

The Birth, Life and Death of a Proposal: The Ill-fated Services Draft

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Introduction

In 1987 Trubek ventured the view that:

"consumer protection of the modern type requires the creation of state institutions that are independent of producers, responsive to genuine consumer need, technically proficient and armed with legal power sufficient to make and enforce effective law" (Trubek, 1987: 11).

The subject matter of this paper - the draft directive on the liability of suppliers of services (SSD)¹ - offers a perspective upon a number of aspects of that proposition. It is emerging from the research in progress that the failure of the SSD:

- sheds new light on the role of the Community institutions in the formulation and adoption of consumer protection legislation (and their interactions with national governments and interest groups), and consequently contributes to a better understanding of those institutions;
- highlights the continuing uncertain position of an EC-level consumer policy in the light of the requirements of the single market and the pressure of the subsidiarity concept; sandwiched between the differing demands of these two normative constructs, consumer policy continues to be an unhappy policy domain;
- reveals once again the diffuse nature of the consumer protection 'interest', particularly in a context where legislation is proposed which appears to threaten the very fabric of national private law.

In order to make these and other related points, this paper will examine the 'birth, life and death' of the proposal in detail, drawing on research which is still in progress and is therefore partially incomplete. As will become apparent, however, my preoccupation is not solely with a better understanding of the dynamics of EC consumer policy-making, but with some rather larger questions which are just beginning to emerge out of the research.

The first is primarily methodological in nature and concerns the general weaknesses of most 'legal' or 'lawyers' approaches to the policy processes of European integration. This is clearly a large question, but one which is increasingly well documented. I can therefore take it as read that the space exists for the development of new voices which articulate models of the European legal order, of the legal dynamics of the policy processes, and of the legal dynamics of the institutions, in particular the Court of Justice (e.g. Burley, 1993; Weiler, 1994; Snyder, 1994). My own objective is much more modest: it is simply to make a contribution through this research to the development of a voice which might be termed 'socio-legal' in a broad sense. This requires a few words of explanation. What is slowly emerging, out of the traditions of a number of disciplines and out of interdisciplinary work, is a body of commentary which examines European legal processes and legal institutions in their broader social, economic and political context, rather than regarding legal processes as an object of study in

themselves. In terms of method, this is obviously facilitated by empirical study, which looks beyond the text and seeks to chart the impact and importance of legal norms and processes for social actors. It also signifies a need to examine the 'EU legal order' (its 'Europeanness', its 'Unionness', its 'lawness', and its 'orderliness') against a background of different theoretical explanations or articulations of the processes of integration and disintegration since 1952. I have explored elsewhere some of the reasons lying behind the nature of 'traditional' EU legal studies scholarship in the United Kingdom, and for the retarded development of a socio-legal perspective (Shaw, 1996a; 1996b). The present research project seeks in a small and rather tentative way to put some of these emerging perspectives into practice. The 'voice' will emerge when the policy process is approached not through the prism and logic of legal procedures and Treaty provisions, but of social actions understood and explained in the light of a multi-disciplinary literature which lawyers have for too long ignored.

My second preoccupation operates within these methodological constraints, and is an attempt to focus on the various actors within the policy process, to understand how and why they choose to act in particular ways, what differences their choices make, and so on. To place this work within a framework of overarching 'legal' concerns, it should be stressed, however, that this is an attempt to articulate the legal in 'socio-legal'. This point can be made more clearly:

- in addition to my methodological concerns, which are specifically addressed to the development of law as a discipline, I also have a particular legal-constitutional question in mind when I look at the policy process, namely the development of a fuller understanding of changes in that process in the post-subsidiarity stage of European integration; in other words it is not concerned with the study of the institutions per se, but with a broader constitutional agenda in mind, regarding the 'whys' and 'wherefores' of the delineation and exercise of legal competence;
- as a lawyer, I bring a rather different set of intellectual baggage of the study of the policy process, and it seems to me useful not to resist my own 'lawyerliness' but to let it run in a self-conscious and non-judgemental way and to see how it shapes my research. For example, lawyers react in a particular way to constraints imposed and possibilities opened by the Treaties, secondary legislation or the case law of the Court of Justice; they tend to place a particular weight upon, and have a particular type of reaction to arguments on policy which are framed in terms of legal or constitutional principle, or legal change and institutional transformation; lawyers have particular views on other questions such as enforcement, implementation, practicability, and the democratic accountability of any new institutions created by legal change. That is not to say that other students of European policy do not experience similar responses, or indeed that different responses are any less valid, but simply to state that a lawyer's voice in this domain can present a different strand of development within multi-disciplinary assessments of EC-level policy-making;
- this point can be made in another way: my preoccupation is not primarily to contribute to a better understanding of the operation of interest groups or the policy process, or theories of pluralism and corporatism, definitions of policy communities or policy networks, government-business relationships, etc.² but to the better understanding of law as a multi-layered set of social relationships contributing to and helping to constitute the governance of the European Union.

