the Member States in determining the standards that apply to foodstuffs produced on their territory. This means that national legislation applying to foodstuffs may still be very divergent, mainly because of different traditions, but also because of different approaches to public health protection and consumer protection. However, in the context of completing the internal market, a Member State cannot prohibit the importation of foodstuffs that do not conform with its national legislation except in the restrictive conditions laid down by the Court of Justice in the "Cassis de Dijon" judgment.

Labelling of foodstuffs

Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ n° L 33 of 8 February 1979, last amended by Directive 89/395/EEC, OJ n° L 186 of 30 June 1989

Council Directive No 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs, OJ n° L 276 of 6 October 1990

Directive No 79/581/EEC of 19 June 1979 on consumer protection in the indication of the prices of foodstuffs OJ n° L 158 of 26 June 1979, amended by Directive No 88/315/EEC of 7 June 1988, OJ n° L 142 of 9 June 1988

Council Directive No 87/356/EEC of 25 June 1987 amending Directive 80/232/EEC on the approximation of the legislation of the Member States concerning the ranges of nominal quantities and nominal capacities allowed for certain prepackaged products, OJ n° L 192 of 11 July 1987

Council Directive No 89/676/EEC of 21 December 1989 amending Directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquids, OJ n° L 398 of 30 December 1989

The Community institutions attach particular importance to foodstuffs labelling: on the one hand they consider it indispensable in helping consumers to choose between foodstuffs; thus labelling plays a major role in protecting their health, safety and economic interests, and Community intervention is justified with a view to harmonising the basic principles; on the other hand, the possibility of regulating labelling is used as a criterion for assessing the proportionality of national mesaures.

Community legislation on foodstuffs labelling is both horizontal and sectoral: on the one hand, there are several horizontal directives relating to consumer information through labelling; on the other hand, several sectoral initiatives which concern not only safety in the use of foodstuffs, but also their quality, have been or are about to be adopted.

Directive 79/112/EEC aims not only at reducing the differences between national legislation in the field of foodstuffs labelling and at creating a common labelling system in the EEC, but also at improving the conditions for protecting and informing consumers in the field of foodstuffs.

The directive applies to all foodstuffs intended for the ultimate consumer and also to those intended for mass caterers, in particular restaurants, hospitals, canteens, etc. However, it does not apply to sectors which prior to its entry into force were subject to specific laws or, to products intended for export.

The directive has a two-fold objective:

- to protect the consumer against misleading information, by specifying that the labelling and its presentation must not be such as to mislead the purchaser;
- to ensure consumer information, by specifying the information which must be included on the label (brand name, ingredients, net quantity in the case of pre-packaged foodstuffs, minimum durability, storage conditions and conditions of use, etc. The text lays down specific provisions for certain types of data (quantities, manner of use, etc).

The directive also specifies that these particulars must be easy to understand and marked in a conspicuous place in such a way as to be easily visible, clearly legible and indelible.

The Commission is currently preparing a proposal for a directive to consolidate the various texts amending Directive 79/112/EEC and to supplement the earlier directive, by providing the consumer with better information on claims made (prohibition of certain claims, restrictions on claims), brand names (percentage of the ingredient to which the name refers, conditions for importing products with the same name as national products but with different composition) and the ingredients (quantitative particulars on the ingredients, specific rules on alcoholic beverages, enumeration by decreasing order of weight, indication of constituents in the case of complex ingredients, etc) [12].

Evaluation

The adoption of Directive 79/112/EEC was the first significant achievement of Community consumer policy. It is in the interest of consumers that all foodstuffs be labelled in the same way to enable them to make a rational choice. Community harmonisation is all the more important in that the Cassis de Dijon judgment seems to give labelling of foodstuffs priority vis-à-vis regulations on their composition. However the

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[12] SEC(89) 2151 final of 20 December 1989

directive, as a result of the compromises which had to be made, originally included no less than 40 exemption possibilities for the Member States. This considerably reduced its effectiveness from the point of view of consumer information and protection. Fortunately, these escape clauses have been eliminated in the latest amendments to Directive 89/395/EEC.

Despite a number of gaps the directive is an important instrument in informing consumers. It lays the foundation for a Community labelling system for foodstuffs and consumers will be among the beneficiaries.

At the beginning of 1992 [13], the Commission tabled a proposal for a directive to amend directive n° 79/112/EEC once again. This proposal has three objectives : to complete the regulation of single ingredient foodstuffs, to modify the labelling of alcoholic beverages and to make obligatory, in certain cases, the indication of the presence and amount of certain ingredients.

Directive 79/112/EEC is supplemented by two other directives relating to specific points: nutrition labelling and price indication.

Directive 90/496/EEC on **nutrition labelling** aims at promoting consumer information on the nutritional value of foodstuffs to enable them to choose an appropriate diet. It is a useful supplement to the provisions of Directive 79/112/EEC in allowing the consumer to improve the quality of his nutritional balance.

However, nutrition labelling is optional for the producer unless a nutrition claim is included in his advertising or on the label. When the producer opts for nutrition labelling, the directive determines the particulars the information must relate to and the content of the label. A proposal for a directive establishing a mandatory nutrition labelling system was not approved by the Council.

Assessment

The directive does little to improve the information available to consumers as regards the nutritional value of foodstuffs.

To be effective, nutrition labelling must allow the consumer to evaluate his daily diet as fully as possible. Thus, nutrition labelling should be ubiquitous and mandatory. However, the directive leaves nutrition labelling optional - and experience with voluntary labelling shows that hardly half of the products are labelled.

In addition, if the consumer is to change his diet with full knowledge and as a function of personal risk factors linked to certain foodstuffs or their constituents, nutrition labelling must be regular and complete and indicate all the relevant nutrients (nine in all: energy value, proteins, glucides, lipids, saturated fatty acids and poly and mono-saturated acids, cholesterol, fibres, sodium). It may also be very useful to indicate other nutrients, such as vitamins and mineral salts. However, in this respect the Directive gives the producer a choice: the labelling must relate either to four nutrients (energy, lipids, protides, glucides) or to eight nutrients (the four preceding nutrients plus cholesterol at least).

Indication of foodstuff prices

The directive on the *indication of prices* prescribes indication of the selling price for all foodstuffs covered. It also specifies that the unit price be indicated for certain types of foodstuffs. These prices must be unambiguous, easily identifiable and clearly legible. Member States may lay down specific rules for such indication of prices, in particular as regards advertisement, labelling of shelves, or packaging.

In this context one should also mention the numerous directives adopted by the Council relating to the ranges of nominal quantities and capacities permitted for certain prepackaged products, which enable the consumer to make easier comparisons.

Assessment

The directive is an important instrument for ensuring better information for the consumer when he has to compare products; comparisons are facilitated thanks to Community texts on nominal quantities and ranges. However, there are some regrettable limitations in that the prices do not necessarily have to be affixed to the product, and in particular the permissibility of codebars.

Foodstuffs monitoring

Council Directive 85/591/EEC of 20 December 1985 concerning the introduction of Community methods of sampling and analysis for the monitoring of foodstuffs intended for human consumption, OJ n° L 372 of 31 December 1985

Council Directive 89/396/EEC of 14 June 1989 on indications or marks identifying the lot to which a foodstuff belongs, OJ No L 186 of 30 June 1989, amended by Directive 91/228/EEC of 22 April 1991, OJ n° L 107 of 27 April 1991

Council Directive 89/397/EEC of 14 June 1989 on the official control of foodstuffs, OJ n° L 186 of 30 June 1989

Verification of foodstuffs compliance with health regulations is a key aspect of these regulations. The official control of foodstuffs at different stages of foodstuffs production and marketing is thus a sine qua non of all public health policies in the foodstuffs field. Since the controls are the responsibility of the administrative authority, in the Community context they fall within the competence of the national authorities. In terms of European integration, the diversity in the powers and practices of the inspectorates is counter-productive, particularly given that rules which are in principle harmonised by Community law may be interpreted or applied differently. A first attempt to coordinate administrative and scientific practices was made in the framework of Directive 85/591/EEC. A more general approach was adopted in 1989, when the Council approved Directive 89/397/EEC.

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[13] OJ n° C 122 of 14 May 1992.

Directive 89/397/EEC provides a common framework for official control carried out by the national authorities. It concerns not only control of foodstuffs, but also that of additives, vitamins, mineral salts, trace elements and other additives, and materials and articles intended to come into contact with foodstuffs.

The Directive specifies that inspection shall cover all stages of production, manufacture, import into the Community, processing, storage, transport, distribution and trade. As a general rule, inspections are carried out without prior warning. Control takes the form of inspection, the analysis of samples, inspection of staff hygiene, examination of written and documentary material, and examination of any verification system set up by the undertaking itself.

The Member States must make it mandatory for the professionals concerned to undergo monitoring, but they must also give them the opportunity to appeal against the measures taken. The inspection agents must respect professional secrecy.

The directive also establishes an information exchange and cooperation procedure for national programmes in the context of monitoring foodstuffs. Finally, it specifies that products intended for export to third countries must also be subject to adequate monitoring.

The directive should have been transposed by the Member States by June 1990. As it is only a framework instrument, its effectiveness will largely depend on the definition and adoption of more specific measures with a view to harmonising and improving official foodstuffs monitoring. Up to now no specific measures have been adopted. However, the Economic and Social Committee has already identified several areas of action: qualifications of monitoring personnel, quality standards for monitoring laboratories, exchange of experience with national authorities, etc.

In parallel with the adoption of Directive 89/397/EEC, the Community institutions adopted Directive 89/396/EEC which establishes Community rules for identifying the lot to which a foodstuff belongs. Indication of the lot to which a foodstuff belongs ensures better information on the identity of products and is useful to know whenever the foodstuffs are the subject of a dispute or constitute a health hazard.

The directive specifies that the number of the lot to which a foodstuff belongs shall be specified in the case of any foodstuffs that are marketed. However, there are many exceptions, particularly those relating to individual portions of ice cream and to small packages or non-prepackaged foodstuffs at the places of sale to the ultimate consumer.

Legislation on additives

Council Directive 89/107/EEC of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption, OJ n° L 40 of 11 February 1989

Council Directive 88/388/EEC of 22 June 1988 on the approximation of the laws of the Member States relating to flavouring for use in foodstuffs and to source materials for their production, OJ n° L 184 of 15 July 1989

Proposal for a Council Directive on sweeteners for use in foodstuffs, OJ n° C 242 of 27 September 1990

Proposal for a Council directive on colorants for use in foodstuffs, OJ n° C 12 of 18 January 1992

Community legislation on additives is based on the existence of a positive list; to be included in this list, an additive must satisfy the following conditions: it must serve a technological need, it must not present a danger for human health at the level of use proposed, and it must not mislead the consumer. Finally, conditions must be established permitting the free movement of additives within the Community.

Community legislation began very early on for individual categories of additives [14]. However, after the definition of the programme for completing the internal market, and because of the immensity of the task, a new approach was adopted. Its main result was the adoption of framework Directive 89/107/EEC.

Directive 89/107/EEC is the basis for drawing up lists of authorised additives and their conditions of use. It provides for the drawing up of a global directive, including specific existing directives relating to individual additive categories. The Member States may provisionally suspend or restrict the marketing of an additive authorised by Community law whenever it emerges that its use presents a health risk. A cooperation procedure between the Member States and the Community authorities is then set in motion to verify the conditions for a definitive prohibition on the additive in question. Moreover, a Member State may provisionally authorise a new additive, under certain conditions and procedures, provided it also implements a cooperation procedure with a view to the definitive approval of the additive.

As regards the free movement of foodstuffs, the Commission in its Communication of 24 October 1989 states that the importation of a foodstuff containing an additive authorised in the Member State of manufacture but prohibited in the importing Member State must be authorised whenever the additive does not constitute a public health hazard, taking into account the results of international scientific research and dietary habits in the importing Member States, and provided the use of this additive responds to a real need, in particular of a technological or economic order.

Member States are required to establish an authorisation procedure which is easily and rapidly accessible to the economic agents.

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[14] cf. Directive of 1962 on Colorants, OJ n° 115 of 11 November 1962
Directive 64/54 on Preservative Agents, OJ n° L 12 of 27 January 1964
Directive 70/357 on Antioxydants, OJ n° 157/70of 18 July 1970
Directive 74/329 on Emulsifiers, Stabilisers, Thickeners and Gelling Agents, OJ n° L 189 of 12 July 1974.

Specific directives for certain categories of additives which were adopted prior to the new approach are constructed on a common model and constitute the list of additives exclusively authorised in the category concerned in the Community: Member States are required to prohibit additives belonging to the category which are not on the list. Moreover, Member States may not issue a general prohibition on an additive included in the Community list. The only exception is Directive 78/663/EEC on preservatives, stabilisers, thickeners and gelling agents: the Member States may authorise only the additives listed in the directive, but they may if they wish completely prohibit the use of certain additives on this list.

Following the discussions on the proposed directive on sweeteners, the Commission is currently preparing an important amendment to directive n° 89/107/EEC (see below). This proposal is aimed at enabling a Member State, for the purpose of preserving a traditional national production process and in conformity with the Treaty, to uphold a ban on the use of certain additives for foodstuffs produced in its own territory.

So, even if such a modification of Community legislation does not prevent the importation into a Member state of foodstuffs conforming to the directive, the option open to Member States to apply stricter rules with regard to national production could lead to disproportionate standards or to a consumer information policy which would allow them to choose properly between national products and others. Moreover, the concept of a national production process is in no way defined and this is liable to lead to broad interpretations and, indeed, abuses by Member States.

Amongst the texts adopted or drafted on the basis of the new approach, it is useful to cite Directive 88/388/EEC relating to *flavourings*.

Flavouring substances are substances used in the manufacture or preparation of foodstuffs to give them an odour or taste. Directive 88/388/EEC is a framework directive which has to be supplemented by specific provisions. Basically, it lays down general purity criteria for flavourings and the maximum contents of certain substances in foodstuffs in which flavourings have been used. It also lays down rules on labelling and includes a safeguard clause identical to that of framework Directive 89/107.

Directive 88/388 was supplemented by Commission Directive 91/71/EEC of 16 January 1991 [15], which contains labelling rules for flavourings intended for sale to the final consumer (name, use-by date, specific preservation conditions, etc.) and also regulates the use of the term "natural" for flavourings.

The Commission proposal relating to *sweeteners* provides for a double positive list: for each sweetener authorised, a list of foodstuffs to which it may be added has been fixed and the maximum quantities have been laid down for each foodstuff. Following discussions within the Council, a footnote has been added to the common position permitting a Member State, in order not to damage traditional products, to prohibit the use of sweeteners in alcohol free beers and in beers whose alcohol content does not exceed 1.2 % vol. which are brewed in line with a traditional national process and are manufactured on that State's territory, on condition that this ban exists at the moment of the directive's adoption. This footnote gave rise to an outcry in the European Parliament which deemed it to be contrary to the principle of free circulation of goods and rejected the common position. The Commission subsequently withdrew its proposal on sweeteners and prepared a proposal for an amendment to the framework directive introducing a traditional production clause (see above). More generally, the problem for consumers is that the proposal does not ensure adequate consumer information, because it does not prohibit the mention "without sugar" when other sweeteners are present. It can also happen that the use of sweeteners instead of sugar leads to a loss of volume which must be compensated for by roughage agents, with the result that calorie value may be the same but vitamin content in certain cases reduced. Thus, there is a need for more adequate labelling on the presence of sweeteners in foodstuffs.

The proposal for a directive on *colorants* establishes a list of authorised colorants as well as authorised maximum doses thereof. It lays down a list of foodstuffs for which colorants are not, in principle, authorised and of foodstuffs to which certain colorants may be added. Other colorants are authorised solely for addition to particular food products.

This proposal takes a very liberal approach to the authorisation of colorants and constitutes a regression when compared with initiatives taken in some Member States to reduce the amount of colorants contained in certain foodstuffs. Rather, in the context of consumer protection, it is necessary that attention be paid to the following requirements:

- the colorants used in foodstuffs, as well as concentrations thereof, should not pose a threat to human health;
- their use should not deceive the consumer;
- the addition of colorants should be necessary from a technological viewpoint and should be kept to a minumum;
- basic foodstuffs, such as bread, should be marketed without colorants;
- labelling should be clear and comprehensible, also for products sold loose.

Incidentally, the Commission is currently preparing a proposal for a directive on additives other than sweeteners and colorants, in particular preservatives and antioxydants.

Contaminants

Proposal for a Council Regulation laying down Community procedures for contaminants in food, OJ n° C 57 of 4 march 1992

[15] OJ L 42 of 15 February 1991.

This proposal for a framework regulation aims at laying down a procedure for the adoption of rules with regard to the determination of the possible toxicity of contaminants. According to the proposal, a foodstuff which contains a contaminant in an amount which is toxiclogically unacceptable shall not be marketed. Tolerance standards are established at Community level by the Commission based on consultation with the Scientific Committee for Food and the Standing Committee on Foodstuffs. The Member States shall allow the marketing of products conforming with the directive, subject to provisional safeguard measures.

Three groups of contaminants have been regulated at Community level independant from the framework regulation: pesticides, hormones and extraction solvents.

As regards *pesticides*, three initiatives have already been taken by the Community authorities:

- Directive 79/117/EEC prohibits the Member States from placing on the market or using plant protection products which contain one or several active substances listed in the Annex;
- provisions fixing the maximum levels for pesticide residues in and on certain categories of foodstuffs;
- a proposal for a directive aimed at drawing up a Community list of authorised active substances.

The positive list of authorised substances is still outstanding. The provisions on the maximum levels for pesticide residues do not cover all foodstuffs; they are also optional and do not necessarily cover exports to third countries.

In the case of *hormones* a very controversial directive was adopted by the Council in 1988:

Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action, OJ n° L 70 of 16 March 1988

After long negotiations the Council established a system for the general prohibition of hormones as growth stimulators. This prohibition does not include all hormones but only certain sexual hormones. The prohibited hormones are put "out of trade" and animals to which these hormones have been administered may not be marketed. Monitoring procedures are envisaged, both as regards trade in hormones and their possible use in farms.

A request for annulment of the directive was lodged with the Court of Justice of the European Communities, the argument being that there is no scientific evidence that ingesting hormones is harmful. The Court, in a judgment of 13 November 1990, confirmed the validity of the directive, arguing that even if the scientific evidence was controversial, banning the use of hormones was in line with long-standing demands on the part of consumers.

The problem of using hormones through clandestine channels is one that crops up regularly. This is a situation which it is difficult to control without more intensive monitoring.

Other types of hormones, such as somatotropine, can also substantially stimulate growth. Despite reassuring studies, we should be vigilant as to the health effects of using these hormones. This is why the Commission in 1989 submitted a report to the Council and on the administration of somatotropine (BST) to dairy cows with a view to improving productivity, in which it is proposed that an evaluation period be fixed for the use of BST in the Community. The Council assented to the Commission's request and established a moratorium [16]. Recently, the Commission proposed extending the moratorium, yet again, until 31 December 1993 [17].

In the case of *extraction solvents*, which are used to dissolve certain constituents in raw materials with a view to extracting them and which are normally eliminated at the end of the process, there is a risk that residues or derivatives may remain in the foodstuff or ingredient. Community law has responded to this risk in the following manner:

Council Directive 88/344/EEC of 13 June 1988 on extraction solvents, OJ n° L 157 of 24 June 1988, proposal for an amendment COM (91) 502 final of 9 December 1991

Under this Directive the Member States are required to authorise the use, as extraction solvents in the manufacture of foodstuffs or food ingredients, of the substances and materials listed in the Annex to the Directive, under the conditions of use and where appropriate within the maximum residue limits therein specified. The Member States are required to ban from the same date the solvents which do not appear in the Annex, and must not extend the conditions of use and the maximum permitted residue limits beyond what is specified in the Directive. Finally, Member States may not prohibit, restrict or obstruct the marketing of foodstuffs or food ingredients on grounds relating to the extraction solvents used or their residues if these comply with the provisions of Directive 88/344/EEC. A safeguard clause is included. In addition, a recent proposal for an amendment provides for restriction on the authorisations given under the original Directive of 1988.

The Directive contains very detailed provisions on the labelling of extraction solvents: certain particulars must be mentioned on the packaging.

Materials and articles in contact with foodstuffs

Council Directive 89/109/EEC of 21 December 1988 on the approximation of the laws of the Member States relating to materials and articles intended to come into contact with foodstuffs, OJ n° L 40 of 11 February 1989

Packaging, utensils and various articles which come into contact with foodstuffs must be regulated as regards their composition and the processes to which they are subjected.

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16 Decision of 25 April 1990, OJ n° L 116 of 8 May 1990, extended by Decision of 4 February 1991, OJ n° L 37 of 9 February 1991.

17 COM(91) 522 final of 12 December 1991.

Moreover, the manufacture and marketing of prepackaged foodstuffs is continuing to expand, for which technical barriers to trade within the Community have to be eliminated.

Directive 89/109/EEC is a framework directive which sets out the common principles, lays down certain provisions concerning labelling, enumerates groups of materials and articles which must be covered by specific directives and introduces a procedure for the adoption of these directives. It replaces a 1976 directive and introduces a reform in that there is a general delegation of competence to the Commission. There are specific directives for three groups of products: regenerated cellusose film, ceramic articles and plastic materials.

This Directive is limited to informing consumers of the fact that an article or material may, without danger to consumer health, enter into contact with a foodstuff, and provides a pictogram of these types of products. But this in no way means that these products have been tested for the absence of the prohibited substances: thus, the consumer has no way of knowing whether a marketed product actually conforms to the regulations that concern it from the given pictogram.

Processing methods

— *deep freezing*

Council Directive No 89/108/EEC of 21 December 1988 on the approximation of the laws of the Member States relating to quick-frozen foodstuffs for human consumption, OJ n° L 40 of 11 February 1989

This Directive regulates the marketing of quick-frozen foodstuffs and contains rules concerning the raw materials used, the freezing agents, the cold chain, prepackaging and labelling.

It contains an exemption which is unfavourable for the consumer, because it does not apply to ice cream. Moreover, there is no obligation on professionals to inform the consumer whenever the products they are marketing in a non-quick-frozen form have been quick-frozen already, or at least one of their ingredients. Besides, there is no obligation on mass caterers, such as restaurants, to inform the consumer that dishes have been prepared from quick-frozen products.

— *biotechnologies*

Council Directive n°90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms, OJ n° L 117 of 8 May 1990

Council Directive n°90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms, OJ n° L 117 of 8 May 1990

The Directive on the contained use of genetically modified micro-organisms covers all types of contained use of genetically manipulated organisms on a small or large scale.

The concept of contained use embraces any operation in which micro-organisms are genetically modified or in which such genetically modified micro-organisms are cultured, stored, used, transported, destroyed or disposed of and for which physical barriers (equipment, operating modes, laboratory practices and designs), chemical or biological barriers (characteristics which are proper to the micro-organisms limiting their survival capacity) are used to limit their contact with the general population and the environment.

A genetically manipulated organism is any organism resulting from a new combination of genetic material through the introduction of nucleic acid molecules produced by any procedure outside the cell into any virus, bacterial plasma or other vector system which allows their incorporation in a host organism in which they are not to be found naturally, but in which they can perpetuate themselves.

The minimum containment levels are drawn up and evaluation parameters for the risks are determined in order to provide precise assessment criteria to the competent authorities responsible for authorising their use within each Member State.

The directive on the *deliberate release into the environment of genetically modified organisms* establishes two distinct procedures: one concerns experimental releases, in respect of which each competent authority is responsible within its Member State; the other concerns the marketing of genetically modified organisms with a view to a specific use; here the consent of the other Member States is required before the product may be marketed. The second procedure does not apply to products already covered by Community legislation that provides for environmental hazard assessment equivalent to the one laid down in the directive.

The placing on the market of products containing genetically modified organisms is of interest mainly to the consumer. The bulk of the products concerned are micro-organisms for non-veterinary, agricultural or environmental use, including pesticides and micro-organisms for breaking down waste. The following products are excluded, because they are covered by other directives: medical and veterinary products, foodstuffs and additives, plants and animals used in agriculture, horticulture, silviculture, fishing and products covered by Community legislation requiring a specific hazard assessment.

Evaluation

The two legislative instruments which the European Community has adopted are too recent to allow a definitive assessment. Although their scope is limited, they are nevertheless a first legislative response at European level to the cross-frontier effects of industrial applications in the field of the new biotechnologies.

There are still many open questions. Consumers' awareness of what is at stake should lead to their growing involvement in the legislative process. The magnitude of the consequences

of any decisions taken justify the involvement not only of lawmakers and people specialised in the technique under consideration, but also the public as a whole. Consumers will thus be led, mainly through the activities of their representative organisations, to define their own aspirations. Only then will the development of the new biotechnologies adequately reflect the diversity of the concerns of those they are meant to serve. These concerns are: consumer information and education, guarantees as to the safety of the products offered, the quality and variety of products, the effects on dietary habits, usefulness and the economic benefits, consequences for ecosystems, etc.

Foodstuffs irradiation

Proposal for a Council regulation on the approximation of the laws of the Member States concerning foods and food ingredients treated with ionising radiation, OJ n° C 336 of 31 December 1988, amendment to the proposal OJ n° C 303 of 2 December 1989.

The Directive applies to the irradiation of foodstuffs and food ingredients and their marketing. It provides that irradiation may not be invoked by a Member State as a reason for prohibiting the marketing of irradiated foodstuffs. However, treatment must have been carried out in accordance with the provisions of the directive.

Only certain foodstuffs may be irradiated. Maximum radiation doses are laid down, as are the methods of calculating these doses. The sources of ionising radiations which may be used are specified. The foodstuffs may not be re-irradiated but the total dose may be imparted on several occasions.

The labelling of irradiated foodstuffs not intended for ultimate consumers is defined in regard to a certain number of particulars, while the labelling of irradiated foodstuffs intended for ultimate consumers is regulated by Directive 79/112/EEC and, more specifically, by the amended version of 14 June 1989 - Directive 89/395/EEC (OJ n° L 186 of 30 June 1989). This Directive specifies that irradiation treatment must be mentioned in the foodstuffs labelling in the form "treated with ionising radiation" or "treated with ionisation". The provisions for signaling that a non-irradiated foodstuff contains one or several irradiated ingredients have not yet been determined.

Irradiation plants must conform with the standards of the international code for the operation of plants recommended by the FAO/WHO Commission (reference OAA/WHO CAC/VOL XV edition 1). They are subject to approval and national monitoring.

Registers must be kept by each plant containing certain information on each lot of foodstuffs treated.

A simplified procedure has been established for amending the directive in the light of technical progress. Finally, an emergency clause authorises States to take temporary restrictive measures concerning irradiated foodstuffs that conform with the directive if they present a health hazard.

Mainly because of the cost and complexity of treatment, concern as to the potential health hazards and the technological necessity of irradiation, the risks inherent to ionisation and non-respect for hygiene rules, loss in nutritional value and absence of detection methods for monitoring trade in irradiated foodstuffs, the Economic and Social Committee deems it inadvisable to endorse a Community framework for food ionisation, apart from ionisation of spices, until such time as the EC Commission has submitted conclusive evidence as to the technical need for and *acceptability on health grounds of this preservation method* (OJ C 194 of 31 July 1989).

