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Consumer Goods Guarantees in the DCFR

CHRISTIAN TWIGG-FLESNER*

ABSTRACT: This article examines the provisions on consumer guarantees as contained in the *Draft Common Frame of Reference* (DCFR). It will be argued that while some of these provisions may seem sensible at first sight, there appears to be no clear justification for their adoption. Drawing on the wider literature on the function of consumer guarantees, it will be suggested that the DCFR provisions have failed to take into account relevant empirical findings and that some of these provisions cannot be supported on the basis of this literature. The limited influence of the DCFR provisions on consumer guarantees on the *Acquis* review is noted.

ZUSAMMENFASSUNG: Dieser Beitrag untersucht die Bestimmungen zu Verbrauchergarantien im *Draft Common Frame of Reference* (DCFR). Es wird argumentiert, dass es – obwohl viele dieser Bestimmungen scheinbar sinnvoll sind – keine klaren Gründe für deren Annahme gibt. Der Beitrag beruft sich auf Forschungsergebnisse über die Funktionen von Verbrauchergarantien, und behauptet, dass solche empirischen Studien unzureichend im DCFR berücksichtigt worden sind. Demnach sind einige der DCFR Bestimmungen nicht annehmbar. Der beschränkte Einfluss der DCFR Bestimmungen wird auf den *Acquis* review angemerkt.

1. Introduction

Consumer guarantees¹ are commonly given by manufacturers, and also increasingly by retail sellers, whenever certain types of goods are supplied to consumers. They are usually free and offer an alternative basis for a consumer to seek a remedy if goods develop a fault. They are essentially an integral part of the marketing and competitive strategies of a manufacturer or retailer. As they are an important part of many consumer sales transactions, one would expect to see some provisions on these in any legal framework, and there are several of those in the *Draft Common Frame of Reference* (DCFR). This article focuses on the provisions of what is Book IV, Part A, Chapter 6 in the DCFR published in 2009 (Articles IV.A.-6:101-108).² These are the provisions on ‘consumer goods guarantees’. Although the provisions contained in this chapter seem fairly sensible, it will be argued that several of these provisions do not seem necessary. Furthermore, there are concerns that emerge from the methodology applied in drafting the DCFR, as well as the wider literature surrounding consumer guarantees. This article will first analyse the DCFR provisions on guarantees and will argue that many of these appear to lack a sound basis in

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¹ Generally, see C. TWIGG-FLESNER, *Consumer Product Guarantees* (Aldershot: Ashgate, 2003).

² C. VON BAR, E. CLIVE & H. SCHULTE-NÖLKE (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (‘DCFR’) (Munich: Sellier, 2009).

national law. In addition, questions are raised about the ‘best solution’ approach (which underpins the development of the ‘model rules’ in the DCFR), illustrated by briefly outlining the two dominant theories regarding the function of consumer goods guarantees. By drawing on research from the wider social science literature, it will be argued that many of the DCFR provisions on consumer goods guarantees are unnecessary. In a final section, the limited impact of these DCFR provisions on the *acquis* review will be noted.

2. An Overview of the DCFR Provisions on Consumer Guarantees

Guarantees are already subject to European legislation through Article 6 of the Consumer Sales Directive (99/44/EC). All the Member States have implemented this provision, and while many have simply followed Article 6, there are some variations.³ One might therefore expect the DCFR to do more than simply restate the *acquis*. This section will provide an overview of the provisions on consumer guarantees in the DCFR. They can be found in Book IV, section A, Chapter 6, Articles IV.A.-6:101–108. As well as analysing the substance of these rules, it will be considered how these ‘model rules’ were developed. Although the notes for the DCFR are not yet available, reference can be made to the corresponding provisions in the *Principles of European Law – Sales* (PELS),⁴ which form the basis for this chapter in the DCFR. While the wording of the respective DCFR and PELS provisions may differ slightly to reflect their particular context, there appears to be no significant substantive difference. The PELS notes should reveal the material that formed the basis for drafting the particular ‘model rules’ in the DCFR.

2.1 Definition of ‘Consumer Goods Guarantee’ (Article IV.A.-6:101)

The definition of ‘consumer goods guarantee’ is fairly detailed. It is designed to cover undertakings given by a producer or other links in the business chain, as well as a seller where these are in addition to the seller’s obligations as seller of the goods, to a consumer in connection with a consumer contract for the sale of goods. This definition recognizes that it will usually be the final seller who will have specific obligations towards the consumer in accordance with the relevant provisions of sales law, and that a guarantee given by a seller can only be an additional obligation. Presumably, this is merely intended to clarify that guarantees cannot substitute for the seller’s legal obligations, and the latter remain unaffected. Although it is not entirely clear from the way this provision is drafted, at first sight, it seems that there is no expectation that a guarantee given by a seller would have to provide something above

³ H. SCHULTE-NÖLKE, C. TWIGG-FLESNER & M. EBERS, *EC Consumer Law Compendium* (Munich: Sellier, 2008), 436–437 and 446–447.