The draft directive in outline

The draft directive on the liability of the suppliers of services originated for the most part in the successful campaign to secure the adoption of the Product Liability Directive (PLD), culminating in 1985.³ The PLD imposes strict liability for defects on the manufacturers of products and requires the consumer only to prove the existence of a defect in the product, and a causal link between the defect and the accident. The consumer does not need to prove that the manufacturer was in any way at fault in producing a defective product, and so the question of finding a defect in manufacturing systems is rendered totally irrelevant. All the Member States except Spain and France have implemented the Directive, and the changes which it has brought about in national regimes of consumer protection and national systems of tort law have been intensively discussed by legal commentators (Lewis et al, 1994; Howells, 1993). Closely linked also is the Directive on General Product Safety.

It must have seemed that the logical next step should be a directive seeking to harmonize liability rules in the Member States on the supply of services. The Commission therefore commissioned an expert study from the Centre de Droit de la Consommation at the University of Louvain-la-Neuve.⁴ This gave

rise to a preliminary draft which proposed harmonizing the national laws on the basis of a strict liability principle, akin to that enacted in the PLD. After discussion and criticism, the Commission published a formal draft in 1990, which proposed, instead of a strict liability system based on the concept of a defect, a reversal of the burden of proof where a person suffers damage as a result of a service. In other words, it would be up to the supplier of the service to prove that she was not negligent in its performance. The draft initiated a wide-ranging discussion: within the EC institutions,⁵ within interest groups and other concerned parties, and amongst academics (whether linked to particular interest groups (Bourgoignie, 1991; many of the contributions to Littbarski, 1992, esp. Maniet, 1992 and Goyens, 1992a), or acting independently (Fraselle, 1992; Deutsch and Taupitz, 1993; Shaw and Wheeler, 1992). After overwhelmingly negative reaction to the proposals contained in the draft, it was cited in the 'Edinburgh list' as a proposal due for reconsideration and possible withdrawal in the aftermath of the implementation of the subsidiarity principle in 1992/93. The proposal was savaged in both the Economic and Social Committee and the European Parliament Legal Affairs Committee, although there were substantial voices in favour in both institutions. In June 1994, the Commission finally formally withdrew the proposal,⁶ which had been practically dead for around two years, citing opposition to the proposal and the principle of subsidiarity as the main reasons, and suggesting new avenues for progress. These include putting the supply of services within a wider context of access to justice by consumers, the development of 'softer' approaches to improving standards such as codes of conduct and voluntary rules, and the possibility of sectoral directives addressing specific service supply areas.

General comments on consumer policy-making

The development of an EC consumer protection policy is largely the product of 'task expansion' by the Commission (Pollack, 1994), at least partly in reaction of developments initiated by the Court of Justice.⁷ The challenges of the single market, as well as the demands of a 'human face' aspect of EC policy have been met in institutional realignment (e.g. the creation of the Consumer Policy Service), secondary legislation of a variety of types and contents, and, latterly, Treaty amendment (Article 129A EC) (Reich, 1993; Micklitz and Weatherill, 1993; Goyens, 1992b). Pollack (1994) characterises consumer protection policy in terms of an early spillover from the free movement of goods, although arguably recent developments have seen it acquire a normative force of its own (Micklitz and Weatherill, 1993). On the other hand, consumer protection interests have been described as 'diffuse' (Trubek, 1987) and lacking in focus, and therefore less effective than business interests. It has also been suggested that it might be more difficult to maintain consumer interests within a system of regional economic integration. Furthermore, at national level, the 1980s and 1990s saw a general weakening of consumer pressure politics (Smith, 1993a and 1993b). There is a high potential for dislocation between the consumer interest, seen in a matrix of public choice theory, and an interventionist consumer policy based on a notion of responsive government articulated by Trubek (see above) (Greenwood et al, 1992: 32-35). Finally, it can be observed that consumer protection policy (like environmental policy) can be categorised as revealing a pattern of diffused benefits and concentrated costs, in terms of 'type' of policy (Wilson, 1974; discussed in Judge et al, 1994: 43). This is used to explain why the EP and its committees have played such an influential role in legislation in the field. Yet that is hardly an unmixed blessing, given the highly ambivalent institutional position of the EP. It can be concluded that it is to be anticipated that the development of consumer protection policy at EC level will encounter many obstacles - structural and ideological - in the progress from idea to policy.