Consumers, as represented by the CCC, consider that any attempt to harmonise national legislation is premature for the following reasons:

- the absence of methods for detecting irradiated foodstuffs means that monitoring is not possible;
- foodstuffs irradiation poses a variety of problems of a microbiological and toxicological order, and the safety of irradiated foodstuffs has not been proven; moreover, nutritional changes might have major consequences for public health;
- recourse to irradiation does not allow the appreciation the genuine freshness of the foodstuffs;
- application of irradiation on a larger scale might lead to new health hazards;
- the application of a nuclear energy source comprises risks to public health, workers and the environment and creates non-recyclable waste;
- mandatory labelling is not sufficient to protect consumers effectively, because the absence of monitoring methods means that fraud cannot be eliminated;
- a system of authorisations granted on a product by product basis cannot adequately contain the use of irradiation. Indeed, experience in the EEC and elsewhere shows that it opens the way to increasingly generalised authorisation;
- finally, Member States which still prohibit irradiation of should be allowed to continue to do so.

Evaluation

The situation is so complex in this area that it is very unlikely that a common solution will emerge quickly. Three situations may be envisaged:

- a Community framework authorising the irradiation of certain foodstuffs is established. The Member States which prohibit the marketing of irradiated foodstuffs on their territory oppose it, while those which currently irradiate a greater number of foodstuffs are also unsatisfied;
- a directive is adopted prohibiting the use of ionising radiation for foodstuffs preservation purposes. This is very unlikely in view of the economic and political interests involved and the positions of the different Member States;
- no Community framework is established and national legislation prevails. This is the status quo and until controls

are established this in fact means free movement of irradiated foodstuffs. Indeed, free trade in irradiated foodstuffs in the European Community could then be established through a judgment of the Court of Justice on the basis of the Cassis de Dijon precedent.

Foodstuffs hygiene

Proposal for a Council directive on foodstuffs hygiene, OJ n°C24 of 31 January 1992

For several years the Commission has been working on a proposal for a directive on the harmonisation of general hygiene rules at all stages of production and marketing of foodstuffs. This instrument should supplement the existing legislative arsenal and guarantee safe foodstuffs throughout the Community. Finally tabled by the Commission at the beginning of 1992, this proposal provides for the implementation of hygiene rules and particularly HACCP (hazard analysis and critical control points). It establishes ties between codes of conduct and the quality guarantee standard series EN 29000.

Such an initiative has long been awaited. However, its effect in terms of health promotion will largely depend on the base level which the Community institutions take for defining the hygiene rules. In this respect one should note that the Codex Alimentarius contains standards which are already exceeded by several Member States and that in this respect it can only serve as a minimum reference base. Furthermore, greater transparency is required on the relations between a possible general directive and specific directives in individual sectors. The relation between legislations, European and national standards and codes of conduct is not very clear and could give rise to extremely complex situations.

Specific questions

Foodstuffs for particular nutritional uses

Council Directive No 89/398/EEC of 3 May 1989 on the approximation of the legislation of the Member States relating to foodstuffs intended for particular nutritional uses, OJ n° L 186 of 30 June 1989

This framework directive defines products intended for particular nutritional uses and the rules on their nature and composition. It establishes a procedure for adopting specific directives for certain groups of products and defines general rules for their placing on the market as well as rules relating to labelling. Finally, it specifies certain rules relating to the mutual recognition of these foodstuffs and contains a safeguard clause.

Currently the Commission is preparing proposals for a directive on foodstuffs intended for weight-loss diets and foodstuffs intended for infants and young children.

Imitation products

Council Directive No 87/357/EEC of 25 June 1987 on the approximation of the legislation of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers, OJ n° L 192 of 11 July 1987.

This Directive has been adopted in response to a specific situation: the danger of suffocation or poisoning associated with products which resemble foodstuffs and which are sometimes confused, particularly by children, with foodstuffs. The directive outlaws the marketing, importation, manufacture and export of such products and establishes an information system between the Member States and the Commission.

Towards a quality policy

Apart from its concern with the safety of foodstuffs for final consumption, the Commission is also very interested in foodstuffs quality. Several initiatives have been launched. All have two objectives:

- to protect producers of foodstuffs possessing specific characteristics against unfair and parasitic competition from producers of similar foodstuffs; this involves harmonisation of certain principles for the protection of specific foodstuffs within the Member States;
- to ensure adequate consumer information, by specifying the conditions which foodstuffs must satisfy in the event of claims that they possess particular qualities; avoidance of risks of confusion between protected foodstuffs and similar foodstuffs which do not satisfy the conditions.

The promotion of foodstuffs containing specific qualities, and protection of their particular characteristics is, in the Commission's view, an important factor in product quality policy: the confidence that consumers will have in foodstuffs presented as having particular qualities and their legal remedies - or those of the producers - in the case of abuse, will, according to the Committee, encourage them to choose better food.

As regards protection of trade names, one should mention Council Regulation (EEC) 1898/87 on protection of the designations used in marketing milk and milk products during commercialisation, (OJ n° 182 of 3 July 1987), amended by Regulation 222/88 (OJ n° 28 of 1 February 1988) and the proposal for a Council regulation (OJ n° C 36 of 14 February 1992) laying down marketing standards for certain milk and non-milk fats and fats composed of plant and animal products.

As regards the protection of the specific characteristics of a product, one may mention Council Regulation (EEC) 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, (OJ n° 198 of 22 July 1991), and the proposal for a Regulation relating to certificates of specific character for foodstuffs, as well as the proposal for a Regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. The Commission is also working on a proposal for a Council Regulation on new foodstuffs ingredients and new foodstuffs production procedures which will define the conditions under which these products may be marketed.

2.2. Medicinal products

General principles of the Community approach

The market in medicinal products is untypical: They are the only legally marketed consumer goods in respect of which the optimum level of consumption is zero. Moreover, in view of the potential toxicity of all medicaments, the market is subject to particular constraints, so it is one of the rare markets in which a product must be approved by the supervisory authority before it is sold. In addition, the decision to consume medicaments involves the decision-maker (often the doctor), the patient and the payer (often the State). As a result, the economic aspects of medicaments marketing are not subject to the normal market laws and must take into account the principles underlying the social security systems. In the context of Community integration and the associated free movement of medicaments, transfer of the supervisory powers, both physical and economic, is the fruit of laborious negotiations and discussions in which the Member States, eager to balance their finances in the health care sector, but also responsible for maintaining employment, and in particular research, join battle with the pharmaceutical industry, keen to protect established national positions but also to exploit more fully the European markets. These conflicts are both contradictory and lacking in transparency.

The Community legislature intervened very early on in order to reconcile the necessity to protect public health with the object of the free movement of goods within the EC. Thus, the Community very soon developed a very complex legislative arsenal justified by the unusual nature of the market in medicinal products.

In the pharmaceutical products sector, the internal market policy has also brought a new dimension to Community legislation. However, when regulating the economic aspects of pharmaceuticals marketing, the concern for integration so often supported, in particular by the Court of Justice, has not in practice given rise to greater competition. Consumers' interests have not been given their due place in regulatory activity - be it as regards the price of medicaments (industrial property, generic medicinal products or the competitive environment (parallel imports).

Legislation concerning the marketing of medicinal products

The internal market policy calls for a single registration system, allowing medicinal products to move freely within the EC without the need to obtain 12 parallel authorisations. Thus, in 1990, the Commission proposed the creation of a central registration system.

— *Authorisation for placing on the market*

Proposal for a Council Regulation (EEC) laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products. OJ n° C 330 of 31 December 1990 and C 310 of 30 November 1991.

This proposal establishes a centralised procedure for authorising medicinal products which applies to the entire Community. This procedure will be mandatory for medicinal products based on biotechnology, but will also be accessible, at the request of the interested firms, in the case of any other new medicament. To this end, a European Agency for the Evaluation of Medicinal Products should be created to prepare, in liaison with the national authorities, authorisation decisions issued by the Commission. This procedure is accompanied by a decentralised procedure for other medicinal products: evaluation by a national authority should lead to recognition by the other Member States. In the event of disputes the Community, acting on the opinion of the Agency, will initiate obligatory arbitration.

Council Common position of 19 December 1991 on widening the scope of Directives 65/65/EEC and 75/319/EEC on the approximation of the laws of the Member States on medicinal products and laying down additional provisions on homeopathic medicinal products, OJ n° C 108 of 1 May 1990

The aim of this proposal is to extend pharmaceutical legislation to homeopathic medicinal products. It contains labelling rules, rules concerning production, monitoring and inspection, standards relating to marketing, and in particular a simplified procedure for registering certain types of homeopathic medicinal products. Unfortunately, the proposal is imprecise, in particular when it comes to defining the notion of a homeopathic medicinal product.

— *Pharmacovigilance*

Despite the existence and functioning of a Committee for Proprietary Medicinal Products made up of European experts in the pharmaceuticals field, and responsible for drawing up common assessments in regard to the toxicity and safety of medicaments, there is no European pharmacovigilance procedure as such, and the extent of monitoring in the Member States is still very different. At present, collection of data on undesirable reactions to medicaments is the responsibility of the national authorities, although they cooperate within the Committee for Proprietary Medicinal Products. Current experience shows that pharmacovigilance data are sometimes transmitted late, after the national authorities have already taken their decision. In the context of European integration, and in response to the need for Community treatment of the problems connected with medicaments consumption, a more European approach to pharmacovigilance is essential. The proposal for a Council Regulation on the creation of a European Agency for the Evaluation of Medicinal Products provides for more active cooperation between the national pharmacovigilance centres.

Legislation on economic aspects of medicinal products marketing

The Community legislator is currently focusing to two specific points: the discovery of new medicaments in connection with the production of industrial property and the control of medicaments prices by the Member States.

— *Industrial property*

Council Regulation of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ n° L 182 of 2 July 1992)

Opinion of the Economic and Social Committee of 30 January 1991, OJ n° L 69 of 18 March 1991

This regulation authorises pharmaceutical firms to request the extension of the duration of validity of their patent in the form of a supplementary protection certificate valid for a maximum of five years. It thus responds to the repeated demands made by the European pharmaceutical industry, which considers that it does not have enough time to amortise its research costs while its American and Japanese competitors have a longer amortisation period. It even allows patent holders to request a patent revalidation certificate for medicinal products registered before the entry into force of the regulation (medicinal products registered in principle after the 1st January 1985).

In the light of this proposal, consumer organisations have called for some amendments, but none of them have found favour either within the Commission or Council: compensation by facilitating the marketing of generic medicinal products, in particular by according the pharmacist the right to substitute; applicability only to genuinely innovatory medicaments, and not to variants of established products, limitation of duration to that of US and Japanese certificates.

The Community institutions' refusal to seriously consider the consumers' viewpoint is inexplicable, insofar as numerous studies have confirmed the good health of the sector, and have seriously questioned the transparency of the cost factors advanced by the pharmaceutical firms, highlighting the significance of advertising costs vis-à-vis research costs in the accounts of the industries concerned. As pointed out in the Economic and Social Committee's opinion, the adoption of this regulation will have a serious impact on the cost of medicinal products in Europe, all the more so because no corrective measures are envisaged, particularly in the context of generic medicinal products. An increase in the price of medicaments will have repercussions, not only on social security finances but also for less prosperous consumers, for whom access to health care may be jeopardised.

— *Transparency of price control measures*

Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems, OJ n° L 40 of 11 February 1989.

The Community legislature, following the lead from the Court of Justice, has considered that it cannot prohibit a Member State from regulating prices of medicinal products, for reasons bound up mainly with national public health policies and, in particular, social security systems. However, this liberty accorded to the States is circumscribed by the provisions of Directive 89/105, the object of which is to make more transparent, for the enterprises concerned, price control procedures and reimbursement rules for pharmaceutical products. The Directive contains provisions on price control for new products, applications to increase prices, both in the context of price control and in that of products covered by social security systems. It also contains references to transfer prices, to price freezes and control on profitability.

Currently the Commission is working on the implementation of Article 9 of Directive 89/105, which stipulates appropriate measures to be adopted with a view to abolishing existing distortions or barriers as regards the free movement of proprietary medicinal products.

— *Parallel imports*

Parallel imports are one of the factors of competition within the European Community. The Court of Justice has always defended the principle of the legitimacy of parallel imports of medicinal products. However, there is no general Community policy of encouraging parallel imports. Thus Member States - and pharmaceutical firms - can pressurise parallel importers with a view to preventing the importation of medicinal products even when they are identical to those that are already registered there.

— *Generic medicinal products*

The Community institutions pay only marginal attention to generic medicinal products (the European market for generic medicinal products amounts to 7% of the entire market, as opposed to 25% in the United States and 18% in Japan), although these could also be an important factor in stimulating competition between pharmaceutical products whose patent has expired. The only references to medicinal products of this sort concern a simplified registration procedure under Directive 55/65/EEC and its subsequent amendments. To reduce the price of certain medicinal products, but also to make savings in social security so that more funds can be allocated to priority research areas (AIDS, cancer, Alzheimer's disease, etc.) it is essential that a more active policy on the free movement of generic medicinal products be pursued, both at national and Community level.

Legislation to encourage the rational use of medicaments

While the first Community initiatives in the field of medicinal products for human use concerned their intrinsic features (safety, quality, etc.), the internal market policy has given rise to activities with a view to harmonising and, where necessary, supplementing the national systems aimed at protecting the citizen both as a purchaser and as a potential user. Thus, in 1990 the Commission submitted to the Council three proposals for a Directive under the title "rational use of medicaments". To these proposals a fourth has been added, aimed at regulating advertising.

Council Directive n° 92/27/EEC on the labelling of medicinal products for human use and on package leaflets, OJ n° L 113 of 30 April 1992.

The objective of this directive is to coordinate and complete existing provisions. It contains a list of mandatory particulars to be included on the label, specifying that these particulars must be easily legible, clearly understandable and indelible, and must be drawn up in the language of the country in which the product is marketed.

In addition, it specifies the particulars which must be contained on the package leaflet, which must also accompany the medicinal product. It stipulates that the leaflet, when establishing the contra-indications or precautions for use, must take into account the particular condition of certain categories of users, must mention, if appropriate, potential effects on the ability to drive vehicles or to operate machinery, and must refer to the excipients knowledge of which is important for safe and effective use. The leaflet must be clear, easily legible and understandable and in one or several languages of the State in which it is marketed.

Labelling and package leaflets are subject to the preliminary control of the competent authorities with regard to premarketing authorisation.

If necessary, the Commission may set up direct lines, in particular for the drafting of packaging leaflets and the content of labelling.

Directive n° 92/26/EEC on the legal status for the supply of medicinal products for human use, OJ n° L 113 of 30 April 1992.

This directive aims at harmonising the criteria used by national authorities to make a medicinal product available only on prescription, with a view to ensuring free movement without jeopardising health.

Directive n° 92/25/EEC on the wholesale distribution of medicinal products for human use, ibid.

This directive aims at ensuring control of wholesale distribution, mainly with a view to facilitating withdrawal from the market of defective products and to combat infringements more effectively. Wholesale distribution will in future be subject to a specific authorisation granted by the competent authority in each Member State and recognised by the other Member States. To obtain this authorisation, the applicant must fulfil certain minimum requirements (qualified personnel, designation of a responsible person, satisfactory premises, installation and equipment etc.), compliance with which will be verified by the Member State in question. The holders of such an authorisation must respect certain obligations regarding operations and, during a five-year period, keep detailed records of all transactions, including information of the date, name of the medicinal product, quantity received or supplied, and name and address of the supplier or consignee.

Directive n° 92/28/EEC on advertising of medicinal products for human use, ibid.

These four directives, even if they do not satisfy all the demands made by the consumers' representatives, nonetheless constitute a significant step forward in the information and protection of patients in the European Community.

2.3. Cosmetic products

Council Directive 76/768/EEC of 27 July 1976 on cosmetic products [18]

Commission directive on the adaptations to technical progress of the annexes to the Directive of 27 July 1976 [19]

Directive 76/768, with amendments and adaptations of the annexes to technical progress, is aimed at harmonising Member State legislation on cosmetic products, while pursuing two major objectives:

- free movement of cosmetic products within the common market;
- safeguarding public health.

Protection of consumer health is assured through a mixed system of positive and negative lists.

The latest proposal for an amendment stipulates that particulars must be provided on the identity, quality, safety and effectiveness of the cosmetic product. The objective is to introduce transparency and to compile an inventory of ingredients used in the products.

Finally, there is a proposal for a Council Directive (SEC(90) 1985 final) designed to consolidate all the existing texts, without changing their content.

Assessment

Major reforms are being called for both by industry and consumers [20].

The consumers' organisations argue that scientific and technical progress, new instruments adopted at Community level, repeated infringements, the lack of harmonisation and, finally, the lack of information and insecurity resulting from the system of lists all justify a review of European legislation on cosmetic products.

The main features of such a review should be:

- the definition of cosmetic product (Article 1 of the original directive) is no longer appropriate. On the one hand, the cosmetic product must have some effect. On the other hand, the effect is not limited to the surface layers of

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18 amended by 79/661 (OJ No L 192 of 31 July 1979, 82/368 (OJ L 167 of 15 June 1982), 83/574 (OJ L 332 of 28 November 1983), 88/667 (OJ L 328 of 31 December 1986, 89/679 (OJ No L 398 of 30 December 1989), Proposal for a sixth amendment (OJ C 52 of 28 February 1991)

19 amended by 83/191 (OJ L 109 of 26 April 1983), 83/341 (OJ L 188 of 13 July 1983), 83/496 (OJ L 275 of 8 October 1983), 84/415 (OJ L 228 of 25 August 1984), 85/391 (OJ L 224 of 22 August 1985), 86/179 (OJ L 138 of 24 May 1986), 86/199 (OJ L 199 of 3 June 1986), 87/137 (OJ L 56 of 26 February 1987), 88/233 (OJ L 105 of 26 April 1988), 89/174 (OJ L 64 of 8 March 1989), 90/121 (OJ L 71 of 17 March 1990), 91/184 (OJ L 91 of 12 April 1991), 92/8 (OJ L 70 of 17 March 1992).

20 See Opinion of the Economic and Social Committee of 4 July 1991, OJ n° C 269 of 4 October 1991

the skin. Consequently, the substances used may lead to systemic toxicity. Thus, in contrast with medicinal products where a side-effect may, in certain circumstances, be permitted, no risk is acceptable in the use of a cosmetic product. Unless the definition is modified, the following conditions must be fulfilled:

- all cosmetic products must be submitted to cutaneous penetration tests before being placed on the market;
- after the results of this test, any cosmetic product capable of having an in-depth effect must undergo systemic toxicity tests;
- any product capable of causing systemic toxicity must be considered as a medicinal product.

- Consumer health protection: a system of strict positive lists offers best protection to consumers. The system of positive lists must be enhanced because, if appropriately modified, it can ensure good protection for consumers. This system could be improved by the following measures:
- the lists must be updated frequently and regularly;
- the lists might be restricted to substances that present risks to human health. Thus, we should start by drawing up a positive list for authorised hair dyes;
- all ingredients used in cosmetic products must be included in a regularly updated European inventory;
- all ingredients used in cosmetic products must be subjected to a minimum number of toxicological tests before being used for the first time;
- no ingredient may be included in a provisional list for too long a time. A time limit must be laid down; once this time limit has expired, the ingredient must be prohibited if there are not enough toxicological data available;
- toxicological evaluation of the ingredients must be accompanied by tests of the final products, with at least one test of cutaneous penetration, whose results will enable one to judge what supplementary test must be carried out.

Every cosmetic product placed on the European market must be accompanied by:

- a marketing declaration lodged with the national and Community authorities; this declaration would mean that the cosmetic product could be entered in a European inventory;
- lodging with the national authorities of a dossier recognised by all the Member States;
- lodging of the formula with the poison control centres.

The future of Annex V

Annex V lists the substances which are excluded from the scope of the directive, in respect of which the Member States take the measures they consider adequate. This annex seems to be unjustified because any substance which is not included in one of the lists of the annexes, and which is not either a preservative, an ultraviolet filter or colouring agent, may be used and is subject to national provisions.

Annex V should be removed after discussing and deciding on the fate of each of the substances it contains.

- Labelling: currently, a certain number of particulars must be included on the label and/or be provided to the recipient of the cosmetic product. These are: identification of the manufacturer or the person responsible for marketing the product, nominal content at the time of conditioning, minimum durability, particular precautions to be observed in use and the reference for identifying the goods.

These particulars should be supplemented by the product's qualitative formula, as is practice in the United States, and by warnings to allergic persons in the case of cosmetic products that contain a substance which is susceptible of provoking allergy amongst sensitive persons; the batch number of manufacture should be mentioned on the container in a clearly legible manner.

2.4. Motor vehicle legislation

The technical harmonisation directives:

Council Directive n° 87/538/EEC amending Directive 70/156/EEC on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers, OJ n° L 192 of 11 July 1987

EEC-Japan Agreement on the importation of motor vehicles, 1991, (not published)

Communication from the Commission of 18 January 1990: a large internal market for motor vehicles SEC (89) 2118 final.

Council Directive No 91/439/EEC of 29 July 1991 on driving licences, OJ n° L 237 of 24 August 1991

Communication from the Commission: Clarification of the activities of motor vehicle intermediaries, OJ n° C 329 of 18 December 1991

Introduction

The organisation of the European motor car market in segments has as its objective the preservation of the large national manufacturers and protection of the European market against Japanese imports. The manufacturers' policy, which the Community authorities have by and large made their own, is linked to that of the Member States, mainly in matters of taxation, technical regulation, quotas and aids to the motor car industry.

The main consequences for the consumer are major price differentials from one country to another and the difficulty of obtaining a car where the conditions are most favourable. Thus, the current situation has been heavily criticised on a number of points [21].

[21] See e.g. the Cecchini Report, the 12th Report by the Commission on Competition Policy, the BEUC studies and the Study on motor vehicle prices in six EEC countries, conducted in January 1989 by the Interregional Consumer Institute.

The current rules in the market are destined to change in the near future:

— adoption of the three last technical directives which will permit establishment of the EC type-approval procedure; these directives will no longer be optional; [22]

— harmonisation of VAT rates and other taxes (these "other taxes" may reach 200% in Denmark);

— fixing of a quota for the importation of Japanese cars at European level;

— greater restrictions on aids accorded by the Member States to the car industry.

Moreover, account should be taken of the agreement approved in July 1991 by the Community and Japan which aims to replace national quotas for Japanese car imports with a Community one; this is more in line with the principle of the free circulation of cars within the Community. Indeed, several Member States (France, Italy, Spain, Portugal and the United Kingdom) currently impose import quotas on Japanese cars which equally apply to those imported indirectly from other Member States. Such policies are contrary to the principle of the free circulation of goods and limit consumers' freedom to procure vehicles which are either unavailable or more expensive in their own country of residence.

It is regrettable that this consensus has not been made the subject of an official publication and that innumerable questions still remain with regard to effective regulation by Member States in the abolition of their quotas. The implementation of the agreement in 1993 should, therefore, be closely monitored in order to quickly evaluate its relevence and appropriateness.

Competition and exemption rules

Commission Regulation (EEC) 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ n° L 15 of 18 January 1985

The objective of Regulation 123/85 is to establish limits for the acceptability of anti-competition clauses contained in motor vehicle distribution contracts. There are three objectives: to maintain traditional distribution networks via the exclusive concessionaries for individual models, to stimulate competition between dealers and to guarantee the final users the right to purchase new vehicles where the price is most advantageous within the Community.

Amongst the very detailed rules, one may cite those which are particularly important for consumers:

— Article 3(4) provides that the manufacturer can oblige the distributor not to sell spare parts which compete with contract goods and do not match the quality of contract goods nor to use them for repair or maintenance of contract goods or corresponding goods;

— Article 3(10) and (11) concern protection of selective distribution and the problem of intermediaries. The final users may use the services of an intermediary to order a new motor vehicle from a concessionary and to accept delivery in such a way as to freely choose their supplier, possibly in a foreign country where prices are more advantageous.

On this issue the Commission, in its Communication of 12 December 1984, said that *"apart from sales contracts between network distributors concerning contract goods, the distribution network enterprises can be obliged not be sell any new vehicle in the range covered by the agreement or corresponding vehicles to a third party or through the intermediary of a third party if this party presents himself as an authorised reseller of the range covered by the agreement, or exercises an activity equivalent to reselling".*

— Article 5 of the regulation specifies as condition for exemption the distributor's obligation to provide a guarantee. The regulation does not grant an exemption when the contract obliges the distributor to respect minimum prices or not to exceed certain rebate rates. Finally, Article 10 entitles the Commission to withdraw the exemption right in individual cases or to modify its scope.

  The regulation provides that the provisions may be revoked whenever prices or conditions which diverge considerably between the Member States for the same products are applied on a continuous basis. The Commission has specified the circumstances in which it will abstain from carrying out investigations into private practices, which might be responsible for considerable price differences. Two cases are examined:

— The Commission will refrain from intervening whenever

  a) the difference calculated on the basis of the ecu is not more than 12% greater than the lowest price or exceeds the list price by no more than 6% for a period of less than 1 year, and this only for a negligible part of the range covered by the agreement or,

  b) the difference in price can be explained by an analysis of the objective circumstances in that:

  - the purchaser of the vehicle must pay in one of the Member States taxes or other similar charges which exceed 100% of the net price or,

  - that the freedom to set prices or profit margins for selling the vehicle is directly or indirectly limited in one of the Member States by state measures, for more than 1 year and that these measures do not constitute an infringement of the Treaty.

— The second case in which the Commission will refrain from intervening is that of sale of a special vehicle which has to be made available at the request of a distributor and in which the manufacturer invoices the distributor with a surcharge which is objectively justified by particular distribution costs, and by the differences in the version and specifications.

Assessment

Regulation 123/85 has come in for a lot of criticism. For example, differences in prices still persist. An official complaint on the failure of motor vehicle manufacturers to comply

with the provisions of Regulation 123/85 was lodged in 1989 by the BEUC (European Consumers' Organisation) with the European Commission, on the basis of price surveys showing the disparity in prices for similar models of cars. Following this complaint, the Commission published in May, the results of its official inquiry, which clearly confirmed the results submitted by the BEUC. Nevertheless, the Commission decided to limit its involvement to a request to manufacturers to publish information on the price of their models at Community level. The Commission also asked manufacturers to publicly declare their willingness to sell to all EC consumers. On the other hand, the Commission does not intend to enter into more restrictive procedures, considering that it hold back on this until the scheduled review procedure laid down in regulation n° 123/85 comes into play, i.e. in 1995.