⁴ E. HONDIUS et al., *Principles of European Law – Sales* (‘PELS’) (Oxford: Oxford University Press, 2008).

and beyond the consumer's legal rights. However, if one considers Article IV.A.-6:103(1)(b), which requires that the guarantee document sets out the advantages of the guarantee compared to the conformity rules, one suspects that there might be an intention to introduce a requirement to add to consumer's legal rights. Overall, this remains rather vague.

The undertakings given by a producer or seller may include:⁵

- (a) that the goods will remain fit for their ordinary purpose for a specified period of time, or otherwise, unless this is caused by misuse, mistreatment, or accident;
- (b) that the goods will meet the specifications set out in the guarantee document or the associated advertising; or
- (c) subject to any conditions stated in the guarantee, the goods will be repaired or replaced, the price reimbursed wholly or in part, or some other remedy be provided.

This tries to encapsulate the various ways in which a guarantee may be designed by the guarantor but is not intended as an exhaustive list.⁶ Subparagraph (b) reflects the definition of 'guarantee' found in the Consumer Sales Directive,⁷ whereas subparagraphs (a) and (c) reflect the kinds of undertakings usually found in guarantees. What is surprising is that there is no reference to the fact that many guarantees, especially those given by manufacturers, tend to refer expressly to faults, which can be attributed to poor workmanship or faulty materials during the manufacturing process, although this kind of situation would be covered by the catch-all phrase 'subject to any conditions stated in the guarantee'.

A further element of this definition is that it does not restrict the term 'consumer goods guarantee' to guarantees given free of charge. This means that guarantees that are paid for, including 'extended warranties', would fall within the scope of this chapter. It might also overcome any problems associated with attempts by a guarantor to escape the application of the rules on guarantees by introducing a nominal charge for them.⁸

2.2 Binding Nature of Guarantee (Article IV.A.-6:102)

Article IV.A.-6:102(1) confirms that guarantees are binding undertakings, irrespective of whether they are contractual or 'unilateral undertakings'. In case of the latter, it is specified to be binding without any act of acceptance, 'notwithstanding any provision to the contrary in the guarantee document or the associated advertising'.

⁵ Article IV.A.-6:101(2).

⁶ Cf. PEELS, 355.

⁷ Article 1(2)(e) of Directive 99/44/EC. Cf. Art. 2(18) of the proposal for a Consumer Rights Directive (COM(2008) 614 final) and the discussion in the final section of this article.

⁸ PEELS, 356.

To this, Article IV.A.-6:102(3) adds that formal requirements such as registration of the guarantee or notification of purchase are not binding on a consumer, either. This is quite a significant development of the position provided for in the Consumer Sales Directive. Article 6(1) states that a guarantee ‘shall be legally binding ... *under the conditions laid down in the guarantee statement...*’,⁹ which does permit requiring compliance with formal obligations such as registration of the guarantee before it is binding on the guarantor and available to the consumer. The DCFR rule seems surprising; as noted above, guarantees are essentially given voluntarily by a manufacturer or retail seller, and their decision to offer such guarantees may be based on a range of factors. Those may include the setting of certain conditions to be fulfilled by a consumer, such as registering the guarantee with the guarantor. Provided these are not unduly onerous or unfair, there seems no reason why these should not be respected.

A further interesting provision is that a guarantee should also be binding in ‘favour of every owner of the goods within the duration of the guarantee’,¹⁰ unless the guarantee document provides otherwise. In essence, therefore, the default position is that guarantees are freely transferable unless there is an express term in the guarantee that limits this to the consumer who first purchased the goods from the business seller. The Consumer Sales Directive did not address this question, and the number of jurisdictions where such a rule exists appears to be small. The PELS notes identify four countries where this appears to be regulated directly (Belgium, Finland, France, and the Netherlands), and others where general rules on the assignment of rights could be utilized. One may therefore question the basis for this particular rule in the DCFR. There are clearly good reasons why a guarantee should be transferable to subsequent owners: Consumers may wish to sell goods or give them away as a present during the guarantee period, and there seems to be no convincing reason why the recipient should be deprived of the benefit of the guarantee (apart from the challenges posed by contract law, if strict rules of contractual privity apply).¹¹ However, the PELS notes do not articulate the reason why this particular rule was chosen – support in the national laws of the EU Member States seems rather limited. It is therefore difficult to accept this as a ‘best solution’ without further justification.

One possible explanation is that this rule accords with the general approach in the DCFR that rights to performance are assignable as a matter of principle (see Article III.5-105(1) DCFR).¹² However, in order to effect an assignment, there has to be an ‘act of assignment’, that is, a ‘contract or other juridical act’.¹³ The provision in

⁹ Emphasis added.

¹⁰ Article IV.A.-6:102(2).

¹¹ Cf. TWIGG-FLESNER, 101–103.

¹² I am grateful to Matthias Storme for drawing this to my attention.

¹³ Article III.-5:101(1) DCFR.