From idea to proposal

Individuals, individual relationships, and the evidence and information which they can marshal can and do make a difference to policy processes, beginning at the stage of agenda setting (Peters, 1994; Majone, 1989). Longstanding personal links between the Commission and the Centre de Droit de la Consommation at the University of Louvain-la-Neuve in Belgium triggered the study contract to look at national liability regimes, on which the preliminary draft directive was based. The Centre is directed by the influential Belgian consumer lawyer Thierry Bourgoignie. In turn, there are close personal links between the Centre and the Bureau Européen des Unions Consommateurs (BEUC), the Commission-sponsored 'peak' interest group for consumers in the EU. A study of the preliminary draft (Bourgoignie, 1990) and early BEUC reaction to the proposal reveals few gaps between the Centre, the Consumer

Policy Service, the Consumers Consultative Committee which expressed general satisfaction, and BEUC, although subsequent events did begin to drive these key actors apart. On the other hand, not all the national contributors to the original study report speak with one voice in favour of a change in liability regimes, either because they consider national laws sufficient or because they fear the consequences of a stricter system of liability. Even at that early stage, later arguments are presaged by warnings that the diversity of sectors supplying services might make the introduction of a harmonization regime very difficult. However, the general report concludes that national laws have not kept pace with the socio-economic development of the services sector and consumers do not have sufficient protection against defective services. Moreover, the existence of the PLD offered an obvious model on the basis of which to develop a strict liability regime. No matter that many lawyers acknowledge the lack of similarity between products and services, particularly as regards the identification and definition of the concept of a 'defect'. Strict liability was therefore the model to be followed.

To the disappointment of its authors, the strict liability element of the proposal did not survive into the 'final' draft which became publicly available in late 1990 (Bourgoignie, 1991). Reversal of the burden of proof was proposed instead, and this change appears to have been generated from within the Commission itself, and, as a legal technique for the protection of consumers of services, has encountered precious little, if any, direct support from commentators. Above all, the stigma attached to a presumption of fault has attracted vehement criticism. It represents a challenge to professionalism. It can only be speculated why, some time during 1990, the Commission decided to 'water down' the proposal in this way. Unfortunately, the method which it chose was probably even more legally flawed than the original proposal of strict liability (it requires not only the harmonization of substantive liability concepts, but also threatens a need to harmonize certain evidentiary rules which drive the concept of the reversal of the burden of proof), and it did not have the merit of being directly supported by the proposal's main outside sponsors (the Belgian consumer law academic 'lobby'). Subsequent events appear to demonstrate that this change and its impact upon the responses of consumer organizations probably fatally wounded the SSD, and eliminated at that very early stage its realistic chances of adoption.

Reactions to the draft directive

The reactions of interested parties to the draft directive were very lively. At this stage of the research, I wish to highlight just three main aspects of particular interest.