On the occcasion of a dispute [23] involving a motor vehicle manufacturer and his distribution network on the one hand and an intermediary carrying out parallel imports on the other, the Commission published a communication to clarify the activities of intermediaries on 18 December 1991. The guidelines established by the Commission concern:

a) The validity of the authorisation and the provision of assistance

The intermediary is free to organise the structure of his activities. However, operations involving a network of independent undertakings using a common name or other common distinctive signs could create the misleading impression of an authorised distribution system. The intermediary can act only on the basis of a written authorisation from a client who is the final user and whose name and address are supplied. The intermediary must be free to assume certain risks linked with the vehicle (transport and storage risks). The assistance service must be provided in total transparency with regard to the various services offered and to payment verifiable through the presentation of detailed and exhaustive accounts to the purchaser.

b) Advertising by the intermediary

This must be such as not to create any confusion between intermediaries and resellers in the mind of the buyers. Subject to this restriction the intermediary is free to use all logos and brand names, but he must make quite clear that he is an intermediary and not part of the distribution network of the manufacturer concerned.

c) Supply of intermediaries

The intermediary must be free to organise his business dealings with the various dealers in the distribution networks of the different manufacturers. However, this should not lead the intermediary to establish with such dealers a relationship which is privileged and contrary to contract obligation entered into in accordance with Regulation 123/85 (especially Articles 3(8)(a), (b) and (9) and (4)(1)(3)).

In particular, the intermediary must obtain supplies under conditions which are normal in the market and he must not make agreements that include undertakings to buy or enjoy discounts different from those which are customary in the market of the country in which the car is purchased.

To this end, sales of more than 10% of the annual sales of any one authorised dealer through any one intermediary would create the presumption of a privileged relationship.

Assessment

The amendment or abolition of Regulation 123/85 scheduled for 1995 must be viewed in the more general context of the production and distribution system for new motor vehicles in Europe. The question concerns not only competition rights, but also patent rights and in particular the extension of these rights to cover spare parts.

Difficulties associated with parallel imports

Although the Commission recognises that the consumer has the right to purchase vehicles in the country in which price and quality are most favourable, the point is whether he can actually exercise this right.

The registration of an imported vehicle requires a certain number of formalities which are often long and costly and can constitute obstacles to parallel imports of vehicles in the EEC.

In its Resolution of 23 January 1987 (OJ No C 46 of 23 February 1987) the European Parliament pointed out that "*harmonisation practiced at national level is used by Member States as a good method of cordoning the European market into national segments.*" The optional character of the technical specification directives means that in very many cases national regulations still prevail. The cost of this heterogeneity has been put at 10 billion ecus (Cecchini report).

In the current state of Community law, a vehicle approved in one Member State should also be registered without problems in another Member State, unless it harbours a risk to the health and safety of citizens or the environment.

The Commission has published a communication (OJ No C 281 of 4 November 1988) on procedures for the registration and approval of imported vehicles, where it very clearly identifies the principles that apply. However, as the Consumers' Consultative Committee has emphasised, it would be advisable for each Member State to draw up a precise list of the national technical standards which it considers are justified in the interests of health, safety and even environmental protection. These lists should be communicated to the Commission, which could thus exercise permanent control in the general interest. They should also be drawn to the attention of the general public so that people can know their rights and be aware of the risks they run in purchasing in other Member States vehicles which do not meet justified specifications applicable in their state of residence.

[22] Directive 92/21/EEC on masses and dimensions, OJ n° L 129 of 14 May 1992, Directive 92/23/EEC on tyres, *ibid*, Directive 92/22/EEC on safety windows, *ibid*.

[23] This dispute was heard before the Court of First Instance of the European Communities, case T-23/90.

As regards the documents to be presented on registration, the Commission has laid down maximum costs and time limits for the issue of a certificate of conformity. But the documents to which the certificate of conformity must refer have not been specified.

Generally speaking, the registration procedures should be simplified and harmonised, as was stressed in the opinion of the Economic and Social Committee on the proposal ,for a directive modifying directive n°70/516/EEC. [24]

The question of roadworthiness tests is also characteristic of the barriers which have been constructed in the European motor car market. In its judgment of 12 June 1986 (Case 50-85) the European Court stated that roadworthiness tests constitute a measure which makes it more difficult and costly to register imported vehicles and takes on the character of measures having an effect equivalent to a quantitative restriction. However, such a measure may be justified if a roadworthiness test is also imposed on vehicles of national origin in the event of a change in registration.

The Directive amending Directive 77/143 on roadworthiness tests aims at harmonisation of the standards and methods used, mainly via:

- a system pursuant to which the Council will adopt specific provisions defining the standards and methods for roadworthiness tests (in respect of the points enumerated in Annex II of Directive 77/143);
- the creation of a Committee for Adaptation to Technical Progress of the technical standards.

Intermediaries

Purchase itself is often rendered more difficult for a non--resident. Lower prices or rebates are reserved for nationals. Prohibitions of sale to foreigners are required by the manufacturers. The aim of this practice is to combat the parallel market organised by intermediaries. The conditions in which motor vehicle manufacturers must respect the activities of intermediaries are specified in the Communication of 18 December 1991 cited above.

Indirect taxes

Taxes differ greatly from one country to another. In its communication on "a large internal market for motor vehicles" the Commission says that "taxes that are so high that they seem exorbitant vis-à-vis the general framework of the national taxation system have an effect equivalent to barriers to trade. Also in the light of decisions expected from the Court of Justice on these matters, the Commission says it will adopt the necessary measures to promote real progress on this point".

Promotion of road safety

— *Introductory remarks*

Because of the 50 000 fatalities that occur each year and the 1 1/2 million injured, promotion of road safety is one of the major concerns of public health. But road accidents are not inevitable, it is possible to reduce the number of accidents, or at least road fatalities, by initiatives aimed at promoting road safety.

The Commission for various reasons can and should play an important role in road safety policy [25]. The most important reasons are: the differences between national regulations in force or the design and signalling systems of the road network may be a source of behavioural errors and thus causes of accidents; free movement following completion of the internal market will mean more cross-border traffic; however,car drivers know little about the highway codes of other Member States; since it is necessary to reduce accidents (or at least road deaths), it is essential that the Member States with the lowest accident rates should allow the other countries to benefit from their experience. The social and economic costs of road accidents for the Community are put at 70 billion ecus each year.

Despite the advantages of adopting initiatives at Community level and of greater cooperation between the Member States, there have been very few regulatory actions on the Community's part. This is because the Community's competence to act in this field is disputed, on the grounds of the principle of subsidiarity.

Consequently, despite the Commission's numerous initiatives, Community measures have focused mainly on programmes to stimulate actions by the Member States, which found concrete expression in the proclamation of 1986 as road safety year. Later, the Commission published a communication entitled "Road safety: a priority for the Community" [26], which was confirmed by a Resolution of the Council and the representatives of the governments of the Member States meeting within the Council of 21 June 1991 on a Community programme of action on road safety [27]. In parallel, the Commission presented the results of the report of a group of experts, proposing 67 technical measures to reduce road hazards.

Generally speaking, it is regrettable that so much time must elapse between the identification of a road safety initiative as necessary or useful and the time of adoption of a regulation transposing it into positive law, from the point of view of protecting lives.

Several domains of activity have been identified with a view to improving road safety. These include technical harmonisation of vehicles, because of the very close links this has with problems of free movement of motor vehicles. This area has been the subject of a very large number of Community directives, most of which are aimed at improving safety devices and safer design of vehicles, even if there are also long delays between the time an invention is identified as contributing to road safety and the adoption of stricter standards in the light of this invention.

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[24] OJ n° C 79 of 30 March 1992

[25] see also the opinion of the Economic and Social Committee of 26 February 1986 on the European road safety year, OJ n° C 101 of 24 april 1986, which recalls the necessity to implement at European level a concerted campaign to improve road safety.

[26] COM(88) 704 final of 9 January 1989

Actions undertaken by the Community

— improvement of user behaviour

Council Directive No 91/439/EEC on driving licences, OJ n° L 237 of 24 August 1991.

This Directive, which replaces a 1980 directive, aims at facilitating mutual recognition of national driving licences and also at confirming or tightening the minimum conditions for the award of driving licences. These conditions pertain mainly to the category of vehicle concerned, the age of the driver, success in an aptitude test and behavioural test, and in particular a medical examination.

Council Directive n° 92/6/EEC on the installation and use of speed limitation devices for certain categories of motor vehicles in the Community, OJ n° L 57 of 2 March 1992.

For heavy vehicles this Directive stipulates that the speed limitation device shall be regulated so that their speed cannot exceed 90 km/h, which at the present state of the art means that the maximum will be set at 85 km/h; in the case of buses whose maximum weight exceeds 10 tonnes the speed limitation device shall be set at 100 km/h.

Council Directive n° 91/671/EEC of 16 December 1991 on the approximation of the laws of the Member States relating to compulsory use of safety belts in vehicles of less than 3,5 tonnes, OJ n° L 373 of 31 December 1991.

The purpose of the Directive is to establish a uniform system concerning the obligations for front and rear seat passengers to wear safety belts in vehicles of less than 3.5 tonnes. The Directive also stipulates child restraint systems adapted to the weight and age of children on seats fitted with safety belts.

The Directive provides for certain derogations by the Member States as regards children: Member States may permit children aged 3 years and over to be restrained by a safety belt system approved for adult use, rather than by a specific system and children under 3 years of age occupying rear seats need not be restrained by a restraint system designed for children if such children are transported in a vehicle where such a system is unavailable. The Directive contains exemptions, along the lines provided for in numerous national laws (pregnant women, persons aged over 12 years of age who are less than 150 cm tall, etc).

The derogations provided for in the Directive, which limit its effectiveness, seem to result from the fact that the technical harmonisation work on the restraint systems for children has not yet been completed.

Despite this the Directive constitutes a great step forward in the protection of passengers. But this is not enough: vans and mini-buses also pose serious accident risks. Thus it will be necessary to introduce Community legislation providing for the presence of safety belts for passengers in these means of transport, and making it mandatory to wear such belts.

Proposal for a Council Directive relating to the maximum permitted blood alcohol concentration for vehicle drivers, OJ n° C 25 of 31 January 1989, amended in OJ C 11 of 17 January 1990.

This proposal, blocked within the Council, aims at establishing the maximum permitted blood alcohol concentration for vehicle drivers at 0.5 mg/ml, which is the strictest limit that exists in Europe at the moment.

Once it is adopted it will make a major contribution to improving road safety.

Other possible initiatives

The measures referred to above are the only ones that have been prepared officially within the Community institutions with a view to effectively influencing the behaviour of road users. However, a large number of additional measures had been identified, in respect of which the Commission should urgently prepare, and the Council adopt, precise and mandatory initiatives. These include:

- education and training, making pre-school and school training mandatory, and extending the practice of accompanied learner drivers;
- creation of a data base on road safety information campaigns conducted in the Community countries; regular organisation of opinion surveys on road safety at EC level;
- prohibition of advertising that encourages unsafe driving;
- harmonised motorway speed limit for the entire Community;
- abolition of the obligation to switch to the outer motorway lane for people driving at the maximum authorised speed;
- reduction of speed limits on roads other than motorways, in particular introduction of "km/h" zones;
- recommended wearing of helmets by cyclists;
- obligation to drive with dim lights on during daytime, etc.

Measures concerning road networks

Amongst the measures that have been identified in this category, none have yet been realised by the Community institutions. However, priority should be given to the following initiatives:

- improvement in the legibility of amenities and equipment;
- ranking of road networks and standardisation of characteristics by section and itinerary;
- possibility of avoiding traffic or driving slowly (emergency stopping lane), in order to make lateral obstacles less dangerous;
- uniform signposting system;
- development of anti-slide road coverings;
- systematic monitoring of road safety;
- establishment of common reference documents for the construction and maintenance of road networks.

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27 OJ No C178 of 9 July 1991.

Measures concerning safety organisation

Council Decision 91/396/EEC of 29 July 1991 on the introduction of a single European emergency call number.

This decision is described below, point 4.5.

Numerous other measures could be adopted, in this field as well, with a view to improving the effectiveness of safety organisation, in particular by providing elementary first-aid training to learner drivers, by extending the possibility of free emergency calls from public telephones and by developing emergency call networks on the large inter-city highways.

Chapter 3. Regulation of consumer services

3.1. General questions

As yet the Community institutions have not prepared texts of a preventative nature regulating the provision of certain services to consumers, with a view to protecting health and safety. Most efforts have been devoted to recognising diplomas for certain professions, so as to permit the free movement of services. While these texts may have an impact on consumer interests, in particular by defining standards for entry to a profession, they are not among the priorities set out in the Green Paper.

This absence of initiatives may be explained by the fact that, traditionally, services provided in the context of consumer relations are rarely of a transfrontier nature, and, consequently, as far as completing the internal market is concerned, there is no true distortion of competition between the Member States.

There seems to be some muddled thinking connected with the internal market policy: thus, in the domain of free movement of products, the Community has developed a pretty sophisticated system to ensure the safety of products marketed on the Community territory, by laying down mandatory safety standards. However, many products, in order to be used safely, also require - from the consumer's viewpoint - correct installation and adequate maintenance (boilers, lifts, etc). These two sectors are classified not under products, but under services. As free movement is not at issue, the Community has until now argued that it does not have the competence to lay down safety standards.

Moreover, in one domain which is transfrontier par excellence, that of tourism, the Council has taken a timid initiative to improve tourist safety as regards fire hazards in hotels.

However, European integration may in fact contribute to increasing transfrontier services and the Commission, in particular the Consumer Policy Service, has begun to devote attention to the safety of services, after having worked in the domain of liability for services and after the politicians at Maastricht gave it some more latitude.

3.2. Liability for products and services

When preventative measures to guarantee the safety of users of products and services are lacking, incomplete, or ignored, it is important that the legal system lays down liability rules for compensation of users or victims of accidents resulting from defective products or services. The Community legal system cannot escape this necessity, because the harmonisation of liability systems is an important prerequisite for eliminating trade barriers. The Community dimension of liability for defective products and services was identified very early on in the field of products - indeed the first discussion on a Directive relating to liability for defective products took place in 1973. However, in the field of services, the Commission did not begin work on liability until the end of the 1980s.

3.3. Liability for defective products

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ n° L 210 of 7 August 1985.

This Directive is the cornerstone of the Community system of product liability. It establishes a liability system without fault of the producers when the products they place on the market are defective. Thus it allows all victims (and not only the contracting partners) to appeal against the producer (and not the vendor) without having to prove his fault. The damages covered by the Directive are those caused by death, bodily injury or damage to property, less a forfeit of 500 ECU. In order to give rise to compensation for material damage to property under the Directive, the product must normally be considered as being a private consumption good and must have been used by the victim mainly for this purpose. The damage to the defective product is not compensated. Compensation for non-material damage is not envisaged by the Directive and is still the domain of national legislation on liability.

Based on Article 100 of the EEC Treaty, this Directive was submitted to the Council for unanimous vote. In order to overcome certain obstacles, it was decided to fall back on optional harmonisation in certain areas. Thus, the Directive gives the Member States three options:

- as far as its scope is concerned, the Directive excludes liability for agricultural products and game and allows the States to include them in their national legislation;
- while the Directive allows the manufacturer to exonerate himself from his responsibility if he proves that the fault is due to a development risk, it leaves Member States free to include development risks in the sphere of producer liability;
- the Directive allows the Member States to set a liability ceiling, fixed at a minimum of 70 million ecus. However, this option will be reviewed in 1995, both as regards consumer protection and on the functioning of the common market, on the basis of the possible effects of the implementation of this option by certain States.

Moreover, the Directive in no way affects the Member States national legislation as regards contractual or non-contractual liability, or in regard to any special liability system in force at the time of notification of the Directive.

Evaluation

Despite the numerous compromises that had to be made, the Directive was considered to be a fundamental advance in the protection accorded to consumers in Europe. The principle of liability without fault is a major step forward in the protection of victims. Moreover, liability is no longer linked to contract, so each *victim* can invoke the *producer* (the person who put the hazard on the market): moreover, the Directive prohibits all contractual restrictions on the protection it accords. Finally, it leaves the national systems intact which permit consumers to invoke contractual responsibility or non-contractual responsibility and applies over and above this legislation.

However, there are a number of major gaps in consumer protection:

- *proof of the defect*: the injured person must prove the damage, the defect and the causal relationship between defect and damage. In practice the defect of a product is very difficult for a non-expert to prove. This means that the injured person must surround himself with technicians and so his costs may escalate. Thus, in practice this proposal acts as a barrier to the exercise of legal recourse. For greater legal protection, the Community legislator should have opted for the principle of proof of the probability of defect, which has already been adopted in some countries, such as the United States.

- *Exoneration for development risks*: this is a major gap in protection. A system designed to protect victims of defective products should be based on the principle according to which all injured parties should be compensated. By excluding development risks it is possible for the producer to shift all risks linked to marketing new products to consumers. The exception would be invoked systematically by producers, thus burdening the procedures and possibly encouraging producers to hold back important scientific or technical data;

- *the liability ceiling*: the possibility for the Member States to fix a financial ceiling on liability may do injured persons a great injustice, because it means that the more victims there are and, thus the more dangerous the product is, the less they will receive. Moreover, calculation of compensation and thus distribution of the amount can give rise to big practical problems;

- *absence of a guarantee system*: the Directive does not make any arrangements to guarantee effective compensation of injured persons by establishing a guarantee fund, or even by establishing mandatory insurance systems. Thus it adopted an individualist approach and does not pay sufficient attention to problems in the event of insolvency of the producer, or in cases when the producer disappears;

- *limitation of the liability period*: the limitation to ten years after the product is first marketed is not acceptable except in the context of a liability system that includes development risks. This is not the case;

- *absence of a liability system* for intermediaries.

However, the real shortcoming of this Directive is that the provisions it contains are not in conformity with the objectives it sets itself: because of the options it leaves to the States, it only contributes in a limited way to harmonising rules and creates distortions in protection, depending on the State in which the liability is invoked.

Moreover, it leaves intact the national compensation systems for non-material damage, as well as the national rules relating to contractual and non-contractual responsibility, which differ significantly. In addition, the Directive does not answer the question as to the law that applies in the case of transfrontier disputes, and in this area the rules of international private law in the Member States also vary to a great extent.

As a result neither injured parties nor producers have a harmonised liability system. Producers will have to continue to adopt different attitudes if they wish to market their products in several Community States. Liability for defective products, both for injured persons and for producers, is still associated with great uncertainty as regards the rights and obligations emanating from the system which has been established.

The Commission, in its report on the application of the Directive which it has to submit to the Council by 1995 will have to pay particular attention to the following points:

- the preventive effect of the directive on control by producers of the goods which they place on the market;
- the effect of the directive on the number of legal disputes and on the outcome of the procedures;
- the effect of the principle of liability without fault, taking into account the obligation of the injured party to prove the defect of the product;
- the impact of options applied by the Member States, particularly as regards the number of disputes and compensation of victims;
- the number of disputes in which development hazards have been invoked, and the associated jurisprudence;
- the impact of the financial ceiling on compensation of injured parties;

3.4. Liability for defective services

Proposal for a Council directive on the liability of suppliers of services, OJ n° C 12 of 18 January 1991

In the field of liability of suppliers of services, work has been very slow. Indeed, the Commission did not submit an official proposal to the Council until the end of 1990. In the context of completing the internal market and free movement, it will entail a growing quantity of services giving rise to transfrontier situations. Accordingly, it is necessary in the interest

both of suppliers and users to establish a harmonised liability regime within the Community.

The text of the proposal seems to involve all sectors. However, in response to the uproar triggered by this horizontal approach, the Commission has declared that it will exempt the medical sectors and the construction industry from the directive's scope, provided they are dealt with in a specific directive. Nonetheless, despite the rapid establishment of working groups charged with the questions of liability and guarantees in the construction sector, the responsible departments within the Commission have not, so far put forward any proposal in either of the specified areas.

The proposal for a directive in its current version does not provide for a system of liability without fault. It establishes the principle according to which the supplier of services is liable for damages caused by his negligence; it is up to this supplier to prove the absense of fault on his part. Thus there is a presumption of fault which relieves the injured party from proving such a fault. The injured person must prove the damage and the causal relationship between the performance of the service and the damage. The directive covers both bodily injury and damage to property insofar as the latter affects consumer goods - without a financial ceiling on liability. It covers all types of services provided on a commercial basis as well as public services, whether provided against payment or free of charge. However, the proposal does not apply to public services intended to maintain public safety, as well as package travel and waste services. It prohibits contractual clauses designed to limit liability of the suppliers of services.

Assessment

On many secondary points the proposal constitutes an improvement as regards protection vis-à-vis the directive on product liability. On the other hand, the principle of shifting the burden of evidence is but a timid advance towards better legal protection of victims of defective services:

— it establishes the doctrine of liability with fault, rather than the more recent and equitable doctrine of liability for safety defects: on this point, it backsteps flagrantly by comparison with the directive on product liability, which was adopted unanimously;

— only in theory does it lighten the burden of proof for the injured person: in practice, the injured person must prove the causal relationship between the defective service and the damage. This means that he must prove the defect in the service. But in this domain the relationship between defect in service and the fault of the supplier is far more blurred than in the field of products. Thus it will often be up to the injured person to prove the fault of the supplier, by establishing the causal relationship.

Moreover, many of the provisions lack precision, in particular those relating to the exemption of certain types of services. Such lack of rigour does nothing to improve legal confidence and does not contribute to improving legal protection of the injured persons.

Several important aspects of liability law have not been taken into consideration in this proposal. Thus, there is no specific mention of its minimal character, allowing the Member States to maintain or adopt complementary provisions. In this context, since the proposal for a directive does not cover non-material damage, and since - by contrast with the 1985 directive - it does not specify that this domain is still covered by the national system - there is to say the least a lack of clarity as to the status of compensation for non-material damage. On the other hand, again in contrast to the 1985 directive, the proposal does not contain provisions on national systems of contractual or extra contractual liability. Unless such a provision is written into the text of the amended proposal, the directive, by refusing to allow national tribunals to apply national legal rules or principles more favourable to victims on the basis of contractual or extra-contractual liability, will lead to a reduction in the protection of victims in several Member States.

More importantly, there is a lack of parallelism between the text of the proposal and that of the directive on product liability. Thus, common notions, such as fault or persons protected, are defined in different ways. Moreover, since the liability systems are different, there is a major gap as regards regulation of liability for services accompanied by the supply of products, or vice versa.

Adopted in its current form, the proposal will contribute little to improving the legal protection of users. It leaves so many notions to the interpretation of the courts that it cannot have a favourable preventive effect for injured persons and may give rise to excessively complicated procedures, which might severely discourage the pursuit of legal actions.

Further work in connection with the adoption of this directive should take into account the need for effective protection of injured persons. Thus, the definition of clear notions would be a first step towards improving protection. Greater consistency between the current proposal and the product liability directive would contribute to clarifying rights and obligations; more fundamentally, the establishment of a liability system based on common criteria for products and services - and in particular the principle of liability without fault - would be a major factor in determining the directive's success. The institutions should take this into account.

As regards the sectors which the Commission has said will be exempted from the scope of the horizontal directive, it has begun work on guarantees and insurance in the construction sector, while it is still examining the need to establish a Community liability system for services in the medical sector. In this respect it is essential that work in the two sectors be based - as regards fundamental principles at any rate - at least on the protection guaranteed in the horizontal directive.

Chapter 4. Community public health policy

4.1. General principles

The Community institutions have already adopted several legislative texts, which in one way or another have a substantial influence on health: thus, Community regulation of medicinal products, or of conditions for the free movement of members of the medical and paramedical professions have a significant impact on the quality of health care in Europe. However, at the level of preventive public health policy, they are by no means as far-reaching.

The foundation for Community action in the field of public health was laid in 1978 and, in parallel, a budget line was created. From the beginning two domains were considered as having priority: prevention of illness and health costs, with a view to encouraging the exchange of knowledge and at stimulating cooperation.

In reality Community action in the field of public health is confined mainly to cooperation between the Member States. Neither the Treaty of Rome nor the Single Act give the Community institutions any competence in the field of public health. This situation will only be slightly improved by the introduction into the Treaty of Political Union of a specific proposal concerning public health, which mainly defines conditions for cooperation and assistance.

On the whole, too, there has up to now always been a very long delay between the preparation of a public health initiative and its definitive adoption.

In 1984 the Commission identified three priority areas of intervention: drug addiction, tobacco smoking and infectious diseases. Amongst these priorities, the fight against cancer became the most important action programme between 1987 and 1989 [28], and was extended by a second action plan for 1990-1994 [29].

On 11 November 1991, the Council and the Ministers for Health, meeting within the Council, adopted a Resolution concerning fundamental health-policy choices, in which they emphasise that it is a matter for the Member States to determine the organisation of their health-care systems, but underline the desirability and necessity of closer cooperation between the them. Thus, the exchange of data, the continued application of specific Community programmes, the stimulation of scientific and public debate, the revision of medical studies syllabuses in order to incorporate the relevant economic, legal, ethical and social aspects necessary to ensure that practitioners dispense adequate health care, analysis of the probable impact of the internal market on national health policies, the medical sector in the States and medical and paramedical staff, and analysis of the Community's possible contribution to removing disparities between supply and demand have all been identified as topics which warrant joint consideration. The Commission is called on to prepare a report before the end of 1992 as a step towards a more detailed discussion on topics within the Community's field of competence and which warrant joint consideration.

On the same day the Council and the Ministers of Health adopted a resolution on health and the environment, in which they invite the Commission to encourage efforts aimed at clarifying the relationship between health and the environment.

- *Fields of action*

4.2. Fight against certain diseases

The anti-cancer campaign comprises approximately 40 action domains. The Ministers for Health of the Member States, meeting within the Council on 4 June 1991, have identified the following priorities: education at school, total prohibition of direct and indirect advertising for tobacco, increase in price of tobacco products and alcoholic beverages, ban on smoking in public places, at the workplace and public transport, to avoid the harmful effects of passive smoking, improvement of programmes for early detection of cancer and for establishing and generalising cancer registers, research into chemical and physical agents which are suspected carcinogens, and reduction in subsidies to tobacco crops within the Community. These conclusions have given rise to detailed measures, which will be examined below.

The Community has also adopted a 1991-1993 "Europe against AIDS" programme by a decision of 4 June 1991, which comprises ten action domains: assessment of the knowledge, attitudes and behaviour of the general public and target groups, information and increrasing of awareness, health education for young people, prevention of HIV transmission, social, support, counselling and medical assistance, estimating the cost of managing HIV infection, data collection, enhancement of human resources, measures to combat non-discrimination against HIV-infected persons and persons close to them, research and international cooperation.

The Community has also, in a resolution of 3 December 1990 on a Community action on health and nutrition [30], declared 1994 the "European Nutrition Year" for which the Commission is preparing an action programme geared mainly to informing the public on the relationship between an appropriate diet and the prevention of certain diseases.

This action programme is welcomed by the CCC, which hopes however that other common policies, such as the common agricultural policy can be given more emphasis in this context.

4.3. Campaign against drugs

Conclusions of the Council and the Ministers for Health meeting within the Council of 13 November 1989 on the implementation of coordinated measures for preventing drug addiction and coping with drug addicts [31].

28 See in particular Decision 88/351, OJ No L 160 of 28 June 1988
29 Decision 90/238, OJ n° L 137 of 30 May 1990
30 OJ n° C 329 of 31 December 1990
31 OJ n° C 31 of 9 February 1990

The conclusions of the Council aim at stimulating exchange of practical experience.

Council Regulation (EEC) No 3677/90 of 13 December 1990 laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances, OJ n° L 357 of 20 December 1990.