The development of an academic 'circus'

For a number of reasons, the SSD attracted the immediate attention of academic lawyers. For the United Kingdom, for example, what the draft proposed would have been the first significant and general change in the liability regime affecting service providers for more than ten years, and probably the most significant legal transformation ever. It marked the first direct foray of the European institutions into the domain of general contract law, and consequently stimulated and fed into continuing debates about the development of a general 'European' contract law (Reich, 1993). On the other hand, it was typical of old-style interventionist harmonization, based on the imposition of a legal model which could not necessarily be easily assimilated into national regimes, rather than the identification of commonalities of approach at the level of principle which characterises other work in this field (Lando, 1992). The SSD drove a coach and horses through the traditional doctrinal divide between contract (voluntary obligations) and tort (obligations imposed by law). It drew no distinction between situations where the injured party has negotiated or purchased the provision of a service, and those where he or she is simply incidentally affected by a service provided by a third party. It drew no distinction between the public and private sectors, a position which is familiar in the UK, but anathema in other EU countries. It treated services as one universal category, drawing no distinction between those which are provided on a universal standardised basis with a contract of adhesion between supplier and consumer, and those which are individually negotiated. Conferences were held, papers presented, and a general reaction developed promoting the protection of diversity and tradition against the insidious capture of private law by the Commission. It is interesting to note that the Commission chose not to participate through a representative at such gatherings. Representatives of the Centre de Droit de la Consommation did attend to present a generally positive view of the SSD, while

interestingly often sliding quickly over the precise question of the reversal of the burden of proof (Maniet, 1992: 17).

Reactions of interested groups

The SSD attracted almost universal condemnation from organizations representing service suppliers, and only lukewarm support from consumer bodies. BEUC, for example, focused its support for the draft, which wavered at times but ultimately did not dissipate completely, on support for the principle of 'doing something' about a protection deficit. It marshalled evidence about the risks faced by consumers from defective and dangerous services, and the inaccessibility of legal remedies under current national regimes. There were even some consumer bodies which attacked the ill-advised nature of the SSD (NCC, 1991).

Opposition came from every sector of the economy, including many groups whose services were never going to fall within the scope of the SSD, which covered only damage to persons and property resulting from services. Consequently, banks, insurance companies, lawyers and accountants, to name but few were excluded from the scope of the SSD. That did not stop them expressing their opposition. Apart from the medical profession, almost the only 'clean-hands' profession which would have been affected if the SSD had been enacted would have been architects, so their implacable opposition was to be expected. The arguments ranged against the SSD varied from polemic based on cost, the insurability of risks, opposition to the blanket treatment of service sectors, and general hostility to the development of consumer protection competence by the EU to strictly 'legal' arguments based on the undoubtedly uncertain drafting of the terms of the SSD and the likely impact upon national laws. Opposition even came from groups such as the BMA which publicly support strict liability for medical accidents - ironically the position abandoned by the Commission.

The opposition raised by service suppliers can be seen to have culminated in the Dinner/Debate held in Paris in April 1992 and organized by Euricef on the initiative of Nicole Fontaine, Vice-President of the EP and a member of the Legal Affairs Committee. This meeting gave members of nearly 20 interest groups implacably opposed to the SSD the opportunity to 'savage' Karel van Miert, then Commissioner responsible for consumer policy matters, supported only by a representative from BEUC.⁸

Surprisingly, perhaps, opposition was not either complete or coherent. For example, a number of organizations with the leisure services field which would have been very considerably affected by the SSD if it had been adopted either came out in favour, or revealed subsequently a complete ignorance of the existence of the proposal during the key consultation phase (especially that conducted by the DTI in the United Kingdom). It could be suggested that in industries which have a strong 'consumer service' image, it is more difficult actively and openly to oppose initiatives such as the SSD.

Events within the EU institutions

Opposition within the ECOSOC and the EP eventually destroyed the legislative impetus of the SSD, and led to its withdrawal by the Commission, after a decent period for reflection and reconsideration.

Within the ECOSOC, opposition centred around members of the Committee who were members of the liberal professions. The Rapporteur appointed to prepare a draft opinion was Secretary General of SEPLIS, the peak association for the liberal professions. Even so, the draft opinion opposing the SSD was adopted in plenary session only by a single figure majority.