This regulation implements Article 12 of the United Nations Convention against the illegal traffic in drugs. It is only a first step and aims only at monitoring traffic between the Community and third countries.

Proposal for a Council directive on the manufacture and the placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances, OJ n° C 21 of 29 January 1991.

This proposal supplements Council Regulation 3677/90. It establishes a documentation, registration and marking system and defines the monitoring and cooperation measures applicable. It also concerns intra-Community monitoring of substances used in the illicit manufacture of narcotic drugs.

Resolution of the Council and the Minister for Health, meeting with the Council of 11 November 1991 on the treatment and rehabilitation of drug addicts serving sentences for criminal offences.

This resolution, which is one of the initiatives aimed at reducing the demand for drugs, invites the Commission to draw up a systematic inventory of social and health policies, measures and actions conducted concerning persons placed in penal establishments or in an establishment subject to judicial supervision.

Moreover, the Commission is preparing a proposal for a regulation on the setting up of a European observation post for drugs and drug addicts, coupled with a European information network on addictive drugs (REITOX). This proposal is aimed at providing States with objective, reliable and comparable information.

4.4. Campaign against alcoholism

Despite certain actions taken in the fight against cancer and the adoption of several resolutions by the European Parliament, there are no specific measures in this field. On the contrary, measures have been adopted in the context of the common agricultural policy with a view to promoting alcoholic beverages originating in the Community.

4.5. Organisation of emergency services

Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 29 May 1986, concerning the adoption of a European health card, OJ n° C 184 of 23 July 1986.

The resolution recommends the States to make available to persons who so wish a European emergency health card which will make it possible to identify their current or past health problems, and which has to be completed by a medical practitioner in line with the model annexed to the resolution. It leaves it to the States to define the standards applicable to the preparation and updating of the card, to determine the information it should contain and its confidentiality.

Council Decision 91/396/EEC of 29 July 1991 on the introduction of a single European emergency call number, OJ n° L 217 of 6 August 1991

This decision calls on the Member States to introduce the number 112 in public telephone networks as well as in future integrated services digital networks and public mobile services, as the single European emergency call number. This number may be introduced in parallel with any other existing national emergency call numbers where this seems appropriate. The number 112 must be introduced by 31 December 1992 at the latest, except where particular technical, financial, geographical or organisational difficulties arise for a Member State. In this event, the Member State must inform the Commission and set a new date for application, which may under no circumstances be later than 31 December 1996.

The purpose is to eliminate national divergencies which pose problems for citizens when they have to contact the responsible services in other Member States in emergencies, which will become more and more frequent in the context of European integration.

Council Resolution of 4 December 1990 on improving of prevention and treatment of acute human poisoning, OJ n° C 329 of 31 December 1990.

The aim of this resolution is to create a database on poison centres and their activities, to ensure optimum availability of antidotes and to increase the practical scope for using them, as well as to provide better emergency services in the peripheral regions of the Member States.

4.6. Campaign against tobacco

This area has, without doubt, seen the most initiatives which will have a binding character for the States and their citizens. The campaign against tobacco addiction is part of the framework of the "Europe against Cancer" [32] programme which contains 14 proposals for action: increase in taxation on tobacco, financing of preventive actions at national level by using financial resources that have accrued through taxation, harmonisation of cigarette labelling in the EC, ban on high-tar cigarettes, harmonisation of standards regarding ingredients in tobacco smoke, ban of tax-free sale of tobacco, protection of children, reorientation of tobacco products towards less toxic varieties, study of conversion possibilities, information and public sensitisation campaigns in the fight against tobacco, Community action in the field of banning smoking in public places, study of the possibility of regulating advertising of tobacco products, and comparative analysis of anti-tobacco campaigns.

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[32] OJ n° C 50 of 26 February 1987

Several of these actions have given rise to regulatory texts, which have been adopted or are currently under discussion:

Council Directive n° 92/41/EEC on the approximation of the laws, regulations and administrative provisions of the Member States on the labelling of tobacco products and the prohibition of the marketing of certain tobaccos for oral use, OJ n° L 158 of 11 June 1992.

This directive amends Directive 89/622/EEC, which mainly concerns cigarettes: it extends to tobacco products other than cigarettes the obligation to include health warnings on the packaging and bans the marketing of certain tobaccos for oral use.

As regards tobaccos for oral use, the directive prohibits the marketing of new products with particular hazards: all tobaccos for oral use in powder or particulate form or in any all combinations of these forms. The directive covers products which are particularly attractive to young people and have already been totally banned in certain Member States.

Proposal for a Council directive on advertising for tobacco products in the press and by means of bills and posters, OJ n° C 116 of 11 May 1990

This proposal concerns advertising by radio, press, posters, cinema and any other type of advertising. Television advertising is already covered by Directive 89/522/EEC of 3 October 1989, Article 13 of which prohibits all forms of direct or indirect advertising for tobacco products.

The proposal, in its amended version of 17 May 1991 [33] stipulates complete harmonisation of advertising for tobacco products and is designed to ban such advertising. It relates both to direct advertising and indirect advertising (e.g. on clothing). The only authorised advertising is within tobacco sales outlets provided that it is not visible from outside the premises.

The proposal makes it possible for organisations, in particular consumers' organisations, to take legal action against advertising infringing the provisions of the Directive. It also allows the Member States to adopt measures relating to advertising for tobacco products that they deem necessary to guarantee the health protection for their citizens, provided such measures comply with the directive.

Following the opinion of the European Parliament, the Commission is currently drafting a further amendment of its initial proposal. The Commission has furthermore accepted the insertion of a new amendment which seeks to allow a derogation from the complete Community-wide prohibition of indirect advertising if a brand name has been registered for products other than tobacco products, but that same brand name is also used to market tobacco products, provided that:

- the turnover of the tobacco products marketed under the same trademark (even by a different company) is not more than half the turnover of other products;
- this trademark had first been registered for products other than tobacco products. [34]

Moreover, a draft Council recommendation on banning smoking in public places, published in 1989 [35], has not yet been adopted. This recommendation calls for banning of smoking in closed areas which are used by the public, but stipulates that clearly defined areas must be reserved for smokers. It also specifies that in the event of a conflict the right of the non-smoker to health shall prevail over the right of the smoker to smoke. This ban on smoking is also extended to all public transport.

There is also a Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes, whose primary objective is harmonisation, for reasons connected with the free movement of these goods within the Community, taking as a basis a high level of public health protection in order to reduce the health damage caused by tar.

Section 2

Protection of consumers' economic interests

Chapter 1. Legislation on advertising

1.1. Misleading advertising

Council Directive n° 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ n° L 250 of 19 September 1984

Misleading advertising is understood as any advertising which in any way is likely to deceive the persons whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which is likely to injure a competitor.

The Member States must establish (administrative or judicial) supervisory bodies empowered to order the cessation or prohibition of the advertising.

The supervisory bodies must have the power to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if this proof is not detrimental to the legitimate interests of the advertiser and is appropriate to the circumstances of the particular case.

This directive is minimalist.

From the point of view of protecting consumer interests, the following remarks must be made:

- the scope is too limited, and unfair advertising is not covered;
- the right of associations to act is not recognised clearly;

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33 OJ n° C 167 of 27 June 1991

34 COM (92) 196 final of 30 April 1992.

35 OJ No C 32 of 8 February 1989.

— reversal of the burden of evidence is very limited;

— the directive is ineffective in combating transfrontier misleading advertising;

— the directive does not protect the consumer who *has concluded* an agreement on the basis of misleading advertising.

1.2. Television advertising

Council Directive n° 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the pursuit of television broadcasting, OJ n° L 298 of 17 October 1989.

The main objective is to encourage the free movement of television broadcasts. The Member States must ensure freedom of reception and retransmission on their territory of television broadcasts from other Member States, provided the broadcasts comply with the minimum conditions contained in the Directive.

Organisation of advertising

The Community legislator has sought to avoid confusion between programmes and advertising. Article 10 specifies that:

— advertising must be readily recognisable;

— isolated advertising spots must remain the exception;

— subliminal or surreptitious advertising is prohibited.

Interruption of programmes by advertising

Article 11 establishes a complex system allowing the insertion of advertisements during programmes under certain conditions.

Amount of advertising

This is subject to a **double limit**:

— maximum of 15% of the daily transmission time

— maximum of 20% per hour.

Ethical principles

Television advertising must not prejudice respect for human dignity, include any discrimination on the basis of race, sex or nationality, be offensive to religious or political beliefs, or encourage behaviour prejudicial to health or to safety, or encourage behaviour prejudicial to protection of the environment.

Protection of minors

Advertising must not cause moral or physical detriment to minors. For example, it must not exploit the special trust minors place in parents or unreasonably show minors in dangerous situations.

Regulation relating to certain products

Advertising of cigarettes and other tobacco products is prohibited. Advertising of medicinal products and alcoholic beverages is restricted.

Monitoring

Appropriate measures must be taken to ensure compliance with the provisions of the directive. A Member State may provisionally suspend the retransmission of broadcasts from another State if the broadcasts repeatedly infringe the directive's provisions, and after due consultation with the transmitting State.

Assessment

The main criticisms of this directive relate to the following points:

As regards monitoring:

— transfer of monitoring to the transmitting country risks leading to "unequal deregulation", insofar as harmonisation is limited and vague;

— the directive says little about internal monitoring. A priori monitoring has not been made mandatory;

— the suspension of broadcasts is subject to a complex procedure which means it will not often occur in practice.

As regards advertising and sponsorship:

— by arbitrarily separating advertising and sponsorship, the directive fails to recognise current strategies of advertisers and is limited to a very conventional view of television advertisements. The French National Consumer Institute worked out that if all forms of advertising are considered, the volume is two to three times the quantity authorised.

As regards organisation of advertising:

— Amount of advertising: the consumers' organisations consider that it should be less than 10%.

— Interruption of programmes: the rules are too vague and too liberal.

1.3. Tobacco advertising

Amended proposal for a Council directive on advertising for tobacco products, OJ No C 167 of 27 June 1991

The proposal is analysed in detail above, Section 1, 4.6.

1.4. Advertising of medicinal products

Council directive n° 92/28/EEC on advertising of medicinal products for human use, OJ No L 113 of 30 April 1992

The directive lays down specific rules for advertising intended for the public and also for professionals, as well as the general

rules which apply to all those to whom the advertising is directed. The directive prohibits all advertising of a medicinal product in respect of which a marketing authorisation in accordance with Community law has not yet been granted. In the case of authorised advertising, all particulars of the advertising of a medicinal product must be compatible with the information listed in the summary of product characteristics and should encourage the rational use of the medicinal product. The advertising must not be misleading.

In the case of advertising aimed at the general public, the directive prohibits advertising of

- medicinal products which contain psychotropic or narcotic substances;
- medicinal products which are only available on prescription;
- medicinal products which are not likely to be made the subject of an advertisement. Article 3.2 does not permit the advertising of medicinal products intended to be used without a doctor's involvement (for diagnosis, prescription or supervision of treatment).

The distribution of medicinal products for promotional purposes is prohibited.

Moreover, advertising aimed at the general public is subject to certain negative conditions (prohibition of the suggestion that the product is a foodstuff, of children as sole target group, etc.) and must contain certain mandatory particulars (indication that it is an advertisement, identification of the product as medicinal, etc.).

Certain promotional practices aimed at professionals are limited in order to preserve a certain independence for prescribers of medicinal products. Thus, the pecuniary rewards and advantages have to be of negligible value. Hospitality offered during demonstrations of a promotional or scientific character must be kept at a reasonable level and must remain subordinate to the purpose of the demonstration. The provision of free samples must remain exceptional and be subject to strict conditions.

Each national legal system must include provisions allowing persons who have a legitimate interest to call for the prohibition of advertising incompatible with the directive either by taking legal action or by bringing such advertisement before an administrative authority. The action may lead to the discontinuance, correction or withdrawal of the advertising, or even to the publication of a corrigendum.

Member States may suspend marketing authorisation if the directive's provisions are not respected.

1.5. Comparative advertising

Proposal for a Council directive concerning comparative advertising and amending Directive 84/450/EEC concerning misleading advertising, OJ n° C 180 of 11 July 1991

This proposal aims at allowing comparative advertising and harmonising its use. Comparative advertising is defined at *"any advertising which explicitly or by implication identifies a competitor or goods or services of the same kind offered by a competitor"* (Article 2, point 3).

With a view to protecting the interests of consumers and competitors, the directive defines that which is acceptable in comparative advertising. In reality, the conditions are that such advertising must be compatible with healthy and fair competition.

The proposal stipulates certain limits for comparative advertising: the comparison may not be misleading, it may not cause confusion in the market place between the advertiser and a competitor; the comparison may not "discredit, denegrate or bring contempt on a competitor or his trademarks, trade names, goods, services or activities". In plain language this means that, apart from the inevitable effects of a comparison which could be considered as unfair, it is forbidden for an advertiser to emphasise his advantage by denigrating his competitor, or by spreading malevolent information or criticism. Finally, the text protects trade names against abuse. Thus, comparative advertising may not be made in conditions which allow the advertiser to capitalise on the reputation of another trade mark or manufacturer's name.

As regards comparative tests carried out by third parties, use of their results in an advertising message will not be permitted unless the person who has carried out the test gives his express consent. Moreover, the advertiser must assume responsibility for the comparative tests as if he had carried it out himself or been responsible for the test.

It is regrettable that the directive's provisions concerning comparative advertising will not be minimal, and thus will not allow the Member States to regulate more stringently the conditions under which comparative advertising is permissible.

Chapter 2. Contracts concluded by consumers

2.1. Unfair terms

Proposal for a Council directive on unfair terms in consumer contracts, OJ C 243 of 28 September 1990, p. 2.

The aim of the proposal is to permit the elimination of unfair terms in consumer contracts. It concerns contracts concluded with a consumer by any person acting in the course of his trade, business or profession, irrespective of the form of the contract.

The initial proposal defines several criteria with a view to determining a term as being unfair: significant imbalance, unduly detrimental performance, significantly different performance, incompatibility with good faith.

The proposal also provides in an annex a list of terms considered as unfair (liability, alteration of contractual terms, warranty, price, burden of proof, timesharing).

According to the proposal, the Member States must do all in their power to ban the use of unfair terms in all contracts concluded with a consumer. Thus, countries are free to choose the means that suits them (administrative, legislative, judicial) to render void terms which such contracts might contain notwithstanding the prohibition. These means must include provisions whereby persons or organisations regarded under national law as having a legitimate interest in protecting consumers may take action before the courts or before an administrative authority competent to make a decision for determination as to whether a term is unfair or not. Moreover, a ban may be brought against a single professional or against several professionals or their companies who use or recommend the use of certain standard or similar terms.

The penalty attaching to an unfair term is that it is void. The other terms continue to be valid and the contract continues to bind the parties if it is capable of continuing in existence without the void provisions.

On 29 June 1992, the Council reached political agreement on a common position. This common position in retracting a large part of the principles enumerated above, appreciably reduces the scope of the directive as initially proposed by the Commission: the directive will only apply to standard terms. It apparently excludes terms which define the principal subject of the contract or which have a bearing on quality/price. Moreover, the list of unfair terms provided in the annex (which is considerably shortened) constitutes only an indicative list which will allow Member States to consider as permissible, in certain circumstances, the use of a given term contained in the list. On the other hand, the common position authorises Member States to maintain or adopt stricter provisions in order to protect the consumer.

Assessment

The common position is the result of more than eight years of work. Despite this, it only represents minor progress with regard to existing national legislations. In reality it constitutes only the lowest common denominator of these laws, a large majority of which provide greater protection. It is up to the European Parliament to restore the equilibrium between consumer protection and contractual freedom, broken by the common position.

2.2. Contracts concluded away from business premises

Council Directive n° 85/577/CEE of 20 December 1985 to protect consumers in respect of contracts negotiated away from business premises, OJ No L 372 of 31 Decembre 1985

The directive concerns contracts concluded between a trader and a consumer:

- during an organised excursion;
- during a visit to the consumer's home or place of work;
- where the visit does not take place at the express request of the consumer.

The directive, which aims at minimum harmonisation, contains many exemptions:

- possibility of excluding contracts for less than ECU 60;
- contracts relating to immovable property;
- contracts for goods intended for current consumption;
- contracts by correspondence;
- insurance contracts;
- contracts for securities.

The directive prescribes certain rules relating to the form and content of the contract. Consumers must be given written notice of their right of cancellation within a special period. He has 7 days to reconsider starting from the date on which he is informed in writing of this right.

National law regulates return of goods or services and reimbursements.

2.3. Distance contracts

Proposal for a Council Directive on the protection of consumers in matters relating to distance contracts. OJ n°C 165 of 23 June 1992

Commission Recommendation of 7 April 1992, on codes of conduct for the protection of consumers in matters relating to distance contracts, OJ n° 156 of 10 June 1992.

The proposition seeks to regulate contracts concluded without the simultaneous physical presence of presence of the supplier or provider of services and the consumer, using a distance communication technique.

The directive does not apply to:

- automatic vending machines;
- computerised commercial premises;
- products produced for personalised use;
- reservation services;
- supply contracts concerning foodstuffs, beverages or other everyday consumer goods or services.

Consumer information is to be introduced in two phases:

- *at the time of application*, the consumer ought to be informed in a clear and unequivocal manner particularly on the following items:
- the identity of the supplier;
- the key features of the product or service;
- the price, quantity and transport cost (if any);
- the method of payment, terms of delivery or fulfillment;
- the duration of the validity of the application.

- *at time of completion at the latest*, the consumer must receive in *writing* and in the language used in the appli-

cation, information on the essential characteristics of the operation (price, quantity, method of payment, right to cancel, etc.).

The consumer may cancel the contract during a period of seven days following receipt of the product or service. Where a product or service is acquired on credit, the credit contract will be annulled if the right to cancel is utilised.

If payment is made by means of a credit card, and only the number of the card has been given or electronically read, any questioning of the validity of the transaction by the cardholder entails its annulment.

If a product or service is sent without prior demand by the consumer, the latter may use it as he sees fit.

The proposal allows any given consumer organisation to take action in law in another Member State.

The consumer cannot waive the rights conferred by the directive.

The proposal does not contain a provision allowing Member States to improve consumer protection.

Moreover, the Commission urges professional suppliers' organisations to adopt codes of practice stating precisely, for the sectors concerned and the means of communication used, the minimum rules contained in the directive. These codes should cover sales promotion techniques (gifts, discounts, lotteries), financial security, right of withdrawal, presentation of offers, etc.

Assessment

The proposal constitutes considerable progress in the protection of the economic interests of consumers. It corresponds to a need for the regulation of a sector which is too often fraught with shortcomings in the matter of information and aggressive commercial practices. A Community level action is all the more justified since distance promotional operations are very often transnational in nature and national consumer protection systems are insufficient to deal with all the problems met by consumers in transactions.

The proposal is not, however, above criticism:

- the exclusions are too many : why should reservation services be exempt from the provision concerning credit card payment?
- if the codes of practice must precisely state certain rules, how much more should these rules be stated in the directive itself? In the matter of financial security, for example, the proposal does not provide any guarantee for the consumer who makes advance payments, especially those payments going to firms located in other Member States.
- the absence of sanctions : the directive should provide for sanctions, at least civil ones, for the non-respect of obligations on the part of the professional.
- The States should have the power to raise the protection level.

2.4. Timesharing

Proposal for a Council Directive on the protection of purchasers in contracts relating to the utilisation of immovable property on a timeshare basis OJ n° C 222 of 29 August 1992

By buying into timeshare or timesharing, the right is acquired to stay for one, or several weeks in a fully furnished and equipped apartment, villa or holiday bungalow. In the course of a year the same dwelling caters for some several dozen households or families.

Most often these appartments or bungalows are situated in club-type complexes with various communal facilities (parks, swimming pools, playgrounds, etc.) in sunny (or snowy) areas such as Spain, the Balearics, Portugal, the South of France, the Alps, Florida, California, etc.

This occupancy right involves a wide range of legal forms and its duration varies, (according to the area and the country), from 20 to 99 years and, in some cases, is unlimited.

The sale of this new style of holiday has been the subject of numerous complaints concerning agressive sales techniques, misleading advertising, the non-respect of contract by the seller etc.

The Commission proposal, without entering into the legal maze of such an operation, seeks to guarantee certain essential rights for the consumer and to clarify the nature of this type of agreement.

The timeshare contract is defined as any contract by which a vendor transfers or undertakes to transfer to a purchaser, on payment of a certain price, a real property right or any other right relating to the utilisation of immovable property at a certain time of the year, which may not be less than one week, and which covers a minimum period of three years.

National legislations are to guarantee:

- the effective occupation of the property;
- the transfer of the real right or any other right of use in respect of the property;
- where appropriate, the right to use common services (swimming pools, sports facilities etc.);
- the purchaser's right to be involved in the process of making any decisions concerning the administration, management and maintenance of the timeshare;
- the purchaser's right to hold the vendor's guarantees concerning the proper completion of the building.

The proposal structures the consumer's consent so that progress toward contractual agreement is based on clear knowledge of the undertaking.

The vendor is bound to provide the potential purchaser with a detailed and unequivocal information document covering every aspect of procedure, in a language which the purchaser has consented to use.

The contract, which must be in in writing, must contain all the essential characteristics of timeshare. The purchaser has the right to withdraw during a cooling off period of 28 days to be counted from the date of conclusion of the contract (14 days if the timeshare is located in and only applies within the purchaser's country of residence).

The purchaser cannot waive his rights under this directive. The directive is minimal in nature, allowing States to adopt or maintain provisions which are more favourable with regard to protecting the interests of the purchaser.

Assessment

The principles adopted by the Commission should allow the consumer to enter into timeshare contracts with a higher degree of security.

But is a sectoral directive the most effective means of fighting against existing unfair practices for only a set period of time and in a single sector? Would it not be more appropriate to anticipate a global framework which would allow for the termination, if necessary, of any unfair practices which may come to light in any given sector?

Conclusions

The European legal space is still very disjointed. Each country forms a particular space with its own laws, practices and courts. The multiplicity of these systems can only constitute an obstacle to free circulation within the market.

Referral back to rules of legal coflict is the most commonly employed technique (Rome convention, assurance directives, etc.) This technique can only be seen as a palliative in terms of its complexity and the uncertainties that it is intended to iron out in the context of national rights and jurisdictions.

In certain areas, not one initiative has been taken by the Community (for example, guarantee with regard to hidden defects, the obligation to provide information, defects in agreements and business practices in general). These are the laws which currently apply to consumer contracts but which still differ from Member State to Member State.

A true Europe necessitates their harmonisation. It is conceded that this is not an easy endeavour, particularly since it touches the very heart of civil rights and cultural traditions.

Chapter 3. Regulation of financial services

3.1. General provisions

The Treaty of Rome

First Council Directive n° 77/80/EEC of 12 December 1977 on the coordination of laws, regulations and adminstrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ No L 322 of 17 December 1977

Second Council Directive n° 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ No L 386 of 30 December 1989.

The title of the Treaty of Rome dedicated to the free movement of persons, services and capital, which is part of the "foundations of the Community" contains a certain number of articles which directly or indirectly concern financial services. Thus, Article 52 provides for the progressive abolition of restrictions on the freedom to set up agencies, branches or subsidiaries in another State; pursuant to Article 58, this freedom also applies to firms formed in accordance with the law of a Member State, provided they have a real link with the Community (registered office, central administration or principal place of business).

Similarly, the Treaty provides for the progressive abolition to obstacles to the free provision of services, in the context of a general programme to be established by the Community institutions (Articles 59-66). While the provisions apply both to legal and natural persons operating in the financial sector, the specificity of the latter was expressly recognised in the initial version of Article 57 (2): this article stipulated unanimity for the adoption of measures relating to protection of savings and, in particular, the granting of credit and the exercise of the banking profession, while Article 61 (2) says that *"the liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of movement of capital"*.

These provisions have often been submitted for interpretation to the "Court of Justice. In 1974, in the REYNERS and VAN BINSBERGEN judgements [36], the Court ruled that Articles 52, 59 and 60 (3) of the Treaty are directly applicable and create individual rights which the law of the Member States must protect: in the second judgment, the Court estimated that this direct effect obliges the States to abolish discriminatory measures against the provider of the service by reason of his nationality or the fact that he is resident in a State other than the one in which the service is provided.

Establishment of the non-discrimination principle was certainly a step forward but from the practical viewpoint it did not bring any major advantages as regards interpenetration of markets. Indeed, the laws of the Member States were very divergent and the fact that a bank had to conform to very different rules whenever it wanted to work in another country, constituted a major obstacle to the geographical expansion of its activities. Moreover, in certain Community countries (Denmark, France, Ireland, Italy) the competent authorities may refuse admission to new banks and even to new branches, whether national or foreign ones, on the grounds of the absence of "an economic need in the market". This criterion was interpreted in a discretionary manner by the national supervisory authorities, and meant that all activities of Community banks could be rendered well-nigh impossible.

[36] Cases 2/74 and 33/74, Reports, pp. 631 and 1299.

3.2. Banking activities

For these reasons the Commission in December 1974 proposed a first directive on coordination which was adopted on 12 December 1977. This directive defines certain minimum conditions for the taking up and pursuit of the business of credit institutions:

- the credit institution has to possess separate own funds, it being up to each State to determine the quantity;
- the credit instition must possess adequate minimum own funds;
- there must be at least two persons who effectively direct the business of the credit institution;
- the persons must have sufficiently good repute and sufficient experience to perform their duties.

The first coordination directive finally made it mandatory for supervisory authorities to collaborate whenever a bank has branches in a country other than the country in which it has its main office.

In 1983, in its Communication on financial integration, [37] the Commission said that the specifically financial dimension of European construction was currently underdeveloped and fragmentary and contrasted with the progress that had been achieved in other domains. However, the creation of a European financial market was more necessary than ever: without it, strengthening of the common market would be compromised.

The Commission proposed a new approach in 1985 in its White Paper on the Completion of the Internal Market. This approach abandons the traditional method of abolishing restrictions while coordinating national legislation.

Following the Single Act, adoption of directives in the field of banking has accelerated. The second directive is aimed at the introduction of a single authorisation for all the Community and, by extension, application of the principle of "home country control". It abandons the idea of preliminary and generalised harmonisation of legislation presented in the first directive. Its approach is to harmonise only in regard to matters considered to be essential. This harmonisation is considered to be necessary but sufficient to enable the application of the principles of single authorisation and "home country control" to credit institutions operating via branches or via the provision of services on the territory of a State other than the State of origin. However, the approach is not limited to mutual recognition of authorisations and systems of prudential control. Is the host State also obliged, by this directive, to dispense with the full application to the institutions in question of its own legislation governing the activities which benefit from this mutual recognition? It should not be forgotten that the primary objective of this directive (and of those that accompany it) is to lay down minimum rules governing credit institutions and not to regulate the exercise of these activities as such.

Thus, the directive's principal measures are aimed at coordination of conditions permitting access to the business and coordination of the minimum rules concerning permanent administrative supervision of the economic agent in the exercise of his activities from the point of view of liquidity, solvency and good repute of the managers and main shareholders, and good organisation from the administrative and accounting viewpoint.

However, the mutual recognition of the exercise of banking activities is not actually one of the provisions of the second directive. This principle is formulated only in a recital: *"..the Member States must ensure that there are no obstacles to carrying on activities receiving mutual recognition in the same manner as in the home Member State, as long as the latter do not conflict with legal provisions protecting the general good in the host member State".*

As the Economic and Social Committee sees it [38], the directive should not have the effect, when this is not its objective, of overriding in any State, national legislation in the field of fair competition in business transactions, or of preventing fair practices in commercial dealings recognised by statute or in case law.

This concerns in particular the legal provisions on the publishing of prices and, more generally, transparency of conditions or conditions for the sale or provision of services, banning sales or services linked to bonuses, etc.; prohibition of misleading advertising; prohibition of the peddling of certain products, etc.

Provisions of this nature, while they may constitute an obstacle to the free provision of services, are nevertheless justified on grounds of the general good. Without coordination, harmonisation and approximation of legislation of this kind, they will remain in force and can be invoked not only in respect of the branch of a credit institution established in a State in which they apply, but also in respect of the provider of a service, even if he is approved in his State of origin and even if the service is included in the list annexed to the proposal for a directive.

3.3. Means of payment

Commission Recommendation of 17 November 1988 concerning payment systems, and in particular the relationship between card holder and card issuer, OJ No L 137 of 24 November 1988.

In view of the growing popularity of credit cards and their increasing use abroad by individuals, the Commission has adopted measures with a view to ensuring compatibility of the cards and also to maintaining balance in the contractual relations between the issuer and the consumer.

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37 COM(83) 207 final of 20 April 1983

38 ESC Opinion, OJ n° C 318 of 12 December 1988

A prerequisite for interoperability is that the cards and card reading devices be technically compatible from one country to another. European standards have already been adopted. Others are being drawn up, particularly for cards containing microprocessors, by the European Standardisation Committee (CEN).

On the other hand, it is essential that the firms that issue such cards cooperate so as to accept cards from other companies in payment operations. This cooperation can only be carried out provided competition rules are respected (in particular as regards commissions).

The purpose of the Recommendation of 17 November 1988 is to standardise and approve protection for cardholders.

Certain measures concern consumer information (written contracts, easily understandable, use of the vector language, transparency). There is a general obligation on the issuer to act fairly. This implies that no means of payment can be dispatched to a member of the public except in response to an application from such persons.

It is in the execution of the contract that the recommendation is most innovatory and, equally, most contested. It lays down limits on the issuer's responsibility in the event of theft or loss of the card. Once the cardholder has notified the issuer of loss or theft, he is no longer liable, unless the issuer can prove that the holder was extremely negligent or acted fraudulently. Extreme negligence is not itself defined. It certainly includes the case of placing the confidential code number on the card or on an attached document, at least if this number is easily readable and unambiguous. Indeed, the proliferation of cards and, consequently, of confidential codes, does not allow the consumer to remember them all. It is logical that these numbers should be located, in a more or less concealed manner, in the card-holder's wallet.

From the time of loss or theft of the card to the time of notification, the holder has to pay for the consequences up to a threshold of 150 ecus.

Assessment

The recommendation should have been applied voluntarily by issuers by 17 November 1989. Otherwise the Commission had committed itself to taking "appropriate measures", this being understood as adoption of a directive.

Three years after the time limit, the recommendation is still not applied generally. Certainly, the issuers apply the principles, but not all of them. At European level, the representative professional organisations have raised numerous objections, in particular on questions relating to liability in the event of theft or loss.

The difficulties of implementing this recommendation suggest that this is type of instrument is not very promising, in particular in a field in which there are few legal constraints.

If such instruments are to be genuinely useful to consumers, four essential conditions must be fulfilled:

— the existence of mandatory standards or a legal framework within which voluntary initiatives may have their place: codes of conduct are no valid substitute for legislation, but it has been proven that they can usefully supplement legislation;

— the existence of a public or administrative institutional structure responsible for triggering the self-regulation mechanisms whenever required and for monitoring the voluntary system;

— direct participation of consumers in drawing up and implementing the codes of conduct;

— effective procedures for compensating the consumer: infringements of the code of conduct should be punishable, not only through the voluntary remedies provided for in these codes, but also in the form of effective legal and administrative action, including collective action initiated by consumers' organisations.

3.4. Cross-border payments

Commission Recommendation n° 90/109/EEC of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions, OJ n° L 67 of 15 March 1990.

The Commission's objective is to achieve, by voluntary means, standardisation of the information to be given to the consumer as regards fees and time limits in a cross-border transaction.

Each institution should provide information, in the form of a notice (booklet, brochure, etc) and, subsequent to the transaction, a statement specifying in detail the commission fees and charges it is invoicing, in particular,

— the exchange rate applied in converting the amount to foreign currency;

— the amount of the commission fee or fees applied or invoiced by the institution;

— the list and amount of any taxes payable;

— the nature and amount of the charges payable by the customer;

— the nature and amount of any additional invoice.

The transfer order should be carried out within a reasonable time. The recommendation considers that transfer orders should be dealt with by the issuing institution within two working days of receipt, while the transferee's institution should fulfil its obligations arising from a transfer order not later than the working day following receipt of the funds.

Finally, the most original part of the Recommendation concerns the settling of disputes: any institution participating in cross-border financial transaction should be capable of dealing rapidly with complaints. If no action is taken on a complaint or no answer received within three months, the complainants may refer the matter to one of the Member State's bodies competent to deal with complaints from users.

The list and addresses of such national bodies should be available on request from any institution undertaking cross-border financial transactions.

One way of applying this principle would be to entrust the treatment of complaints to bodies independent of the parties concerned and forming part of:

— the public sector (ministerial department);

— the central bank;

— a specialised body such as the ombudsman's office;

— a contact committee comprising bank representatives and users.

The Member States must notify the Commission not later than 30 September 1990 of the names and addresses of the bodies referred to above. As regards the four principles of the recommendation, no time limit for application is established.

Assessment

This recommendation is the Commission's first measure relating to transparency of banking conditions (apart from the Eurocheque case). One may ask why transparency of banking conditions has not been tackled globally, since the Commission's competence is not limited to cross-border transactions. Transparency should be analysed in the context of the huge market for financial services. One very important aspect of cross-border operations concerns payments that have gone astray. The growth in travel from one Community country to another and particularly tourism are the cause of numerous payment problems for consumers.

Making payments in the internal market. Discussion paper presented by the Commission, COM (90) 447 final of 26 September 1990.

Making cross-border payments easier : eliminating barriers, Commission Working document, March 1992.

Cross-border payments : Charter for Community users, March 1992.

(The abovementioned documents have not been published in the OJ.)

The document on *"payments in the European internal market"* stresses the need to improve the operation of cross-border payment systems and to emphasise the high cost and variable quality of existing services.

The first direct result of this document was the setting-up of working groups charged with advising the Commission on problems related to cross-border payments.

The document *"Making Payments Easier"* comprised the first conclusions of these groups, particularly that of the group covering payment systems users, made up of representatives from banking, consumers and SMEs.

This user's group stressed:

— the information deficit;

— the excessively high cost of cross-border payments as compared with internal ones;

— the problem of double charging;

— the delay in the execution of cross-border payments;

— exchange transactions : their cost and lack of transparency;

— complaints and mechanisms for dealing with complaints.

These problems are not new.

To resolve them, the Commission has proposed a "user's charter" to be respected by banks.

" (1) The bank should inform the user of payment services of the most appropriate method available.

(2) Complete information on the total cost of a payment must be given to the user of the service.

(3) The user should have the the option to pay all charges so that the beneficiary receives the full amount of the payment.

(4) Cross-border payments must be speeded up. The objective being that they be on a par with internal payments in terms of execution time and reliability before the third stage of EMU.

(5) The user should have recourse to a complaints procedure at least equivalent to those which exist with regard to internal payments."

Assessment

The Commission's efficiency in defining problems is inversely proportionate to its efficiency in solving them. If the difficulties resulting from cross-border payments are not evidence enough, "the users charter" which does not impose a single obligation on the providers of services, is not a Community legal instrument, and which does not give the consumer any means to practically apply the ideas therein, is the definitive example.

3.5. Consumer credit

Council Directive n° 87/102/EEC of 22 September 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 42 of 12 February 1987.

This Directive belongs to the "old approach", i.e. it is an attempt to harmonise national legislation.

It responds to the diversification of forms of consumer credit by a very wide definition of "a credit agreement", which is defined as "an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a loan or other similar financial accommodation" (Article 1 (c)).

The Directive encourages consumer information by regulating advertising in connection with credit operations and

imposing certain restrictions on contracts. It stipulates that the consumer may discharge his obligations under a credit agreement before the time fixed by the agreement (Article 8). It calls on the Member States to regulate the activities of credit intermediaries, in particular through official authorisation or a similar procedure.

Finally, the Directive attempts to regulate problems arising from the separation of lender/seller and creditor in connection with repayments.

Assessment

The Directive does not do a lot to solve the problems linked with consumer credit operations. It ignores several important questions such as protection against incitation and the unfair granting of credit, protection against discrimination and unfair terms in credit matters, and improvement of the consumer's situation when he finds it impossible to meet his repayment obligations.

However, the Directive allows Member States to retain or adopt national provisions which are more favourable to consumers (Article 15); this seems necessary if the Member States are to offer effective protection to consumers in their countries.

3.6. Annual percentage rate of charge

Council Directive n° 90/88/EEC of 22 February 1990 on the annual percentage rate of charge, OJ No L 61 of 10 March 1990.

The main objective of this directive is to introduce into the 1986 Directive a single mathematical formula for calculating the annual percentage rate of charge and for determining the components of the cost of credit. Moreover, the Directive expands the range of information which must be provided to the consumer in the mandatory communication attached to the written contract.

The annual percentage rate of charge (APR)

The main function of the annual percentage rate of charge is to facilitate comparison of different credit offers for the consumer. Definition of this annual percentage rate of charge gave rise to numerous difficulties in the drafting of the Directive, because each Member State wanted to generalise its own system. Finally, the following definition was adopted: "the total cost of the credit to the consumer, expressed as an annual percentage of the amount of credit granted" (Article 1, (2) d).

The annual percentage rate of charge must be indicated in any advertisement or offer which is displayed at business premises, in which a person offers credit or offers to arrange a credit agreement and in which a rate of interest or any figures relating to the cost of the credit are indicated (Article 3). This rate must also be indicated in the credit contract.

Adoption of a uniform Community method for calculating the annual percentage rate of charge

The annual percentage rate of charge is calculated at the time the credit is concluded, on the assumption that the credit contract is regularly fulfilled by the parties (Article 1 (2), insertion of Article 1 (a) (4);

- if the contract does not specify a credit limit, the Member State lays down a reference sum which may not exceed 2000 ecus (Article 1 (2) insertion of 1 (a) (7);
- if there is no fixed timetable for repayment, the duration of the credit shall be deemed to be one year (Article 1 (2) insertion of Article 1 (b) (7);
- where the contract provides for more than one repayment date, it is the earliest date which is applicable (Article 1, 2 insertion of Article 1 (a), (7).

Cost elements which are excluded from the annual percentage rate of charge

All costs which the consumer must pay must be taken into consideration in determining the annual percentage rate of charge, with the exception of (Article 1, 2 insertion of an Article 1 (a), 2):

- charges for non-compliance of the consumer with his commitments;
- charges other than the purchase price in the purchase of goods and services (transport costs, etc);
- charges for the transfer of funds and charges for keeping an account intended to receive payments where this is necessary; these charges however must be included "where the consumer does not have reasonable freedom of choice in the matter and where such charges are abnormally high";
- subscriptions arising from agreements separate from the credit agreement, even though such subscriptions have an effect on the credit terms (cooperatives, etc);
- charges for insurance or guarantees, except those designed to ensure payment of the creditor in the event of death, invalidity, illness or unemployment of the consumer, of a sum equal to or less than the total amount of the balance due.

Information to be provided in the written contract

To these particulars, (annual percentage rate of charge, the conditions in which may be modified, and the basic terms of the contract, whose content is left to the Member States) the Directive of 22 February 1990 adds the obligation to indicate a statement of the amount, number and frequency or dates of the payments to be made, as well as the total amount of these payments where possible, and a statement of the cost items which are not included in the annual percentage rate of charge but which have to be paid by the consumer, specifying the conditions in which these will be required.

3.7. Mortgage credit

Proposal for a Council Directive on mortgage credits, OJ No C 42 of 14 February 1985, amended proposal, OJ No C 161 of 19 June 1987

Opinion of the Economic and Social Committee of 27 November 1985, OJ n° C 344 of 31 December 1985.

Currently, mortgage credit hardly goes beyond national borders. Several factors hinder or discourage both creditors and consumers from mobility with regard to this market. On the one hand, some national laws have prohibited (and some still do) taking up a credit in one country to finance the purchase of real estate situated in others. On the other hand, national legislation differs as regards the authorisation of credit institutions to grant mortgage credits.

Two measures taken by the Community authorities should permit a relative opening of the market:

- liberalisation of capital movements.
- second Directive on banking coordination.

For candidate borrowers, no positive integration measure has yet been taken. Thus, the content of the interest rate and the way it is indicated vary considerably from one country to another, and even within individual countries. Thus, for two creditors advertising identical rates, repayment instalments may be very different.

Other factors also hamper the opening of the market:

- the diversity in mortgage regulations;
- tax disparities;
- the diversity in regulations relating to means of execution.

The proposal for a Directive on mortgage credit establishes the principle of mutual recognition of laws. This approach was adopted very early on by the Commission. In 1982 the Commission said that "harmonisation seemed to be too complex and very difficult". It went on to say that it would aim rather at mutual recognition of all existing mortgage credit systems [39]. This was defined more closely in 1984 : the objective of the Directive will be to ensure that institutions established abroad can, in principle, operate under the same financing rules as in their own country [40]. The proposal for a Directive realises the Commission's intentions. It was amended in 1987.

The guiding principles are the following:

- the proposal frees mortgage activities exercised by "credit institutions" as defined in the first Directive on banking coordination. It does not concern insurance companies.
- it covers credits accorded for both private and professional or commercial aims.
- The creditors must be able to exercise their activities in the host country in accordance with the financial techniques authorised by the legislation of their country of origin.
- The host Member States must abolish provisions which prevent mutual recognition of legislation.

This strategy of imported deregulation has the advantage that it allows introduction into national markets of new financial techniques which cannot but expand the range of choices open to the consumer in his search for a financial product which is better adapted to his needs. This strategy cannot be effective unless rules are also imposed ensuring information and protection of consumers.

Ipso facto mutual recognition leads to a reduction in the level of protection both in respect of foreign and national operators. To avoid distortions of competition, what other solution is there for the host state but to authorise institutions established on their territory to adopt the techniques used in the other Member States? Thus, would a country which regulates variation in interest rates with a view to protecting the consumer be obliged to abolish such regulation because the creditor's country contains no such restriction?

In order to protect consumers, certain national laws contain very strict rules regarding advertising of consumer credits, in particular as regarding the indication of interest rates. The credit institution must comply with precise obligations, in particular as regards the way in which the interest rate is calculated. Adopting such legislation has numerous advantages. It benefits the consumer because he can make precise comparisons between credit institutions, but also the bankers who are all placed on an equal footing, so that the conditions of competition are maintained.

Does the absence of regulation on this point in several Member States justify abandoning these information measures in the name of mutual recognition? The question can be applied to numerous aspects of the contractual relationship which differ between the Member States: the conditions under which credit is granted, prior repayment, delayed payments, fines to be paid in the event of failure to meet obligations on the part of the creditor, securitisation, recovery procedures, etc. The length of this list depends on how one defines the notion of "financial technique". And while this notion is of primordial interest, neither the existing proposal nor the "banking" Directive attempt to define it.

The assistance measures provided for by the authorities (housing premiums, tax relief) cannot be a source of discrimination. These measures cannot be reserved to nationals or be subordinate to the condition that the credit be accorded by an institution established on the national territory of the Member State in question. For example, this should mean that the consumer will benefit from tax relief on interest irrespective of the creditor's place of origin.

This proposal for a Directive is currently frozen, because the Commission considers that the opening of the mortgage market will be achieved through the second Directive on banking coordination. The only item on the Commission's agenda

[39] OJ n° C 156 of 21 June 1982

[40] OJ n° 116 of 30 April 1984

is harmonisation of the way the rate of interest is expressed, in the form of preliminary studies which should lead to the clarification of the notion of an overall effective rate of charge for mortgage loans.

Assessment

The main criticism - and one that resembles the criticisms made of insurance policy - is that financial markets have been opened in a hybrid manner: on the one hand, mobility of credit institutions is encouraged, while on the other hand there is no assurance of mobility for consumers of financial products.

No specific protection rule has been established by the Community legislator. The free movement of financial products is subject to numerous uncertainties. In view of these risks, it is to be feared that the parties, both professionals and consumers, will not risk getting involved in cross-border operations, unless they possess sufficient knowledge to tackle these risks.

For more than ten years the Community authorities have been arguing the "complexity" or mortgage operations to postpone harmonisation of the general principles of protecting the borrower, at the risk of continued partitioning of the market.

3.8. Deposit guarantee systems

Proposal for a Council directive on deposit guarantee systems, OJ n° C 163 of 30 June 1992

This proposal follows from a Commission recommendation concerning the setting up of Community deposit guarantee systems [41]. It provides for minimal financial security for depositors when a given credit institution is going through a financial crisis rendering deposits unavailable.

Deposits as a whole are covered up to an amount not exceeding 15.000 ecus. This ceiling covers the loss sustained by a depositor with one credit institution irrespective of the number, currency or localisation of these deposits within the Community.

The Member States may maintain or adopt measures which raise the guarantee ceiling.

Assessment of the regulation of banking activities

The approach is to promote information of the consumer, whether this concerns the total cost of credit, the basic terms of the contract, or the costs linked with a transfer or payment by credit card.

This policy has had positive effects but much more must be done. Nowhere is there mention of the consumer's right to information, which would take concrete shape in an obligation to provide information or counselling on the part of the professional. Such an obligation is indispensable, particularly in the case of cross-border operations.

The policy adopted is also wanting in that it considers information to be the key issue in bringing about the market for financial services. This policy is not surprising in that it presupposes that the actors are on an equal footing to negotiate contractual terms. However, in consumer relations, this is an illusion.

The absence of Community initiatives does not mean that the consumer is devoid of legal protection. National laws continue to apply, even if the new approach risks dismantling them. Thus, national laws protect the consumer to a different extent, and the principle of mutual recognition introduces many uncertainties as regards their application.

Moreover, numerous problems arise for the consumer in the field of banking services, particularly as regards over-indebtedness.

In a climate of tough competition and deregulation, banks are giving increasingly favourable treatment to depositors, but they charge for their services, including the keeping of accounts. Small accounts are the most hard-hit, so much so that numerous clients may be turned away. The professionals should be obliged to offer basic banking services to ensure that people with the least resources can continue to use them.

Consumer indebtedness has soared in recent years, both because of the supply and demand for credit. Frequent causes of over-indebtedness are family problems or the client's job situation. There are also other causes. Thus, questions have to be asked about the policy of granting credits and about financial marketing.

Several Member States have drawn up standards to fight over-indebtedness or are about to adopt such standards (France, Germany, Netherlands).

At Community level differences in the treatment of over-indebtedness in the Member States may give rise to major difficulties in the case of cross-border credit contracts. These differences may lead to distortions in competition incompatible with the establishment of an internal market in the credit field.

Chapter 4. Insurance

4.1. Non-life insurance

First Council Directive n° 73/239/EEC of 24 July 1973 on coordination of the laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance, OJ n° L 228 of 16 August 1973.

This Directive provides for freedom of establishment and the conditions in which it can be exercised, particularly through an application for authorisation sought from the supervisory authorities in the country of establishment.

[41] OJ n° L 33 of 4 February 1987

Its objective is to coordinate conditions of access which insurers must fulfil in the context of the right of establishment, be it at the level of the head office, or that of the creation of agencies or branches in other Member States.

It lays down the financial requirements for the technical provisions, the solvency margin and the minimum guarantee fund which insurers must have at their disposal.

Second Council Directive n° 88/357/EEC of 22 June 1988 on the coordination of rules, regulations and administrative provisions relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ n° L 172 of 4 July 1988.

This Directive organises the free provision of services for insurance other than life insurance and civil liability insurance for motor vehicles. A distinction is made between mass risks and large risks. From 1 January 1993 on large risks are considered as firms with a total balance of 6.2 million ecus, a turnover of 12.8 million ecus and at least 250 employees. Two of these three conditions are sufficient and until 31 December 1992 the figures are twice as high. For mass risks, administrative approval may be required; it is the supervisory authority of the country in which the services are offered which is competent and which may in particular impose its legislation regarding technical provisions and insurance conditions. In the case of large risks, it is the supervisory authority of the country of establishment which is competent.

This Directive provides particulars as to the law applicable to the insurance contract in question.

Council common position on a third Council Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and amending Directives 73/239/EEC and 88/357/EEC

The objective of this proposal is to complete the internal market in non-life insurance. It follows from the commitment undertaken by the Commission to submit proposals which will permit application of the principle of supervision by the Member State of origin of all this activity and to subject it to a single supervisory regime. Thus the host state will no longer be entitled to require new authorisation of the insurance firms which are already authorised in the Member State of origin.

The Member States must have at their disposal the necessary supervisory instruments in order to ensure coordinated pursuit of insurance activities.

The common position also reaffirms the principle of the freedom to choose the law applicable to the insurance contract, without however harmonising the law applicable to the contract.

4.2. Life insurance

First Council Directive n° 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance, OJ n° L 63 of 13 March 1979.

This major directive concerns direct life assurance practised by firms which are established or which wish to become established and its pursuit in respect of life assurance, pensions, supplementary insurance, etc.

It coordinates the conditions of access and confirms the coexistence of specialisation and the business of life insurance by composite companies. However, countries which stipulate specialisation may not authorise composite companies.

Second Council Directive n° 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ n° L 330 of 29 November 1990.

This Directive provides for the freedom to provide all kinds of life insurance, i.e. other than group insurance. It distinguishes between the active free provision of services, i.e. the freedom to provide services initiated by the firm, and passive freedom, i.e. at the initiative of the client generally via the agent of an insurance broker.

In the case of active provision, authorisation is required by the country in which the services are provided. In the case of passive free provision, authorisation in the country of establishment is sufficient, but the contract must comply with the supervisory requirements of the country in which the service is provided.

Council common position of 29 June 1992 on a third Directive on direct life insurance (not published in O.J.; see Directive 92/96/EEC - O.J. n° L 360 of 9 December 1992)

For the life insurance sector this common position introduces the fundamental notion of a single authorisation enabling a firm, on the basis of the authorisation accorded to it in a Member State, to have access to life insurance activities throughout the Community.

The directive contains a new provision specifying that supervision in financial matters, including activities exercised via branches and in the provision of services, is the responsibility of the Member State of origin. It provides for cooperation between Member State authorities with a view to ensuring adequate control of the firms in the sector both as regards the freedom of establishment and the free provision of services.

Assessment

While there is virtual unanimity on the objectives of the single market, there is much criticism of the methods used to achieve this objective.

The main objective of the first two directives was to establish the freedoms of establishment and provision of services. The second Directive makes the consumer's freedom

dependent on whether he is active or passive vis-à-vis the professional. Even if this corresponds to consumer attitudes, establishing the principle of such a separation without simultaneously specifying the horizontal rules permitting all consumers to acquire insurance products in the Community under good conditions - serves merely to maintain and perpetuate inequalities between consumers.

The third-generation Directives go even farther in this paradoxical direction: in searching for an appropriate insurance product, the consumer risks being confronted with a contract in a language he does not know, or with foreign legislation, or a rule of general interest. In the event of disputes, he will be plunged into the jungle of the rules of conflict of laws and the maze of procedures.

The problem lies in the Commission's preoccupation almost exclusively with one aspect: the mobility of firms, while ignoring the mobility of the consumer and that of the product.

Thus, for a consumer to be mobile five conditions must be satisfied:

- the consumer must be fully informed;
- the consumer must be adequately protected, which implies that Community principles on protection of the policy holder must be recognised;
- there must be an effective supervisory system;
- there must be systems to regulate disputes;
- there must be a genuinely competitive market and the benefits of opening the market must not be frustrated by merger-type operations between firms.

Current law does not adequately satisfy these conditions.

4.3. The insurance contract

Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts, OJ C 190 of 28 July 1979, amended proposal: OJ No C 355 of 31 December 1980.

The objective of this proposal is to coordinate the provisions governing insurance contracts and access to direct insurance business other than life insurance, motor vehicles, civil liability for motor vehicles, maritime civil liability, credit insurance and suretyship. It specifies the documents which must be provided to policy holders and a general scheme which the contract must satisfy.
It has not yet been adopted by the Council but it must become law before liberalisation of mass risks.

4.4. Motor vehicle insurance

Council Directive n° 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and to the enforcement of the obligation to insure against such liability, OJ n° L 103 of 2 May 1972.

The objective of this Directive is to improve free movement within the Community while avoiding checks of motor vehicle insurance at borders.

Each of the Member States, by creating a Bureau or confirming that one already exists, commits itself to compensating the victims of accidents occurring on its territory caused by vehicles coming from other Member States whether they are insured or not. These bureaux, after compensating the victims, recuperate their expenses either from the insurer, or from the Bureau of the country of origin.

Through a series of agreements, this system has been extended to third countries such as Austria, Finland, Hungary, Norway, the ex German Democratic Republic, Sweden, Switzerland and Czechoslovakia.

Commission Recommendation of 8 January 1981 on accelerated settlement of claims under insurance against civil liability in respect of the use of motor vehicles (81/76/EEC - O.J. n° L 57 of 4 March 1981)

This recommendation calls on the Member States to take all measures necessary to facilitate the transmission of proceedings and other court documents necessary for paying insurance compensation against civil liability in respect of the use of motor vehicles.

Second Council Directive n° 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ n° L 8 of 11 January 1984.

The aim of this Directive is to harmonise certain conditions relating to insurance against civil liability in respect of the use of motor vehicles, in particular the guarantee limits, which differ greatly from one country to another. It also provides for the creation of a common guarantee fund in the case of uninsured or unidentified vehicles. Likewise it provides for the obligation to cover compensation for injury of members of the family of the policy holder, the driver or any other responsible person.

Third Council Directive n° 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ n° L 129 of 19 May 1990.

This Directive stipulates:

- the obligation to extend liability for personal injuries to all passengers of a vehicle, except for the driver;
- that the compulsory insurance policies must cover the entire territory of the Community;
- that every insurance policy should guarantee, on the basis of the same single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based, when that cover is higher;
- that it must be ensured that the guarantee fund cannot require, in order to compensate the victim, that the victim

establish that the person liable is unable or refuses to pay;

— that the Member States, in the event of a dispute between the civil liability insurance and the guarantee fund, should ensure that one of these parties is designated to be responsible in the first instance for paying compensation.

Council Directive n°90/618/EEC of 8 November 1990 amending, particularly as regards insurance against civil liability in respect of the use of motor vehicles, the first Directive 73/239/EEC and the second Directive 88/357/EEC which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance, OJ n° L 330 of 29 November 1990.