In the EP, hostility also appears to have come primarily from those close to, or themselves working within, the liberal professions. Early signs of support were positive. A generally positive opinion was given by the Consumer Protection in 1991. However, the 'lead' committee was the Legal Affairs committee, dominated by professional lawyers who saw vested interests potentially being challenged by a measure such as the SSD. The first rapporteur appointed (a Spanish Socialist MEP) was generally sympathetic, but he eventually resigned after a vote in which a plethora of amendments - some constructive, others frankly 'wrecking' in inspiration - were adopted in the final report from the Committee to the EP plenary. Probably the final straw came for the supporters of the SSD with the

suggested amendment of the legal basis of the directive from Article 100A to Article 235, notwithstanding an opinion from the EP's own legal service which indicated that the EC undoubtedly had the necessary competence to act under Article 100A. Members did not hesitate to express their hostility; at a meeting in June 1992, van Miert was closely interrogated by Committee members. Eventually, the Report from the Legal Affairs Committee was not discussed in plenary session, but referred back to the Committee, which was then assured that the Commission proposed to withdraw the SSD. In effect, the EP's actions, in combination with those of the ECOSOC killed the SSD, a point acknowledged in the subsequent withdrawal communication.

Comments

I have separated out these sections not because they represent discrete events within the policy process, but because it is revealing precisely to reveal the interactions between them. Certain key figures begin to emerge. Willi Rothley, a German SPD MEP and member of the Legal Affairs Committee, qualified lawyer, hosted a conference at the European Law Academy (Rothley, 1992; Littbarski, 1992), at which academic views of the legal issues raised by the SSD (e.g. Shaw and Wheeler, 1992; Hübner, 1992), intersected with strongly partisan views of interested parties in favour of the SSD (Maniet, 1992; Goyens, 1992 (consumers)) and against it (Frietsch, 1992 (governmental); Fagnart, 1992 (medical profession); O'Connell, 1992 (construction sector)). Henry Salmon, Rapporteur for the ECOSOC, also participated in the dinner/debate in Paris in April 1992 as Secretary General of SEPLIS and Secretary General of the French organisation Union nationale des professions libérales. On the consumer side, Monique Goyens, then of BEUC faithfully supported a SSD about which she had personal misgivings, and strongly opposed what she saw as "unfair" arguments put against it by some MEPs, who obfuscated the true scope of the SSD (which was relatively narrow). She too participated in the dinner/debate.

Looking back on the origins of the SSD, the terms in which it was drafted, the failure of the Commission to gather a strong coalition of consumer forces prepared to offer firm, consistent and loud backing, and the failure of the Commission itself to speak out publicly in favour of the draft as often as it might have done, it can be seen to have been doomed to failure from the very beginning. In terms of its approach to harmonization, it can be seen as 'old-style' harmonization out of its time: a sweeping attempt to reshape an intimate part of the national legal systems, consistent neither with the 'new-style' of the 1992 programme, nor with the self-restraint preached under the subsidiarity principle. What is more, not only did the SSD face the hurdle of overcoming the usual business-based resistance to consumer protection based on arguments of cost and inconvenience with commensurate gain to consumers, it also scratched at other open wounds. It appeared to challenge the competence of the liberal professions (although many would never have been touched by it) by imposing upon them a presumption of fault. It also threatened legal change within the Member States, externally imposed and potentially outside the control of national legal lobbies.

The withdrawal of the proposal and the future of services liability under EC law

The SSD was withdrawn by the Commission, as a tactical or symbolic sacrifice to the hyenas of EU minimalism in the wake of the Edinburgh subsidiarity declarations. In reality, given the events which had occurred, the Commission 'lost' little. Consequently it is difficult to be too sympathetic to the Commission's dilemma, given the clumsy drafting of the proposal and its generally unenthusiastic handling by the Commission. To return to the Trubek quotation at the beginning of this paper, it would seem that in respect of the SSD none of the variables of effective consumer protection legislation were present. The SSD, as a general measure, was probably tactically misconceived. Unfortunately, five years on from the publication of the draft, identified lacunae in the legal protection for consumers, which may well have been exacerbated in a number of different ways as a result of the operation of the processes of negative integration and of the single market are little closer to being closed. The Commission acknowledged at an early stage in the debate, before it agreed to withdraw the whole proposal, that separate sectoral directives for medical and construction services were needed. These are mentioned also in the withdrawal communication. No public output of the ongoing discussions with these highly integrated policy communities has been forthcoming. The Commission is also making extremely slow progress with other facets of its consumer policy, in particular its work on access to justice, although this is arguably the greatest contribution to practical consumer assistance with the

supranational authorities could make. It is difficult to know what lessons the Consumer Policy Service has learnt from its experiences with the SSD, but it seems unlikely a comparable general initiative will occur in the future.

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Responsibility for errors, etc. lies solely with me.

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