The principal objective of this directive is to insert the notion of compulsory civil liability insurance into the framework established by the second Council directive n° 88/357/EEC, concerning insurance other than life assurance, in order to permit the exercise of the free provision of services in this category.

The directive applies to the provision of services with regard to insurance against civil liability in respect of the use of motor vehicles by an insurer established in one Member State for motor vehicles registered in other Member States.

Two categories of risks, namely, class 10 (motor vehicle liability) and class 3 (damage to or loss of land motor vehicles and land vehicles other than motor vehicles) are to be included in the system of the second directive which establishes a distinction between large risks and mass risks with corresponding degrees of control by the country of origin and the host country.

The Member State in which the services are offered shall require that the undertakings providing the services become members of its national motor vehicle insurance bureau and participate in the financing of said bureau and its national guarantee fund. Members' contributions will be calculated solely with reference to premium income from that class of insurance in that Member State, or on the number of vehicles insured. In other words, no annual or minimum contribution can be demanded.

It is mandatory to appoint a representative in the Member State in which services are offered whose principal task is to collect information and to represent the insurer in relation to persons who could pursue compensation claims before the courts and authorities of the State of provision of services. The States where the services are offered can also require this representative to assist them with regard to checking the existence and validity of insurance policies.

4.5. Legal expenses insurance

Council Directive n° 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, OJ No L 185 of 4 July 1987.

The objective of this directive is to ensure minimum coordination of provisions relating to legal expenses insurance.

Legal expenses insurance is defined and each Member State must take the necessary measures to ensure that undertakings established on its territory adopt one of the following alternatives:

1. it must organise a distinct and very rigorous management, ensuring that no member of the staff who is concerned with the management of legal expenses carries on at the same time a similar activity for another branch;
2. it must entrust the management of claims in the legal expenses branch to an undertaking having separate legal personality (system of the claims management bureau);
3. it must afford the insured person the right to entrust defence of his interests, from the moment he has the right to claim from his insurer under the policy, to a lawyer of his choice or, to the extent that national law so permits, any other appropriately qualified persons.

Specialisation is authorised but it is no longer mandatory and Germany, where such specialisation was mandatory, must allow non-specialised companies to come and work on its territory.

Assessment

The following questions relating to protection of policy holders in this area remain relevant:

— The technique of legal expenses insurance depends on the existence of a risk. In many cases the dispute implies a voluntary act by a policy holder which is by definition not risky. To this day, several solutions have been adopted by companies. Some of them exclude voluntary risks. Others envisage recourse to an objectivity clause. Should we not in future examine the compatibility of these requirements with the development of legal expenses insurance?

— Direct conflict of interests may arise also whenever the same insurer has an interest in a given dispute because of two separate covers. In this respect the directive's solution is not a panacea. Independent management does not rule out the identity of financial interests in the different services of one and the same company and legal independence is no guarantee of economic independence.

— In future it will also be necessary to take into account the insurer's interest that his dispute be regulated as rapidly as possible.

— Similarly, one should not forget that insurance companies are also payers in the case claims relating to physical injury. Here too is a source of conflicts of interest.

4.6. Intermediaries

Council Directive n° 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the

activities of insurance agents and brokers and, in particular, transitional measures in respect of those activities, OJ n° L 26 of 31 January 1977

This directive obliges the Member States to ensure that a beneficiary (insurance agent or broker) who applies therefor to be provided, before he establishes himself or before he begins to pursue any activity on a temporary basis, with information as to the rules governing the profession which he proposes to pursue.

Where in a Member State the taking up or pursuit of any of the activities covered by the directive is subject to possession of general, commercial or professional knowledge and ability, that Member State must accept as sufficient evidence of such knowledge and ability the fact that one of the activities in question has been pursued in another Member State for any of he following periods:

- four consecutive years in an independent capacity or in a managerial capacity;
- two consecutive years in an independent capacity or in a managerial capacity, where the beneficiary proves that he has worked for at least three years with an insurance undertaking.

Commission Recommendation on insurance intermediaries, OJ n° L 19 of 28 January 1992

Independence of Intermediaries

Intermediaries shall disclose to the person taking out insurance (the person signing the contract) "any direct legal or economic ties to an insurance undertaking or any shareholdings in or by such undertakings which could effect the complete freedom of choice of insurance undertaking.

It is indeed interesting for consumers to know whether they are dealing with an independent agent or not. Insurance brokers shall disclose to a competent body set up by the Member State, the spread of business with different insurance undertakings over the previous year.

The above measure is of use in determining the degree of independence of a broker with regard to an insurance company and allows the distinction to be made between the brokerage practice and the insurance company.

Professional Competence

The taking up and pursuit of the activity of insurance intermediary shall be subject to certain professional requirements (which currently vary widely from one country to the next). The intermediary shall:

- be of good repute, and shall not have previously been declared bankrupt;
- possess general, commercial and professional knowledge and ability to be determined by each Member State (in the absence of mutual recognition of qualifications);
- hold professional indemnity insurance or any other comparable guarantee (unless such is already provided for by an insurance undertaking).

Registration

The recommendation lays down a formal registration requirement: "Only registered persons shall be allowed to take up and pursue the activity of insurance intermediary." This system would seem to constitute a degree of scrutiny which is, without doubt, aimed at countries which do not require the strict control of intermediaries.

4.7. Competition in the insurance sector

Council Regulation No 1534/91 of 31 May 1991 on the application of Article 85(3) to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ No L 143 of 7 June 1991

This regulation allows the Commission to grant exemptions to certain types of agreements between undertakings which have as their object cooperation with respect to

- the establishment of common standard insurance policy conditions;
- the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims;
- the common coverage of certain types of risks;
- the settlement of claims;
- the testing and acceptance of security devices;
- registers of, and information on, aggravated risks, provided that the keeping of these registers and the handling of this information is carried out subject to the proper protection of confidentiality.

It is important to prevent insurance companies from aligning prices and eliminating competition under the pretext of cooperating in the analysis of statistics relating to the evaluation of claims.

The Economic and Social Committee [42] considers that the objective of this Regulation should be to oblige the insurance companies to offer products and services on the market the best conditions, in the interests of the economy and of consumers In this context, cooperation in respect of claims settlement should lead to claims being settled more rapidly; unfair terms and obscure contractual terms should be banned; refusal to insure a risk should be justified in writing.

4.8. The Insurance Committee

Council Directive n° 91/675/EEC of 19 December 1991 setting up an insurance committee, OJ n° L 374 of 31 December 1991

42 OJ n° C 182 of 23 July 1990

The objective of this Committee is to assist the Commission in the field of insurance with a view to establishing closer cooperation between national control authorities and the Commission.

The Committee shall examine any question relating to insurance policies and shall draw up new proposals concerning life and non-life insurance. The Commitee shall not consider specific problems relating to individual insurance undertakings. It is to be composed of representatives of Member States and chaired by the representative of the Commission.

The Committee began work on 1 January 1992.

Final remark on the assessments made concerning financial services

In view of the gaps in consumer protection with regard to financial services, in particular cross-border financial services, the establishment of a single market in financial services must consist of more than provisions allowing professionals to work more freely within the EC. It is essential that the Community institutions go beyond the objectives of informing the consumer, with a view to more actively promoting legal protection of the consumer in the field of financial services.

Chapter 5. Community policy on tourism

5.1. General policy

Tourism policy has been one of the tasks of Directorate-General XXIII (trade and distribution), since its creation in 1989. However, currently this competence is shared with DG III (internal market), and the Consumer Policy Service is also involved.

Tourism policy is relevant to consumers in many ways, because it is a service industry directed mainly to consumers. Any initiative on tourism policy will have direct implications for consumer interests. More generally, it is recognised that tourism plays an integrating role at European level and that it contributes to closer relations between the Member States.

Community initiatives in the tourism sector are sometimes horizontal, tending to define a general Community policy in regard to tourism or to promoting certain forms of tourism, while sometimes they are more specific, tending to encourage information and protection of tourists.

The starting point for Community policy on tourism was the Council Resolution of 10 April 1984 [43] concerning a Community policy on tourism. In this Resolution the Council adopted a communication from the Commission on initial orientations for a Community tourism policy, which partly concerns promotion of tourists' interests: reduction of customs checks, reduction of police controls at borders, social security for tourists, tourist assistance and car insurance, protection of tourist interests in regard to misleading advertising, insufficient information and provision of defective services. Moreover, other parts of the resolution also concerns tourists, such as vocational training, staggering of holidays, social tourism, transport, etc.

Currently the Community institutions are discussing a Community action plan in favour of tourism presented by the Commission in early 1991 [44]. The aim of this action plan is to underpin the horizontal approach to tourism (improvement of knowledge of the sector, coordination of national policies, consultation of professionals, improvement in tourist protection, staggering of holidays) and also to support specific actions in favour of tourism (rural tourism, cultural tourism, environment, vocational training, wider access to holidays, social tourism and youth tourism), and it was the subject of an agreement in principle by the Council on 4 June 1992. This draft plan of action contains references to providing better information to tourists, easier access to justice, and the need for a provision concerning time-sharing arrangements.

5.2. Initiatives taken by the Community institutions

The first precise initiatives taken in the context of tourism policy are based on a Communication from the Commission on a Community action in the field of tourism [45] which gave rise to three Council instruments adopted on 22 December 1986.

Council Resolution of 22 December 1986 on a better seasonal and geographical distribution of tourism, OJ No C 340 of 31 December 1986

This initiative has no binding force and invites the Member States to cooperate with a view to better seasonal and geographical distribution of tourism by promoting staggered holidays. The primary objective of this resolution mainly concerns protection of natural and cultural resources in the tourist destinations, as well as better economic exploitation of tourist infrastructures. Staggered holidays are of advantage to tourists, in that they allow them to avoid the drawbacks associated with high-season tourism, in particular very high prices.

This resolution has not led to any coordinated policy for staggering holidays. The subject badly needs a new impetus.

Council Recommendation n° 86/655/EEC of 22 December 1986 on standardised information in existing hotels, OJ No L 384 of 31 December 1986

The recommendation provides the tourist sector with a pictorial information system for tourists to allow them to better evaluate the services provided by hotels. Use of pictograms means that problems of multilingualism can be avoided.

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43 OJ n° C 115 of 30 April 1984
44 OJ n° C 120 of 12 May 1992
45 OJ n° C 114 of 14 May 1986

Its non-mandatory character means that progress as regards information for tourists is far less than it could have been; a study should be carried out to determine the actual use of pictograms. Moreover, consumers were not involved in preparing the dossier, and this means that the pictograms have not been tested on their main addressees.

In principle the recommendation can contribute to improving transparency of hotel services and thus constitutes an interesting instrument for improving consumer information. However, its range is limited in that certain pictograms can only be understood by the initiated. On the other hand the recommendation applies only to hotels, and there is an equally important need for information in regard to other establishments, such as camping sites, youth hostels, rural dwellings, etc.

The recommendation does not envisage any protection of the consumer as regards the validity of the information supplied. There is no way of checking the truthfulness and appropriateness of the pictograms selected by the hotel management. Moreover, the pictograms contain only individual references to services provided: the systems of awarding "stars", which are the responsibility of very different organisations, has not yet been harmonised. This represents a major gap, because the classification criteria are almost as numerous as the number of organisations responsible for awarding them. The consumer takes these criteria into account on the basis of the experience of his own country and not on the basis of the criteria of the country of destination (a three-star hotel is not the same thing in Denmark as in Greece, etc.).

Council Decision n° 86/644/EEC of 22 December 1986 establishing a consultation and cooperation procedure in the field of tourism, ibid.

This decision establishes an Advisory Committee with a view to facilitating the exchange of information and cooperation in the field of tourism, in particular on the provision of services for tourists. It requires that the Member States send the Commission, once a year, a report on the most significant measures they have taken in the field of tourism.

The Committee meets at least once a year. It is made up of members designated by each Member State.

The creation of an Advisory Committee can help contribute to setting up a more active policy in the tourist sector, by establishing structures to facilitate decision-making. In this context it is unfortunate that there is no guarantee of participation by representatives of the interested parties, neither in the tourist industry nor a fortiori the tourists themselves.

Council Recommendation n° 86/666/EEC of 22 December 1986 on fire safety in existing hotels, ibid.

For many years, consumers' representatives, in particular the Consumers' Consultative Committee, had called for a definition of strict safety measures in this field, in view of the severity of the accidents that have occurred and specific safety matters relating to hotel establishments.

The recommendation invites the Member States to adapt their legislation with a view to ensuring better safety of existing hotels (to reduce the risk of fire breaking out, to prevent the spread of flames and smoke, to ensure that all occupants can be evacuated safely, to enable the emergency services to take action). The means listed in the recommendation are the following: safe escape routes must be available, must be clearly indicated and remain accessible and unobstructed, the building's structural stability must be guaranteed, presence of or use of highly flammable materials in wall and floor coverings must be carefully limited, all technical equipment and appliances should operate safely, there must be appropriate systems for alerting the occupants, safety instructions must be provided, emergency firefighting equipment must be provided and maintained in proper working order, the staff must be given suitable instruction and training.

The recommendation has a technical annex with detailed guidelines, but these will only be applicable to hotels that can accommodate more than 20 persons. The recommendation invites the Member States to subject hotels to periodic inspection of their conformity with the principles.

The choice of instrument is the biggest single drawback, since a study carried out in 1990 by the consumers' associations showed that application of the instructions contained in the recommendation by the hotel sector is totally inadequate (Example, of 22 hotels studied in Corfu and Torremolinos, not one complied with the minimum safety standards).

The standards for information of occupants are reasonably satisfactory. On the other hand, the standards concerning safety itself are sometimes drafted in an ambiguous or vague manner. More generally, the recommendation extends only to existing hotels, without any reference to the standards that apply to new hotels.

The recommendation gives the Member States two years to implement these principles. The Community institutions have not yet initiated any action following the expiry of these time limits.

Council Directive n° 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ No L 158 of 23 June 1990

This directive constitutes a great step forward in the protection of the tourist, in that it contains important provisions concerning:

- precontractual information (prohibition of misleading information, content of the brochure, in principle mandatory information which the brochure must contain, information on passports and visas);
- information during the execution of the contract (transport connections, address of the local representative, information for parents of minors, travel insurance);
- the content of the contracts (mandatory clauses, form of the contract, status of price review clauses);

— non-execution (transfer of the holiday to a third party, cancellation, compensation, alternative arrangements, liability rules);

— claims (obligation on the organiser and/or retailer or his local representative to take due care to find appropriate solutions);

— guarantees against insolvency of bankruptcy.

The Directive is open to numerous interpretations in that the notions used are very vague and their scope is sure to be hotly debated. The fact that rights and obligations have not been defined clearly will limit the practical application in favour of consumers, because in the event of a dispute it will be up to the judge to interpret the text. Likewise, the option open to the Member States to apply the rules either to the tour organisers or to the retailer is not very clear and might give rise to divergent interpretations unfavourable to the consumer.

One very welcome feature is that the Directive stipulates numerous obligations to provide information to the consumer/traveller.

Moreover, legal protection of the consumer has improved, though it still contains major gaps:

— the principle of joint liability between the organiser and the agent in the case of transfer of the package to a third party, when the consumer is prevented from travelling, it is not acceptable;

— the status of the price revision clauses is too lax and favours the tour organisers and agents;

— the authorisation of limitation clauses in regard to liability for damage other than personal injury runs counter to the principles of consumer protection;

— the absence of an effective, rapid and inexpensive system for regulating disputes will in many cases prevent the consumer from asserting his rights;

— in view of the timidity and limited scope of the provision making it mandatory for professionals to provide guarantees against insolvency and bankruptcy, one should reconsider the idea of establishing a guarantee fund in this sector and how precisely it should function.

The absence of standards in international private law will make it difficult to determine the right that applies to cross-border contracts and to cross-border disputes - in relation to package tours.

Assessment

In view of the need, in the context of an internal market in tourism, to provide the tourist with all-round protection, several important measures remain to be taken. These measures are in addition to general initiatives concerning judicial remedy, consumer information and protection both of their personal and their economic interests. Besides improvements to existing instruments, the main areas of action should be:

— an instrument to penalise overbooking in hotels, etc., on the lines that apply to airlines;

— access to health services: abolition of form E 111;

— tourist safety (rest areas on motorways);

— establishment of a Community guarantee fund to compensate tourists in the event of insolvency or bankruptcy of the professional;

— abolition of ceilings on tax-free imports for private use for travellers within the Community;

— analysis of travel insurance contracts, in particular over-insurance.

Chapter 6. Protection of data relating to private life

In the context of completing the internal market, discrepancies in national legislation on data protection relating to private life may also hamper the free movement of products, services, capital and individuals. Accordingly, towards the end of the 1980s the Commission began work which resulted in two proposals for directives both of which are relevant to consumers - one is a framework directive and the other a specific directive on the telecommunications sector. Only the first directive will be analysed here.

Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data, OJ n° 277 of 5 November 1990

The proposal has two objectives: protection of the private life of individuals and free movement of personal data. In order to reconcile the two objectives, the directive lays down rules for using and transmitting information contained in the files.

The proposal specifies that the applicable law is that of the Member State in which the file is located, in principle.

In creating and processing files, no particular formality is required, whenever such creation and processing is legitimate. Communication of files to third parties is allowed, if it is legitimate, but, in principle, the controller of the file must inform the persons concerned of the communication.

The controller of the file has to notify the supervisory authority of its creation only in certain circumstances.

Moreover, the data subject concerned has certain recognised rights (right to be informed, consent required under certain circumstances, right of access and right to rectification, quality of the data).

Assessment

A detailed criticism of the proposal has been made by the Economic and Social Committee in a noteworthy opinion [46]. The European Parliament issued a very extensive opinion proposing some 95 amendments [47].

46 OJ n° C 159 of 17 June 1991

47 OJ n° C 94 of 13 April 1992

On the one hand, the Parliament broadened the scope of the proposal by including therein all data, but on the other hand it circumbscribed its scope in reducing the number of sectors to which the directive could be applied (public welfare associations, the press, etc.).

The regulation of public files is re-examined in order to bring them closer to private ones. The relations between citizens and the controllers of the files are set out. Crossborder flows of data are subject to stricter rules. Sanctions are reinforced.

The brief and powers of the Working Party on the Protection of Data are to be extended and its membership enlarged (to include representatives of employers, consumers, unions and civil liberties defence groups).

Moreover a certain number of principles must guide consumer protection and not all of these principles have been given attention in the proposal.

These guideline principles have two objectives: transparency and protection which, without being new, are none-theless dealt with in detail in the field under study. The power of information technology is all-pervasive. Accordingly, it is important to establish clearly who is responsible for processing,and to determine the limits of the information flows, and the consumers' right to knowledge about this processing.

If the information provided by the consumer and the persistence of the legal relationship into which the consumer has entered can be deemed voluntary, the consumer is doubly dependent. In order to satisfy his needs or to obtain certain services, the individual will not refuse to enter a contractual relationship and accept the conditions presented to him. Moreover, he is in a dependent legal situation. The "power of information technology" symbolises and reinforces this relationship: the information flow is fed with data proper to a person who is in a dependent situation and dominated by those who have economic power.

- Information technology must be at the service of all citizens. It must not compromise human identity, human rights, private life or individual or public liberty.
- All processing must be made known.
- All processing must have a legitimate purpose. Any change in purpose must be approved by the consumer or submitted to the supervisory authority.
- In principle, the communication of any data recorded must be approved by the consumer.
- The controller of the file must be clearly identified.
- The quality of the data must comply with the general principles of the Convention of the Council of Europe: fair and legitimate collection, pertinent, adequate data which are not excessive vis-à-vis the objectives; data should be accurate and up-to-date; the data should be kept for no longer than necessary.
- The consumer must easily be able to exercise his fundamental rights: right to information, access, rectification, removal.
- Cross-border flows must be regulated by legislation designed to ensure an equivalent level of protection.
- The supervisory authorities must be independent.
- The consumers organisations must be able to take group action against the controllers of the files.
- Sectoral provisions have to be taken (banks, insurance companies, marketing, etc.).

Chapter 7. Competition policy

7.1. Minimum list of criteria

The preceding sections have shown that numerous interventions are justified in order to correct some unavoidable effects of competition. Similarly, the very objectives of competition, i.e. improvement of general welfare and satisfaction of needs, can in certain cases justify practices which restrict competition such as agreements and mergers.

Moreover, it is important to ensure that the opening of borders should not be a merely transient event, because private firms put up obstacles to trade which threaten to become replacements for public, national ones.

Finally, mergers between European firms should not be hindered if they are to take on powerful American or Japanese competitors which constitute an important element in the context of Community industrial policy.

Nevertheless, one must be very attentive to developments in the field of mergers. Is it not possible that they will push derogation from the rules of competition to a point of no return? Are not new monopolies being set up by the very people who call for more competition in the market?

The objectives which these restrictive practices are supposed to attain are not borne out by their actual impact on the market and consequently consumers' interests are not necessarily served.

It is fitting that before we examine the horizontal organisation of European competition law, we should establish a minimum list of criteria to be taken into account.

European competition law is regulated by Articles 85, 86, 90 and 94 of the Treaty. Their application has to take account of the interests of consumers. More particularly, these articles take
the consumers interest into consideration in the following passages:

- article 85(3):

  ...The provisions of paragraph 1 may, however, be declared inapplicable ...(for agreements) which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not...

— article 86 :

...Such abuse may, in particular, consist in :

b) limiting production, markets or technical development to the prejudice of consumers,...

— article 92(2):

a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned.

Various individual or group exemption measures, already adopted by the Commission, have up to now made it possible to identify certain benefits which must be present to justify barriers to competition between firms. However, if in the 1980s Article 85(3) was used as a lever to pressurise large undertakings to ensure that consumers benefit from aspects other than the effects of price competition alone, a structured approach to consumer interests is still wanting. Before examining the major types of exemption, we suggest the following benchmarks:

— *Protection of consumer health and safety*

Restriction of competition whose prime objective is promotion of health, technological innovation or improvement of products and services must be accepted. Nonetheless, on each occasion one must determine how such a measure affects the price of products or services concerned. Thus, the voluntary establishment of sectoral guarantee funds in the field of product liability could receive the Commission's approval, even if it meant higher costs. These funds could indeed be appraised in the light of Article 85 of the Treaty.

— *Improvement of after-sales service*

The improvement of after-sales service, often presented as justification for invoking Article 85(3) of the Treaty, must be tangible for consumers. The distribution network must be effective and operational. Access to the product or service without benefiting from after-sales service should be possible within reason for consumers who do not want such service.

— *Improvement of consumer choice*

Any restrictive practice which leads to an expansion in the range of products or services offered may be in the interest of consumers provided it constitutes a real advantage and that the ensuing costs for the distributors not be passed on directly or indirectly in the form of an increase of prices for other products offered by the same distributor.

— *Improvement of the conditions of exercise of the services provide*

This parameter, particularly in the field of financial services or insurance, makes sense only if one takes into account the precise number of users who may benefit from this service and if the associated costs do not fall back on other users of the services offered by the same distributor who do not need these improvements.

— *Expansion of the concept of consumer*

The beneficiaries of advantages which are normally invoked to exempt a restrictive practice do not belong to a single group. In this respect pluralist approach is called for (Council Decision of 25 November 1981, (IV/428 - VBBB/VBVB), OJ No L54 of 25 February 1982). Unfortunately, the CPS has been consulted only in exceptional cases in the application of competition rules to firms or the abuse of a dominant position.

— *Improvement of consumer information*

Because competition is expected to give people better information on products and services which are on the market, it is clear that the restrictive practice should never curtail the quality and quantity of information available to the purchaser.

7.2. Rules of procedure

The following observations may be made regarding the institution of proceedings:

Council Regulation No 17 on the application of Articles 85 and 86 of the Treaty (OJ n° 13 of 21 February 1962, as amended)

Regulation 17 epitomises the unique status of competition law at European level because it is the only one that gives consumer organisations the power to effectively inform the Commission. The effectiveness of competitive law depends on the information at the European Commission's disposal. The Commission's power to launch an investitation springs from a request from a Member State or from natural or legal persons with a legitimate interest.

In this regard individual consumers and consumer protection organisations have been recognised as having a legitimate interest to request the Commission to find an infringement of Articles 85 and 86 of the Treaty and to request it to initiate an action with a view to terminating this infringement.

It is desirable that the principle laid down by the Court of Justice in the METRO/SABA judgment be confirmed (CJEC, Case 26/76, Metro-SB Grossmärkte v. Commission, 1977, Reports. p. 1875). In this judgment the Court stated that "*it is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is dismissed either wholly or in part, to institute proceedings in order to protect their legitimate interests.*"

Unfortunately the regulation does not provide for formal consumer participation once the proceedings get under way. One should consider an amendment of Article 19(2) of regulation 17 with a view to transforming the Commission's right to hear third parties into an obligation to hear consumers organisations directly concerned by the agreement or who are susceptible of being directly concerned.

7.3. Exemption regulations by category

Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements, OJ n° L 281 of 13 October 1983.

Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements, OJ n° L 281 of 13 October 1983

Communication on regulations 1983/83 and 1984/83 by the Commission of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements and exclusive distribution agreements, OJ n° C 101 of 13 April 1984.

These two regulations concern distribution in the wide sense and in particular beer supply and service-station agreements. They protect legally integrated distribution networks. They are of direct interest to the consumer in that they are susceptible of restricting competing offers from different producers.

For further details on Regulation 123/85, concerning exemption by category in the field of the selective distribution of motor vehicles, see section 1, point 2.4.

7.4. Concentrations

Council Regulation (EEC) n° 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ n° L 219 of 14 August 1990.

This regulation, whose adoption was a long and painful process, applies to all concentrations of Community dimension and lays down ceiling figures for such concentrations. Specifically, it applies to approximately 40 to 60 cases of concentrations per year in the European market.

Article 2(1) concerns consumers' interests. In order to determine whether a merger or purchase, viz. concentration operations, are compatible with the common market, the Commission has to take special account of the interest of the intermediary and final consumers and of the development of technical and economic progress.

It is too early at this stage to determine how in practice consumers' interests will be evaluated in implemention. However, it is regrettable that once again the Regulation does not contain specific provisions allowing consumers' associations to be heard.

7.5. Other types of agreements

Commission Regulation (EEC) n° 417/85 of 19 December on the application of article 85(3) of the Treaty to categories of special agreements, OJ n° L 53 of 22 February 1985

Commission Regulation (EEC) n° 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements, OJ n° L 53 of 22 February 1985.

Commission Regulation (EEC) No 4087/88 of 13 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements, OJ n° L 359 of 28 December 1988.

Following the judgment of the Court of Justice in the Pronuptia case (Case n° 161/84, Reports 1986, p. 353), systems of franchise agreements for the distribution of goods were judged as not in themselves interfering with competition.

After adopting five decisions on individual exemption regarding the systems established by Pronuptia, Yves Rocher, Computer Land, Service Master and Charles Jourdan, the Commission finally adopted a general regulation on 30 November 1988.

The regulation aims at specifying the provisions of franchise agreements which are compatible with Community competition laws. For the purposes of the regulation, a franchise is defined as a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users (Article 1 (3)(a)).

The franchise agreement must include at least:

- the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport;
- the communication by the franchisor to the franchisee of knowhow;
- the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement.

The guarantees this network must provide for the consumer are of two types:

- The franchisee must appear only as an intermediary and the name or shop sign which give the network the common identity should lead the consumer to address himself directly to the franchisor. This line of reasoning is an extension of the notion of guarantee.

The transfer of knowhow may be an obvious advantage for the consumer because the direct intermediary with whom he has concluded a contract has been specially chosen for his ability to develop the franchisor's methods.

Franchising corresponds to approximately 10% of retail trade. This is why a separate regulation has been adopted for this type of distribution.

Assessment

The basic question for the consumer is whether, on a practical level, the regulation can ensure correct application of a guarantee linked to the name or trademark.

Do the criteria for selecting franchisees coincide with consumers' demands and expectations? Is better after-sales

service thus ensured? In other words, does the investment required of the franchisee not exceed his real economic and financial capacities, thus turning him into an ephemeral intermediary who, once he has disappeared, will leave the consumer all the more remote from the franchisor?

7.6. State aids

Community competition law lays down a number of rules applying to states which provide aid to undertakings (Articles 92 to 94). Assessment of the criteria which may justify state aid are generally based on a conflict between, on the one hand, economic agents who benefit therefrom and users and, on the other hand, competitors in other Member States who are in a less favoured position because of this aid.

Consumers' interests are not specifically mentioned. Three criteria are specified in Article 92(3) of the Treaty, viz. development of severely affected regions, promotion of a project of common European interest, and development of certain economic activities or of certain areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

The question for consumers whether aid accorded in this manner does in fact pursue the alleged objective and whether it leads to excessive production costs which competition could eliminate.

Chapter 8. Common transport policy

8.1. Air transport

European air transport law has had a very troubled history. Because of Article 84(2), it was not until the Nouvelles Frontières judgement of 30 April 1986 that it was possible to consider air transport as falling under the general rules of the Treaty, including those relating to competition, in line with the other means of transport [48].

Application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector

Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector OJ n° L 374 of 31 December 1987

Air transport was closely linked to state aid and consequently the competitive environment had to be changed in a gradual manner. Inevitably, the airline companies tend to make agreements, both in relation to capacity and to charges, and these should not be exempted on too large a scale.

For this reason a general regulation was adopted, which was followed by three other regulations which will be examined below.

Thus, Regulation 3976/87 establishes a general political guideline allowing the Commission to further exercise its power to implement Article 85 and without close liaison with the competent authorities in the Member States.

As regards legal protection of consumers, it is difficult to evaluate this regulation because it is a framework law which does not prejudge later application of Article 90 of the Treaty as regards the links between the airline companies and the Member States. However, the Commission has also, in a number of subsequent legal texts, increased the number of categories of agreements which may be exempted. Thus, the following categories of agreement are exempted:

— sharing of revenue from scheduled air services,

— consultations for common preparation of proposals on tariffs, fares and conditions for the carriage of passengers and baggage on scheduled services,

— slot allocation at airports and airport scheduling,

— common purchase, development and operation of computer reservation systems,

— technical and operational ground handling at airports,

— services for the provision of in-flight catering.

In order to maintain a certain degree of competition between the airline companies, certain restrictions have been enumerated. They mainly concern the concrete conditions for such practices and in particular the conditions in which they may be terminated. Every undertaking must be in a position to opt out eventually.

This regulation has been subject to much criticism by the airline companies. However, it is part of a policy of gradual liberalisation in the airline sector where it is clear that the balance between the benefit accruing to consumers and the market interest has not yet been achieved. It should be noted that the Commission has tabled a draft regulation amending regulation n° 3976/87 to extend the scope of the latter to cover transport services which are wholly confined to one Member State (OJ n° C 225 of 30 August 1991).

In application of this regulation, three category-specific exemption regulations have been adopted. These regulations are of a temporary nature, even if they are renewable, and clearly manifest the will to prepare the next stage.

EEC Regulation n° 82/91 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices concerning ground handling services, O.J. n° L 10 of 15 January 1991

This regulation concerns ground handling services provided either by air carriers or specialised undertakings, such as technical and operational ground handling, handling of passengers, mail, freight and baggage, and services for the provision of in-flight catering.

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48 (CJEC, Reports, p. 1425)

EEC Regulation n° 83/91 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services (ibid)

This regulation applies to agreements for the common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing. Thus, it allows airline company agents and travel agents to increase their share of the market and their opportunities for selling their products and allows consumers, on the basis of more complete information, to make an optimum choice.

EEC Regulation n° 84/91 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices concerning joint planning and coordination of capacity, consultations on passenger tariffs and cargo rates on scheduled air services and slot allocation at airports (ibid)

This regulation's point of departure is that the concerted practices it covers may offer the users substantial advantages. Moreover, the agreements must ensure a good range of air services and must not limit the supply of supplementary capacity by carriers. Finally, these agreements must allow each partner to withdraw on giving reasonable notice.

The regulation is also based on the principle that agreements on sharing of revenue may encourage carriers to exploit a line during less busy periods.

Consultations on tariffs are also admissible under certain conditions and, finally, agreements on slot allocation in airports and airport scheduling may also contribute to ensuring better use of airport capacity and to better use of air space.

Air fares

Council Directive n° 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States, OJ n° L 374 of 31 December 1987

The Commission published in July 1981 a report on passenger airfares on scheduled flights within the Community [49]. It pointed out that fares were fixed in accordance with a rigid procedure which did not allow companies to respond to market developments. It transpired that companies had reasonable profits on short routes but their profit margins were far too great on long-distance trips. Finally, the report highlighted the tariff control that national authorities exercise over the national airline companies.

In 1981 the Commission published a proposal for a directive which was adopted in 1987 after numerous amendments. The directive lays down rules relating to the establishment of scheduled airfares between Member States, i.e. their scope, criteria and the procedures for their submission, approval or disapproval. The directive concerns only the fixing of fares within the Community and the profits of the airline companies [50].

The directive allows carriers to propose their fares without being obliged to consult other carriers. Of course the two states concerned still have to approve the new fares. Nonetheless, the power of the Member States is restricted. Silence on the part of the Member States is equivalent to automatic approval. Every refusal by a Member State must be justified.

As regards association and protection of consumers, consultation and information of users is provided for. The Commission must consult and inform, at least once per year, the representatives of air-transport user organisations within the Community.

The real innovatory feature of the directive is that users are consulted. This is essential in this domain and in the field of price regulation generally, even if the opinion is not binding. However it is difficult to evaluate the real role of consultation up to now.

Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services, OJ No L 217 of 11 August 1990.

This regulation constitutes the second step towards the liberalisation of airfares. It defines the criteria and procedures applied with respect to the establishment of fares charged on routes between Member States.

Transport and safety

As we know well from the deregulation of air transport in the United States, an increase in competition may put pressure on carriers to reduce costs. It is important that such pressures do not have a detrimental impact on safety. In a document of 16 January 1989 [51], the Commission defined several proposals designed to solve these problems.

The first measure was a proposal for a Council Decision on consultation and coordination between Member States in the field of air traffic services and air traffic flow management. A common centralised system for managing air traffic flows was to be assured by Eurocontrol.

The second measure was a proposal extending to air and sea transport the scope of Decision 78/174/EEC of 28 February 1978 [52], instituting a consultation procedure and creating a Committee for transport infrastructure [53]. This measure should be encouraged because it will allow consumers to be genuinely involved.

The third measure is a proposal for a Council Recommendation on a flexible and efficient use of airspace.

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49 COM (81) 398 final

50 For more recent developments consult CJEC 11 April 1989, Case 66/88 Ahmed Faeed, Reports, p. 803.

51 Doc COM(88) 577 final

52 OJ n° L 54 of 25 February 1978

53 OJ n° C 281 of 19 September 1987

Moreover, following a Parliament resolution of 15 September 1987, the question of air safety is now a priority. Technical working parties have already at their disposal rules which are set out in the certification codes.

Finally, the Commission wishes to propose measures designed to reduce costs by encouraging exchange of information between airports and their users.

Compensation of passengers in the event of overbooked flights

Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport, OJ No L36 of 8 February 1991.

The purpose of this regulation is to oblige airline companies to compensate passengers who have a confirmed reservation for a scheduled flight if they are denied boarding for reasons connected with over-booking. It applies to all scheduled services from a Community airport.

This regulation applies only in the event of over-booking, and not to simple flight cancellations for technical or commercial reasons. It obliges the carrier to define the priority rules that apply in the case of over-reservation and to inform the public thereof, while specifying that certain categories of persons, such as unaccompanied children or handicapped persons, must be given priority for boarding. Passengers who are denied boarding are compensated on a flat-rate basis, which depends on the distance of the final destination and the duration of the delay. They have of course the right to be boarded for their destination at the first opportunity, or they may demand reimbursement of their ticket. The carrier must also cover expenses on meals and refreshment and telephone call and/or telex/fax messages.

The regulation entered into force on 8 April 1991.

8.2. Rail transport

Communication on a Community railway policy, COM (89) 564 final of 25 January 1990

Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, OJ n° L 237 of 24 August 1991.

The aim of this directive is to facilitate the adaptation of Community railways to the requirements of the single market and to increase their efficiency, while ensuring the management independence of railway undertakings, by separating the provision of transport services and the operation of infrastructure, by improving the financial structure of undertakings and by insuring access to the networks of Member States for international groupings of railway undertakings and for railway undertakings engaged in the international combined transport of goods. The directive does not apply to the provision of urban, suburban or regional services.

It provides that, while Member States will remain responsible for the development of the railway infrastructure, greater competition will be established as regards exploitation of these networks, stimulated by the mandatory separation of the provision of transport services and the operation of infrastructure.

Council Decision concerning the establishing of a network of high speed trains, OJ No C34 of 14 February 1990.

This Decision aims at stimulating the development of a high speed train network which will guarantee quality services to users. The objective is to reinforce the European infrastructure, but also to tackle the problem of air traffic congestion and roadways; moreover, high speed train technology is in the Commission's view environment-friendly.

8.3. Road transport

Council Regulation n° 684/92/EEC on common rules for the international carriage of passengers by coach and bus, OJ n° L 74 of 20 March 1992

The consumer aspects of road transport have been studied above, (section 1, chapter 2, para 2.4. - motor vehicle regulation).

8.4. Maritime transport

Council Regulation n° 479/92/EEC of 25 February 1992 on the application of article 85, par.3 of the treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies, OJ n° L 55 of 29 February 1992

To our knowledge there is no binding text in this sector which is directly relevant to consumers.

Chapter 9. Community policy in the field of energy

9.1. Introduction

In the field of two specific energy sources: gas and electricity, the internal market is not something for tomorrow. Moreover, the White Book on the Completion of the Internal Market did not discuss this aspect of Community integration. In effect, the Community institutions have clashed with powerful national monopolies in the electricity sector. It is here that disparities are greatest, the price of electricity differing up to threefold depending on the State. However, rationalisation of the sector at Community level would lead to substantial savings. Faced with the refusal of most States to accept the principle of generalised free access to gas and electricity grids, the Commission in 1991 finally agreed to step by step integration. This integration will not be completed before 1996. In the short term, the policy is one of cooperation and gradualism.

One must distinguish between two aspects of Community policy in this field: on the one hand the liberalising of the energy

sector, and on the other saving energy, both of which are of direct relevance to consumers.

9.2. Completion of the internal market in electricity and gas

Council Directive No 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, OJ NO 185 of 17 July 1990.

Council Directive No 91/296/EEC of 31 May 1991 on the transit of natural gas through grids, OJ No L 147 of 12 June 1991.

The creation of an internal market in energy has had considerable impact on the functioning of the internal market. In 1988 the following objectives were set for the policy of the internal market in energy:

- reduction in energy costs;
- improvement in the structure of the energy industry by rationalising production and distribution;
- reliability of supplies, through greater solidarity between the Member States and greater flexibility in supply;
- increase in trade between the Member States.

The following problems have been identified: tax harmonisation, procedures for awarding public works contracts, open access to infrastructure, State aids, problems connected with environmental protection and efficient use of energy. In this final context there is a need to impose additional taxation, such as tax on carbon dioxide, with a view to an appraisal of the effective social cost of energy. These multifarious problems led to a delay in the programme for the liberalisation of the energy market. Accordingly, current discussions relate only to three aspects:

- liberalisation of the production and distribution of electricity;
- separation of the two functions, in particular as regards charges;
- access of third parties to the grids (ATR), limited to industry.

In this context the residential consumer belongs to a captive market because of the natural and technical imperatives associated with the production of electricity or gas. He is in a weak position vis-à-vis energy users, with the result that some have come to think that the profits from liberalising the energy market need only rarely be passed on to the residential consumer. Thus, it is essential to specify the following:

- as regards access of third parties to the grid, the question whether residential consumers will also benefit from the cost reductions is a very controversial one, because there is no certainty that these reductions will in fact percolate through to domestic bills;
- any liberalisation in production and distribution must also take into account the fact that consumer demand is effectively captive and that to a certain extent there is a need for a universal service: what is required is a universal electricity supply service comprising a Community-wide grid and charges criteria which reflect this aspect of the public service;
- price transparency measures must also apply to residential consumers;
- energy price policies must not penalise residential consumers as a result of the economic power of industrial users;
- residential consumers must be able to communicate their expectations and opinions through the creation of committees in which consumers will participate, both at national and Community level;
- the development of alternative energies must be encouraged;
- all measures to tax energy consumption must take into account the needs of less-favoured consumers, in particular old people;
- the introduction of taxes on carbon dioxide must be accompanied by mandatory measures for the more effective use of energy, in order not to penalise the consumer excessively.

9.3. Energy-saving

Council Resolution of 15 January 1985 on the improvement of energy-saving programmes in the Member States, OJ No C 20 of 22 January 1985.

Council Resolution of 16 September 1986 concerning new Community energy policy objectives for 1995 and convergence of the policies of the Member States, OJ No C 241 of 25 September 1986.

Council Decision No 89/364/EEC of 5 June 1989 on a Community action programme for improving the efficiency of energy use, OJ No L 157 of 9 June 1989.

Council Directive 92/75/EEC on the indication by labelling and standard product information of the consumption of energy and other resources of household appliances, OJ n° 297 of 13 October 1992.

Energy savings have an important impact in the production cycle, but they can significantly influence the efficiency of residential energy use. In this context, electricity represents a major part of energy consumed in Europe (1 % of household expenditure on average).

However, there are problems with regard to saving energy, in particular electricity:

- on the one hand, it jeopardises the objective of maximum profitability among producers of electrical appliances, for whom energy consumption is only one of several factors;
- on the other hand, it does not necessarily mean a wider choice for consumers, in particular residential consumers, for reasons linked with lack of information, but also budgetary constraints;

— finally, a reduction in energy demand also depends on the policy of electricity producers, who may or may not become involved in an active energy-saving campaign.

The Community decided, independently of its programme to liberalise the energy market, to develop an action programme to promote energy saving, where priority is given to action affecting household appliances consumption and the labelling of household appliances. The actions are designed to inform the consumer and encourage him to use electrical equipment and appliances more efficiently. Accordingly, the action programme is based on voluntary initiatives of producers and consumers.

This action programme has given rise to a first initiative concerning the indication by labelling and standard product information on the consumption of energy and other resources by household appliances. This proposai for a directive, currently under discussion, aims at improving the energy efficiency of household appliances, by improving consumer information and by persuading consumers to purchase more efficient appliances. Thus it also aims at improving competition between producers and designers of such appliances. With a view to maximising its impact it aims at establishing a standardised information system throughout the Community, mandatory for all manufacturers of household appliances specified in the proposal. Information on energy consumption must be contained on a label and on an information leaflet attached to the brochure or in all other documents supplied with the appliance. The proposal contains a number of provisions designed to ensure respect of the obligations incumbent on manufacturers and distributors.

These measures are good in that they constitute a step towards more rational consumer behaviour. But on their own they are not enough and should be supplemented, in particular by tax incentives to purchase more efficient appliances, or by energy price policies that take into account energy-saving measures, in order to encourage electricity suppliers to participate in the rational use of energy.

Thus, apart from simple measures to guide consumer choices, whose effectiveness is often questioned by producers, binding standards should be worked out as regards the energy efficiency of appliances, in order to eliminate from the market appliances which no longer meet acceptable efficiency criteria in the light of technological process and ecological considerations.

Moreover, the Commission should encourage the adoption of European standards to take into account scientific and technological progress regarding building insulation [54].

Chapter 10. Community communications policy

10.1. Introduction - telecommunications

Green Paper on the development of the common market for telecommunications service and equipment (COM(87)290 final)

Communication from the Commission of 9 February 1988 on implementing the Green Paper on the development of the common market for telecommunications service and equipment (COM(88)48 final)

Council Resolution of 30 June 1988 on the development of the common market for telecommunications service and equipment up to 1992, OJ No C 257 of 4 October 1988

Proposal for a Council Directive on the procedures for the award of public contracts to firms operating in the telecommunications sector OJ No C 40 of 17 February 1989

Council Directive n° 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications service through the implementation of open network provision, OJ No L 192 of 24 July 1990

Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications service, OJ No L 192 of 24 July 1990

Council Recommendation on the coordinated introduction of Digital European Cordless Telecommunications (DECT) in the Community, OJ No L 187 of 27 July 1990

Council Directive n° 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition for their conformity, OJ No L 128 of 23 May 1991

Report on the implementation of an open network provision for vocal telephony (ONP), COM 91-53 of 12 July 1991

Communication by the Commission on guidelines for the application of Community competition rules to the telecommunications sector, OJ No C 233 of 6 September 1991

Council Directive of 5 June 1992 on the application of of open network provision to leased lines, OJ n° L 165 of 19 June 1992

Council Resolution of 5 June 1992 on the development of a numerical network for the integration of services (RNIS) in the Community toward a paneuropean telecommunications infrastructure for 1993 and beyond, OJ n° C158 of 25 June 1992

The beginnings of a dynamic telecommunications policy date from 1987, with the publication by the Commission of the Green Paper on the development of the common market in telecommunications services and equipment (COM 87/290 final). Improvement of European telecommunications is indeed one of the essential prerequisites for economic growth in Europe, and is also a factor in European integration. Traditionally, the regulation of telecommunications has been the task of strictly partitioned national systems and, moreover, national administrations or organisations have enjoyed exclusive or special rights. Thus it is essential that the Community provide a regulatory framework for this sector, to allow it to expand and to promote economic growth, while playing a motor role on the path to European integration.

[54] see on this subject the directive on construction products, OJ n° L 40 of 11 February 1989.

Consumers have an interest in the way telecommunications are regulated, both as direct users (telephone equipment and service) and as indirect beneficiaries (value-added services, such as electronic cash transfer, telematics, remote surveillance, home banking, etc.).

Following a long consultation process which took place after publication of the Green Paper, agreement has been reached that the regulatory framework must allow development of a market which offers European users:

— a greater variety of telecommunications services;

— better quality telecommunications services;

— lower prices.

According to the Commission, this presupposes full freedom of movement of goods and services in the field of telecommunications. This calls into question the existence or at least the extent of public services and the associated monopolies and endorses a competitive and more liberal and flexible environment. Note that a general principle that applies to this area - and one that is essential for consumers - is that of progressive implementation of the rule that charges should in general follow cost trends.

The Green Paper sets out several lines of action, which have given rise to the following regulatory initiatives.

10.2. Telecommunications equipment

Opening of the market should ensure unimpeded supply of terminals in all the Member States and between the Member States. This means that the current acceptance procedures will have to allow greater competition with the Member States. However, as regards telephone services it should be noted that the first telephone set may, during a transitional phase whose duration not been specified, be provided by the telecommunications administration monopoly.

At the same time it is necessary to proceed to mutual recognition of approvals accorded by the national authorities, and to allow the manufacturer of equipment to market his product everywhere in the Community, on the basis of a single approval procedure. This is the objective of Council Directive No 91/263/EEC, which is based on the need to define standard technical solutions and defines the essential requirements which terminal equipment must satisfy. The States will not be entitled to oppose the use on their territory of equipment that is in conformity with the Directive.

10.3. Telecommunications services

The following points should be noted in connection with the principles guiding the Community's activity in this area:

— exclusive monopolies or special rights may be maintained only in connection with the supply and use of the network infrastructure, for a limited number of basic services when considered essential for safeguarding the purpose of the public service, in particular vocal telephony.

— The telecommunications authorities' activities in the field of regulation and management have to be kept apart. Regulatory activities mainly concern the granting of licences, monitoring of approval procedures and specification of interfaces, allocation of frequencies and general surveillance of network utilisation conditions.

The principles that determine application of competition rules to the telecommunications sector are set out in the Communication from the Commission of 6 September 1991. The objective is to authorise and encourage operators to establish the necessary cooperation mechanisms so as to create or maintain total interconnection between public networks and, where relevant, between the services, so as to allow the consumer to benefit from a wider range of better and less costly services.

In this context, Open Network Provision (ONP) , which defines the principles and conditions for the supply of an open network (technical conditions, conditions of use and charging) plays a basic role in ensuring equal access at Europen level to interconnected public networks. ONP implies, from the supply side, the elimination of all economic and/or institutional obstacles that prevent new competitors from operating on an equitable and non-discriminatory basis. On the demand side, it provides for the establishment of users' rights in their dealings with telecommunications organisations. ONP rules thus usefully supplement the competition rules.

These principles have given rise to several specific initiatives:

10.4. Leased lines

The Directive adopted by Council on 5 June 1992 involves a dual approach : the leased lines provided by the public network will have conditions of use and charging principles that are harmonised at European level. This will considerably facilitate use of the infrastructure. On the other hand, certain types of leased lines will be supplied in conformity with harmonised technical standards. The telecommunications organisations will have to provide these leased lines corresponding to need and demand.

10.5. Vocal telephony

The Commission's report establishes the concept of ONP for vocal telephony. Since vocal telephony may be subject to exclusive or special rights, it must be possible to compensate for the restrictions on competition by recognising certain rights for users. The report contains interesting proposals concerning the contractual nature of the relationship between the user and the telecommunications organisation, transparency of charges and in particular the structures of international charges, detailed billing, certain social criteria concerning access to telephone services, such as access for elderly people, economically disadvantaged consumers, public telephone booths and, finally, compatability standards for pre-paid telephone cards.

The Commission is currently working on a proposal for a Directive based on the ONP Report that takes into account the report's conclusions and the position statements to which it has given rise.

10.6. Assessment - telecommunications

It is clear that telecommunications play an increasingly important role in the functioning and efficiency of numerous economic activities. In the face of the imperatives of professional users, one may raise the question as to what extent the interests of "residential" consumers are taken into account, who should also enjoy the fruits of innovation.

Consumers are in favour of a competition-oriented policy in the field of terminal equipment and telecommunications services. However, items that are essential for the residential consumer such as vocal telephony and the first telephone unit - will, at least for a certain period, remain the monopoly of the telecommunications organisations. However, for numerous consumers the telephone is the only direct contact they have with telecommunications. The restrictions on the kind of equipment they can use not only denies them access to more sophisticated phone units (except when they are in surplus) but also exposes them to certain potentially unfair practices on the part of the telecommunications organisations.

The extension of the principle of liberalisation of equipment to all apparatus, including the first telephone unit, is urgent.

As regards the vocal telephony service, the characteristics of the public service (covering of rural zones, etc.) may justify certain exemptions. However, since the telecommunications organisations will find themselves in a competitive environment for all the other services, there is a risk that the quality of the service of vocal telephony for residential consumers will suffer as a result of more intensive profit-seeking.

The development of a Community quality system for telephone services, so that the residential consumers can share the fruits of innovation is thus essential. Moreover, a system run by an independent organisation for supervising the telecommunications organisations is also required.

10.7. Postal services

Postal services are crucial for European integration. However, major discrepancies in charges for the same basic services are still excessive; there is no standard definition of the different postal services; the quality of the services, as measured in terms of delivery periods, is very different from one State to the other and generally fails to meet users' reasonable expectations.

In June 1992 the Commission published a Green Paper on postal services [55]. Its preparation revealed the differences in approach between the point of view which favours a total liberalisation of the European market, and that of the public postal administrations.

It will be a first step towards defining standards of quality, transparency and efficiency of the postal services.

It is essential that in developing a Community policy in the field of postal services, the Community should take into account the interests of residential consumers, so that the latter can benefit from greater coordination and efficiency. Attention must be paid to the following points in particular:

- harmonisation of charges and services, both at national and Community level, in particular through the creation of an ecu stamp;
- quality of postal services. In this respect, quality indicators must be worked out. These indicators will have to be binding for the postal administrations and their application will have to be checked periodically by an independent body and the results published;
- users' rights. These rights are not recognised in the same way in all the Member States. It is important to implement the right to reimbursement in the event of loss or theft of a consignment or in the case of delay.

It is essential that the Community take initiatives with a view to creating a Community system of postal services which will ensure greater efficiency and greater protection of users.

SECTION 3

Promotion of consumer — information and education [56]

1. Introduction

The high level of protection provided for in Article 100A(3) of the Treaty is not sufficient in itself. Protection must be backed up by information and education: regulations, laws, standards, codes of good practice, etc. are a point of departure but they will remain ineffective if citizens do not know them, do not understand them and do not apply them.

The need to interlink protection, information and education of the consumer has long been recognised. It was proposed for the first time by President Kennedy in 1963 in the United States. In Europe, it was first recognised officially in April 1975 with the adoption of the first Consumer Protection Programme aimed at ensuring five basic rights for consumers. These included the right to education and information and were reaffirmed six years later by the adoption in May 1981 of the second programme In the context of the internal market, these rights are an even more crucial factor, since the range of goods and services is increasing and has opened new and unfamiliar opportunities for 340 million consumers.

2. The difference between education and information

Information and education are interdependent, but there still exist considerable differences between the two. It was the Council of Europe which preceded the European Community in preparing detailed and long-term studies on consumer education, which first stressed this problem in the context

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55 COM(91) 476 final

56 The authors of the technical document wish to thank Mrs Alma Williams, who drafted the section on consumer education,for her cooperation.

of schools and pointed out that "it is difficult to separate consumer education and consumer information, in other words it is difficult to provide an adult consumer with adequate information if he has not received a minimum practical consumer education at school. The child's critical spirit must thus be developed as early as possible to allow him to adopt a reasonable attitude vis-à-vis his economic and social environment" (Working Party No 2 of the Council of Europe, 1971).

To sum up, information provides the facts, while education teaches us to evaluate, use and apply them. Only education can turn the consumer into a well-informed citizen capable of tackling complex problems connected with the freedom of choice created by the internal market. Only education can enable us to face the moral dilemmas raised by the need and desire to consume, by our responsibilities for the environment and the Third World (see 1.4.7). Only education allows hope for a lasting change in human attitudes and behaviour.

For this reason consumer education - which includes information - is internationally defined as the "development of a reflective and critical frame of mind."

3. Specific case - Labelling

Sometimes information is more specific in nature, for example in the case of labelling [57]. According to the Commission (Ten years of Community Policy in regard to Consumers, 1985) "the main progress made at Community level has concerned improvement in labelling relating to consumer products." This mainly concerns foodstuffs, textiles and information on energy consumption of household appliances. Indication of the price and mention of the unit price are also considered important, because they facilitate transparency of choice at the point of sale. In other terms, consumers need labelling "in order to decide on the basis of full knowledge", in particular if they want to purchase abroad. But the point of departure is the same: it is necessary to allow consumers to use not only information contained on labelling (which one hopes is clear, simple and readable), but also the information contained in brochures and prospectuses, mass media and advertising, which are mainly targeted at adult consumers.

4. Schools

While the Commission recognises the priority of consumer education, particularly in schools, it is aware that certain difficulties limit the scope of its action and that "Community action will consist in ensuring a widespread exchange of views on national experiences and discussion of consumer education methods in schools." (cf. Ten years of Community Education in regard to Consumers, 1985). Before 1975, the Commission had commissioned certain experts to prepare studies in each of the ten Member States and had organised a symposium in London. The main objective was the establishment of a network of pilot schools to allow the pooling of experience and ideas between teaching staff. The conclusions - which are still valid today - were:

- that it is possible to integrate a new subject or to introduce a new accent in existing school curricula;
- that such integration means that it is necessary to give teachers specialised training and to provide them with appropriate teaching aids;
- that Community action in this field is called for.

Consequently, the Resolution on Consumer Education in Primary and Secondary Education was adopted unanimously in 1986 (OJ C 184 of 23 July 1986). But a resolution was the most that was to be had. It was not binding, its implementation depended on political will in the States and encouragement from the Commission, but it was in line with the broader Resolution of 13 December 1976 adopted by the Ministers of Education with a view to facilitating "the transition of young people to working life and to preparing their entry into professional life" (OJ C 308 of 30 December 1976).

5. The Resolution on consumer education

General responsibility for implementing the Resolution resides mainly in the Commission and the States, although one should not underestimate the specific contributions of consumer organisations and professional bodies.

The Commission:

- has established and financed pilot projects in the States, in schools and for teachers. It has also promoted the development of national teaching aids;
- has helped coordinate the projects;
- has launched campaigns (campaign for child safety, for example);
- has financed seminars and conferences and an exhibition of teaching aids in Madrid in 1988;
- has proposed publication of its own pan-European teaching aids relating to safety;
- has generally encouraged consumer education.

The gaps in the Commission's activities are however evident: firstly, it does not have enough resources (and thus it does not have specialised personnel, although it has recently nominated a person officially responsible for consumer education). Its budget is being reduced rather than increased, despite the new needs for the information and education of consumers created by the internal market. Despite repeated pressure, the results of a very thorough pilot study conducted by teachers on their experiences in schools has never been published in all the languages, and thus has not been exploited in an effective manner. One may ask whether the inventory of teaching aids in nine languages on consumer safety, drawn up with an eye to the internal market and the subject of recent pilot studies in the States, will meet the same fate. Moreover, although the accent has been on the need for networks, it sometimes happens that projects and pilot tests remain isolated and that related activities are undertaken in mutual ignorance even within individual Member States. There is much to do, at higher cost, to improve coordination.

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[57] see in particular directive n° 88/314/EEC on the indication of price on non-foodstuff products, of 7 June 1988, OJ n° L 142 of 9 June 1988

The States are faced with different situations and their general education systems are very different, for example as regards centralisation of curricula. The unanimous approval accorded to the Resolution has not in general given rise to initiatives, although there are excellent examples which might be cited. Outside school education there are a variety of approaches, which often involve the mass media, and whose success depends on putting the message across on an adequately simple level.

6. Priorities for the future

The simplest way of enabling consumers to tackle the challenge of an enlarged market is to concentrate on two elements:

- training of teachers in the shortest possible time;
- supply of appropriate teaching aids which will take into account the requirements of the internal market.

One can only praise the Commission (Commission Report on Consumer Education, 9 June 1986 (86/C 184/07) for its declarations on each of these subjects. By contrast, one can only deplore its current incapacity to match words with deeds.

The Commission has recognised:

- *the importance of promoting consumer education through specific prior training of teachers, not only during their initial but in the course of in-service training. Appropriate training of teachers could help to:*
- *understand the contents of consumer education;*
- *master the methods of such training;*
- *distinguish between good and bad teaching material (whether of commercial origin or not);*
- *organise the incorporation of consumer education in the curriculum both as a separate subject and as a feature of a variety of more general subjects;*

and

- *the importance of promoting the development of teaching material for the training of teachers and of teaching material to be used by teachers in educating their pupils.*

The implementation of these two priorities will give consumers the best possible preparation for playing their role - one that is continuously growing in importance but often neglected - as key "economic agents" in the context of 1992, and equally in a more distant future.

Section 4

Consumer access to justice

1. Introduction

The contributions of European law to improving rules on disputes have mainly taken the form of national projects financed by the Community. These projects pursued by the Commission have led to relatively homogenous results according to the Member States.

Projects conducted or in progress in France, Belgium, Italy, Portugal, the United Kingdom and Ireland, essentially focus on settling individual disputes in which consumers are likely to be involved.

Nonetheless, no binding measure has yet been adopted by the Communities in this field. The explanation given is that there is no specific legal basis for doing so.

A similar failure to act applies in the case of collective interest actions or group actions and the right of consumers associations to take legal action.

There have been numerous exchanges of views on this subject. Colloquia have been organised and studies financed. However, there is still no likelihood of concrete actions of this kind being organised at Community level.

It is only thanks to the far from revolutionary decisions of the Court of Justice that it has been possible to establish the right to intervene in matters susceptible of interesting the consumer.

2. Simplified procedure

The results of experiments with the simplified procedure carried out in different States lead us to urge the rapid implementation of an action programme taking into account the following parameters for the adoption of a directive on a single simplified procedure model, which should be rapid and inexpensive, and applicable both to court procedures and other forms of arbitration. These parameters are:

a) *Recognition of the specificity of national legal systems*

Each of the Member States should still be free to adapt the harmonised rules to their own legal systems. This brings us back to Article 4 of Directive 84/450/EEC, OJ n° L 250 of 19 September 1984, on the approximation of national legislation in the field of misleading advertising.

However, such recognition may render ineffective actions taken by consumer associations outside the territory in which they exercise their main activity.

b) *Complementarity*

Up to now studies have failed to accentuate the complementarity of models for resolving disputes. Thus, Council Directive No 87/344 of 22 June 1987 (O.J. n° L 185 of 4 July 1987) on legal expenses insurance has not given sufficient attention to the consumer problem, as we will see later. Nonetheless, it confronts the phenomenon of privatisation of the financing of access to justice.

By contrast, legal aid and court aid have not been discussed at all at Community level.

c) *Adaptability*

The systems that have been established should be able to cope smoothly with a variety of legal systems. It should be easy to appeal to higher courts to interpret the relevant law. Arbitration is a case in point. (see 4 below)

Specific rules on resolution of conflicts of jurisdiction and conflicts of laws should be envisaged. The conventions of Brussels and Rome are still too theoretical.

d) *The contribution of substantive law*

The development of rules recognising consumer rights should be realised through the courts. These simplified procedures should contribute to the development of substantive law. Considerations of good faith or equity should play only a subsidiary role.

3. Access to Community jurisdiction

To this day the European Court of Justice refuses to recognise the right of an association representing a collective interest to initiate proceedings (CJEC 14 December 1962, reports 1962, pages 901-921).

However, two loopholes have been opened in competition law and in the context of implementing anti-dumping rules.

In the field of competition law the Commission has considered that consumer organisations have a legitimate interest in establishing an infringement of Articles 85 and 86 of the Treaty. It would be desirable if transposition of the METROSABA judgment (CJEC 1976, Reports 1977, page 1875) were to be affirmed clearly and that accordingly, once a complaint has been rejected by the Commission, a procedure could be initiated with a view to protecting legitimate interests. The point of view of consumers' organisations in the field of competition law, has been able to find expression [58] mainly under Article 37(2) of the protocol establishing the Articles of Association of the Court of Justice, in conjunction with Article 93 of the Rules of Procedure (OJ n° C 39 of 15 February 1982). In the field of anti-dumping rules, the Court on 22 November 1991, accepted an action by the Bureau Européen de l'Union de Consommateurs, in Case C 170/89, while later rejecting it on fundamental grounds.

4. Cross-border disputes

Rules concerning cross-border disputes are currently based on the Brussels Convention on jurisdiction and the enforcements of judgements in civil and commercial matters of 27 September 1968 (O.J. n° L 299 of 31 December 1972) and the Rome Convention on the law applicable to contractual obligations of 19 June 1980 (O.J. n° L 266 of 9 October 1980), in the matters covered by these conventions.

These two conventions contain specific provisions on contracts concluded by consumers. It is agreed that the cases envisaged are too theoretical and are aimed mainly at protecting the passive consumer. Any person who has had dealings with a foreign undertaking and who has concluded in his State all the necessary formalities can choose the jurisdiction he wants, i.e. that of his own State or that of the State of the undertaking. Contractual clauses concerning territorial competence are invalidated. Similarly, the professional can initiate proceedings only in the state in which the consumer is domiciled.

One specific category, however, is not covered by these rules. It concerns hire purchase and leasing and all other financing operations connected with the purchase of a specific good. For this category the legal operation is applicable independently of the criteria under which the contract is concluded (advertising, act of signing the contract, etc.).

In the field of consumer law, it is important to encourage reliance on substantive criteria so that the rules of conflict of laws can be invoked with greater certainty.

This process needs encouragement all the more since the matter covered is being progressively harmonised.

The adoption of standard categories is a vital factor for improving the treatment of cross-border disputes.

Likewise, it is also important to examine the difficulties a consumer may encounter later when it comes to enforcing the judgment. The Brussels Convention does not do enough to ensure the free movement of judgments.

FINAL REMARKS

The path followed since the first stirrings of the consumer movement in 1960 has been an eventful one. Nevertheless, to consolidate and complete what has already been achieved, a fresh impetus must be given. This is one of the missions of the Economic and Social Committee.

a) Evaluating achievements

We must ensure that the objectives pursued by new Community legislation are realised in practice. Transposition into national law must be scrutinised and scrutinised in public - so as to measure the real impact of the measures adopted.

b) Exploiting new legal bases

We should not over-emphasise the principle of subsidiarity. This principle is itself secondary vis-à-vis the primary objectives of the Treaty.

c) New areas of activity

In a rapidly changing world it is essential to define a consumer protection policy which has the necessary degree of flexibility. An on-going reevaluation of the reality experienced by consumers is essential, with a view to adapting consumer policy accordingly, while taking into account external imperatives, such as environmental protection.

[58] See Order of the President of the Court, case 229/82, 21 September 1982, OJ n° C 258 of 2 October 1982.

ANNEXES

List of principal judgements of the CJEC relating to Articles 30 and 59 of the EEC Treaty, which have a bearing on consumer matters

ARTICLE 30

1. **Case 8-74, 11 July 1974, *Procureur du Roi/Benoit et Gustave Dassonville*, ECR., p.837**

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions."

2. **Case 120/78, 20 February 1979, *Rewe/Bundesmonopolverwaltung für Branntwein*, ECR., p. 649**

"In the absence of common rules, obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of a product must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

3. **Case 2/78, 16 May 1979, *Commission/Belgium*, ECR., p. 1761**

"...in the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion it is, however, subject to the condition that those measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

To check the authenticity of a product bearing a designation of origin by the expedient of examining certificates of origin issued in the producer Member State is not unreasonable".

4. **Case 788/79, 26 June 1980, *Gilli et Andres*, ECR., p. 2071 and**
Case 113/80, 17 June 1981, *Commission/Ireland* ECR., p. 1625

"In the absence of common rules relating to the production and marketing of a product it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intracommunity trade.

It is only where national rules, which apply without discrimination to domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to the protection of public health, the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising out of Article 30 of the EEC Treaty".

5. **Case 27/80, 16 December 1980, *Fietje*, ECR., p. 3839**

"The extension by a Member State of a provision which prohibits the sale of certain alcoholic beverages under a description other than that prescribed by national law to beverages imported from other Member States, thereby making it necessary to alter the label under which the imported beverage is lawfully marketed in the exporting Member State, is to be considered a measure having an effect equivalent to a quantitative restriction which is prohibited by Article 30 of the EEC Treaty and which is not justified on the ground of the public interest in consumer protection in so far as the details given on the original label supply the consumer with information on the nature of the product in question which is equivalent to that in the description prescribed by law.

It is for the national court to make the findings of fact necessary in order to establish whether or not there is such equivalence".

6. **Case 53/80, 5 February 1981, *Officer van Justitie/Kaasfabriek Eysson*, ECR., p. 409**

"...the addition of nisin to processed cheese is not subject to uniform rules in all the Member States. Whereas it is totally prohibited in domestic trade by certain Member States, such as the Netherlands, it is permitted in other Member States without restriction or subject to prescribed maximum levels.

In view of this disparity of rules it cannot be disputed that the prohibition by certain Member States of the marketing on their territory of processed cheese containing added nisin is of such a nature as to affect imports of

that product from other Member States where, conversely, the addition of nisin is wholly or partially permitted and that it for that reason constitutes a measure having an equivalent effect to a quantitative restriction".

7. **Case 113/80, 17 June 1981, *Commission/Ireland*, ECR., p. 1625**

   "National legislation requiring all souvenirs and Articles of jewellery imported from Member States to bear an indication of origin or the word "Foreign" constitutes a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty".

8. **Case 193/80, 9 December 1981, *Commission/Italy*, ECR., p. 3019, and**

   Case 182/84, 26 November 1985, *Miro*, ECR., p. 3731

   "...vinegar is a generic term and it would not be compatible with the objectives of the Common Market and in particular with the fundamental principle of the free movement of goods for national legislation to be able to restrict a generic term to one national variety alone to the detriment of other varieties produced, in particular, in other Member States.

9. **Case 6/81, 2 March 1982, *Industry Diensten Groep/Beele*, ECR., p. 707**

   "National case-law prohibiting the precise imitation of someone else's product which is likely to cause confusion may indeed protect consumers and promote fair trading; these are general interests which according to the decisions of the Court...may justify the existence of obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of products. That such a rule does not meet mandatory requirements is moreover borne out by the fact that it accords with the principle underlying Article 10 bis of the Paris Convention for the Protection of Industrial Property, as last revised on 14 July 1967 at Stockholm, which prohibits **inter alia** all acts of such a nature as to create confusion with the goods of a competitor, and by the fact that this rule is recognized in principle in the case-law of most Member States".

10. **Case 75/81, 31 March 1982, *Blesgen/Belgium*, ECR., p. 1211**

    "The concept in Article 30 of the EEC Treaty of measures having an effect equivalent to quantitative restrictions on imports is to be understood as meaning that the prohibition laid down by that provision does not cover a national measure applicable without distinction to domestic and imported products which prohibits the consumption, sale or offering even without charge of spirituous beverages of a certain alcoholic strength for consumption on the premises in all places open to the public as well as the stocking of such drinks on premises to which consumers are admitted or in other parts of the establishment or in the dwelling appurtenant thereto, in so far as the latter prohibition is complementary to the prohibition of consumption on the premises.

    Since it does not affect the marketing of the spirits referred to and since the restrictions make no distintion whatsoever based on the nature of the origin of the spirits such a national measure has in fact no connection with the importation of the products and for that reason is not of such a nature as to impede trade between Member States".

11. **Case 261/81, 10 November 1982, Rau/De Smedt, ECR., p. 3961**

    "...It must be recalled, as the Court has repeatedly held..., that in the absence of common rules relating to the marketing of the products concerned obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to imported and domestic products without distinction, may be recognised as being necessary in order to satisfy mandatory requirements relating inter alia *to consumer protection. It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods.*

    The application in one Member State to margarine imported from another Member State and lawfully produced and marketed in that State of legislation prohibiting the marketing of margarine or edible fats where each block or its external packaging does not have a particular shape, for example the shape of a cube, in circumstances in which the consumer may be protected and informed by means which hinder the free movement of goods to a lesser degree constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty".

12. **Case 286/81, 15 December 1982, Oosthoek's Uitgeversmaatschappij, ECR., p.4575**

    "Articles 30 and 34 of the EEC Treaty do not preclude the application by a Member State to products from, or intended for another Member State of national legislation which prohibits the offering or giving, for sales promotion purpose, of free gifts in the form of books to purchasers of an encyclopaedia and requires, for the application of an exception to that prohibition, the existence of a relationship between the consumption or use of a free gift and the product constituting the basis for the offering of the gift".

13. **Case 94/82, 17 March 1983, De Kikvorsch, ECR., p. 947**

    Article 30 of the Treaty in no way prevents a Member State from protecting its consumers against labelling which is of such a kind as to mislead the purchaser.

Such protection is indeed required by Article 2(1) of Council Directive 79/112/EEC[59].

Such consumer protection may also entail a prohibition of the provision of certain information on the products, particularly if that information may be confused by the consumer with other information required by national rules. For such a prohibition to be applied to products from another Member State, in such a way as to necessitate the alteration of the original labels of such products, the original labels must actually be of such a kind as to give rise to confusion which the rules seek to avoid. The findings of fact necessary in order to establish whether or not there is such a risk of confusion are a matter for the national court".

14. Case 174/82, 14 July 1983, *Sandoz*, ECR., p.2445

"Community law does not permit national rules which subject authorisation to market foodstuffs lawfully marketed in another Member State to which vitamins have been added to proof by the importer that the marketing of the product in question meets a market demand.

The sole fact of imposing such a condition constitutes in itself a measure having an equivalent effect to a quantitative restriction prohibited by Article 30 which cannot be covered by the exception in Article 36. The objective pursued by the principle of free movement of goods is precisely to ensure for products from the various Member States access to markets on which they were not previously represented".

15. Case 222/82, 13 December 1983, *Apple and Pear Development Council/Lewis*, ECR., p.4083, and

Case 237/82, 7 February 1984, *Jongeneel Kaas/The Netherlands*, ECR., p.483

"As the Court has held...a publicity campaign to promote the sale and purchase of domestic products may, in certain circumstances, fall within the prohibition contained in Article 30 of the Treaty, if the campaign is supported by the public authorities. In fact, a body such as the Development Council, which is set up by the government of a Member State and is financed by a charge imposed on growers, cannot under Community law enjoy the same freedom as regards the methods of advertising used as that enjoyed by producers or producers' associations of a voluntary character.

In particular, such a body is under a duty not to engage in any advertising intended to discourage the purchase of products of other Member States or to disparage those products solely by reason of their national origin.

On the other hand, Article 30 does not prevent such a body from drawing attention, in its publicity, to the specific qualities of fruit grown in the Member State in question or from organising campaigns to promote the sale of certain varieties, mentioning their particular properties, even if those varieties are typical of national production".

16. Case 238/82, 7 February 1984, *Duphar/The Netherlands*, ECR., p.523

"Community law does not detract from the powers of Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the consumption of pharmaceutical preparations in order to promote the financial stability of their health-care insurance schemes.

Provisions adopted within the framework of a compulsory national health-care scheme with the object of refusing insured persons the right to be supplied, at the expense of the insurance institution with specifically named medicinal preparations are compatible with Article 30 of the Treaty if the determination of the excluded medicinal preparations involves no discrimination regarding the origin of the products and is carried out on the basis of objective and verifiable criteria, such as the existence on the market of other, less expensive products having the same therapeutic effect, the fact that the preparations in question are freely marketed without the need for any medical prescription, or are products excluded from reimbursement for reasons of a pharmo-therapeutic nature justified by the protection of public health, and provided that it is possible to amend the lists whenever compliance with the specified criteria so requires".

17. Cases 266/87 and 267/87, 18 May 1989, *The Queen/Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers and others*, Rec. p. 1295

"A national rule of a Member State requiring a pharmacist, in response to a prescription calling for a medicinal product by its trademark or proprietary name, to dispense only a product bearing that trademark or proprietary name may be justified under Article 36 of the Treaty on grounds of the protection of public health even where the effect of such a rule is to prevent the pharmacist from dispensing a therapeutically equivalent product licensed by the competent national authorities pursuant to rules adopted in conformity with Community law and manufactured by the same company or group of companies or by a licensee of that company but bearing a trademark or proprietary name applied to it in another member State which differs from the trademark or proprietary name appearing in the prescription".

18. Case 382/87, 16 may 1989, *R.Buet and Educational business services (EBS) SARL/Ministère public*, ECR., p.1235

"The application to imported products of a ban imposed by national legislation on canvassing at the home in

59 Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate customer, OJ n° L 33 of 8 February 1979.

relation to the sale of educational material is not incompatible with Article 30 of the Treaty.

Such a ban is not disproportionate, inasmuch as it may be considered that in that sector giving consumers a right of cancellation does not constitute sufficient protection and that for that purpose it is necessary to ban canvassing at private homes".

19. **Case 25/88, 11 may 1989, *Criminal proceedings/Esther Renée Bouchara, née Wurmser, and Norlaine SA*, ECR., p.1105**

"As Community law stands at present, a provision requiring the person responsible for placing a product on the national market for the first time to verify its conformity with the rules in force on the said market regarding the health and safety of persons, fair trading and consumer protection and rendering that person liable in criminal law for breach of that requirement is compatible with Articles 30 and 36 of the EEC Treaty on condition that its application to products manufactured in another Member State is not subject to requirements going beyond what is necessary to achieve the object pursued, on the one hand, to the public interest in question and, on the other to the means of proof normally available to an importer. With regard, in particular, to the verification of information on a product's composition supplied to consumers when the product is released for sale, the importer must be entitled to rely on certificates issued by the authorities of the Member State of production or by a laboratory approved by the said authorities for that purpose, or, if the legislation of that Member state does not require the production of such certificates, on other attestations providing a like degree of assurance".

20. **Case C-362/88, 7 march 1990, *GB-INNO-BM/Confederation du commerce luxembourgeois*, ECR., p.I-667**

"Free movement of goods concerns not only traders but also individuals, it requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population(...). Since Community law regards the provision of information to the consumer as one of the principle requirements with regard to consumer protection, Article 30 of the Treaty cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection".

21. **Case C-238/89, 13 December 1990, *Pall corp./P. J. Dalhausen & Co.*, ECR., p. I-4827**

"Article 30 of the EEC Treaty is to be interpreted as precluding the application of a national provision on unfair competition which enables an economic operator to obtain a prohibition in the territory of a Member State on the marketing of a product bearing the letter (R) in a circle next to the trademark, if that trademark is not registered in that state but in another".

Provisional translations (n°s 22 and 23) from the French (texts as yet unavailable in English):

22. **Case 369/88, 21 march 1991, *Criminal proceedings/J.M. Delattre***

"...a monopoly of the right to distribute medicinal or other products, granted to dispensing pharmicists, may constitute a barrier to importation...if a Member State chooses to restrict to pharmicists the right to distribute products of that kind, such a barrier is, in principle and in the absence of any evidence to the contrary, justified in so far as it concerns medicinal products... where other products are concerned, however they may be classified in national law, it is for the national court to determine whether a monopoly of the right to market such products granted to pharmacists is necessary for the protection of public health or of consumers and whether those two aims cannot be achieved by measures less restrictive of intra-Community trade."

23. **Case 62/90, 8 April 1992, Commission/Federal Republic of Germany,**

"This Member State is in breach of obligations under Article 30 of the Treaty by preventing private individuals, with certain exceptions, from importing in quantities commensurate with normal personal requirements, medicinal products which are issued only on prescription in that Member State, and which have been prescribed by a medical practitioner and purchased in a pharmacy in another Member State."

ARTICLE 59

1. **Case 52/79, 18 March 1980, *Procurer du Roi/Marc J.V.C. Debauve and others*, ECR., p.833**

"Articles 59 and 60 of the EEC Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television - as they prohibit the broadcasting of advertisements by television - if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place in which he is established.

Indeed, in the absence of any harmonisation of the relevant national laws, a prohibition of this type falls within the residual power of each Member State to regulate, restrict or even totally prohibit television advertising on its territory on grounds of general interest, even if that prohibition extends to such advertising originating in another Member State".

2. **Case 279/80, 17 December 1981, *Webb*, ECR., p.3305**

"The principle aim of the third paragraph in Article 60 is to enable the provider of a service to pursue his activities in the Member State where the service is given without suffering discrimination in favour of the nationals of that State. However, it does not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States.

...the Court held that, regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered incompatible with the Treaty where they have as their purpose the application of rules governing such activities. However, the freedom to provide services cannot be considered incompatible with the Treaty and may be restricted to only provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the member State of his establishment."

3. **Joined Cases 286/82 and 26/83 (31 January 1984) *Graziana Luisa and Giuseppe Carbone/Ministero del Tesoro*, ECR., p.377**

"The freedom to provide services includes the freedom for the recipients of services to go to another Member State in order to recieve a service there, without being obstructed by restrictions, even in relation to payments. Tourists, persons receiving medical treatment and persons travelling for the purposes of education are to be regarded as the recipients of services".

4. **Cases 205/84-206/84-252/83-220/83, 4 December 1986, *Commission/Federal Republic of Germany, Ireland, Denmark and France*, ECR. p.3755**

"So far as direct insurance is concerned, the protection of policy-holders and insured persons justifies in the present state of Community law the application by the Member State in which the service is provided of its own legislation concerning technical reserves or provisions and the conditions of insurance, provided that the requirements of that legislation do not exceed what is necessary to ensure the protection of the policy-holders and insured persons".

5. **Case 159/90, 4 October 1991, *The Society for the Protection of Unborn Children - Ireland Ltd./S. Grogan*** - Sig. S 4685

"Medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.

It is not contrary to community law for a Member State in which medical termination of pregnancy is forbidden to prohibit student associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information".

Provisional translation (n° 6) from the French (text as yet unavailable in English):

6. **Case 204/90, 28 January 1992, *Hans-Martin Bachmann/The State of Belgium***

"In the current state of Community law, the consistency of such taxation arrangements cannot be secured by provisions which are less restrictive than those which are the subject of the main proceedings; and any other measure permitting the recovery, by the State concerned, of the tax, stipulated in its legislation, on the sums to be paid by the insurers by virtue of their contracts would have consequences similar to those flowing from the non-deductability of contributions.

In the light of the above it must be accepted that in the field of pension schemes and life assurance, provisions such as those provided for under Belgian law are warranted by the need to ensure the consistency of the tax arrangements to which they are subject; consequently such provisions are not in breach of the Treaty.

It is a matter for the national courts to assess whether the said provisions are also necessary to achieve this objective in the case of sickness and invalidity insurance."

European Communities - Economic and Social Committee

The Consumer and the Internal Market

1993 - 104 pages

DE, EN, ES, FR

Catalogue no. : ESC-93-003-EN

This publication deals with the an Own-Initiative Opinion of the Committee on Consumer Protection and Completion of the Internal Market, an additional Opinion on the Consumer and the Internal Market accompanied by an report of the section for Protection of the Environnement, Public Health and Consumer Affairs as well es a study entitled ''Consumer Protection and the Internal Market - Evaluation and Prospects''.

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Catalogue Number : ESC-93-003-EN