Article IV.A.-6:102(2) on the binding nature of a guarantee is not expressed in terms of an ‘assignment’, so one would have to regard the transaction by which the first consumer purchaser transfers ownership of the corresponding goods to a subsequent consumer (whether by gift or subsale) also as an act of assignment, which might be a generous interpretation. If this were the explanation, then the justification for this rule would be the same as that for the general principle of assignability. If that is the case, one might ask, though, why this was not stated in such terms in Article IV.A.-6:102(2), that is, rather than expressing this in terms of the ‘binding nature of a guarantee’, a statement that ‘a guarantee is assignable in accordance with Book III, Chapter 5’ might have provided more clarity. However, there is a further difficulty with this analysis: Article IV.A.-6:102(2) applies ‘unless otherwise provided in the guarantee document’, which suggests that the guarantor could insert an express term into the guarantee document that the guarantee is not transferable to subsequent owners of the corresponding goods. However, Article III.-5:108(1) DCFR states that a ‘contractual prohibition of ... the assignment of a right does not affect the assignability of the right’, which would mean that a term in the guarantee document restricting the benefit of the guarantee to the first consumer would be ineffective.¹⁴ So there remains some uncertainty as to the basis for this rule.

2.3 Guarantee Document (Article IV.A.-6:103)

There are fairly detailed requirements regarding the guarantee document. A basic requirement is that whenever a guarantee is given, the consumer has to be given a guarantee document. This must contain the following details:

- (a) It has to state that the consumer has legal rights that are not affected by the guarantee. This is an important element of any guarantee, because guarantees often overlap with these legal rights. A clear statement that these rights are unaffected at the very least draws the consumer’s attention to the fact that a guarantee is not the full extent of his rights if something should go wrong with the corresponding goods.
- (b) It has to point out the advantages of the guarantee for the buyer in comparison with the conformity rules. This is a surprising requirement, because it appears to be based on the assumption that a guarantee has specific advantages that could be pointed out. As discussed above, it is not entirely clear whether there is an expectation that a guarantee should provide something above and beyond the legal rights of a consumer. It seems that the significance of this provision will turn on how the word ‘advantage’ is understood. Thus, the mere fact that a manufacturer offers any kind of guarantee could be an advantage in that the consumer

¹⁴ For serious concerns about the appropriateness of this rule, see S. WHITTAKER, *The ‘Draft Common Frame of Reference’ – An Assessment* (London: Ministry of Justice, 2008), 167–168.

is able to seek a remedy from a party not directly liable to the consumer in law. However, even a guarantee given by the final seller could be an advantage in that this would offer a basic reference point as to how that seller is most likely to respond to consumer complaints.¹⁵ However, if the ‘advantage’ effectively has to be something that adds substantively to consumers’ legal rights, then this could become quite an onerous obligation on any guarantor. It has to be remembered that there is no obligation to offer guarantees and that guarantees are essentially an aspect of the marketing strategy of a manufacturer or retailer. If there is too much intervention in the substance of guarantees, then there may be a backlash in that manufacturers might cease to offer such guarantees altogether. While the comments to the corresponding PEELS provisions require an indication of ‘the advantages, *if any*’,¹⁶ suggesting that there is no overriding requirement to exceed the legal rights of consumers, it is also suggested that this requirement would ‘counteract guarantors for providing guarantees with no additional, or even less protection’¹⁷ than that given in law, suggesting a normative position that guarantees should go above and beyond the legal rights.

While there is clearly a risk that consumers may be misled by guarantees and assume that the guarantee is the full extent of their rights if goods are faulty, a clear reference to the existence of consumers’ legal rights, perhaps together with a short summary, would seem to be sufficient.¹⁸

The PEELS notes suggest once more that there is only a very limited basis for this requirement in the national laws. Denmark, Estonia, Spain, and Norway appear to have a firm requirement in this regard,¹⁹ but it certainly does not appear to be a widely accepted requirement across Europe.

- (c) The guarantee also has to contain all the ‘essential particulars’, which are needed for claiming under the guarantee. These include:
- name and address of the guarantor;
 - name and address of the person to be notified with a claim, as well as the procedure for notifying that person; and
 - territorial limitations to the guarantee.

This provision reflects Article 6(2) of the Consumer Sales Directive, although that provision also treats the ‘duration’ of the guarantee as an essential particular. It is surprising that such a core aspect of the guarantee has been omitted from the list of ‘essential particulars’, although one might suspect that ‘duration’ is implicitly covered.

¹⁵ Cf. the discussion further below.

¹⁶ PEELS, 368. Emphasis added.

¹⁷ *Ibid.*

¹⁸ Cf. TWIGG-FLESNER, 116–121.

¹⁹ PEELS, 374. See also SCHULTE-NÖLKE et al., 446–447.

In addition, the guarantee document has to be drafted in plain, intelligible language,²⁰ which corresponds with Article 6(2) of the Consumer Sales Directive. Furthermore, there is an obligation to draft the guarantee document in the same language as that in which the goods were offered.²¹ Intuitively, this might sound like a good idea, but one can raise the question whether such a rule would work easily in practice. For example, if a shop assistant in a retail store in Malta happens to be able to speak Bulgarian and sells a digital camera to a Bulgarian tourist, would that trigger the obligation to provide the guarantee in Bulgarian? A more appropriate rule might be to require the official language of the country in which the goods were sold. Although many manufacturers are able to produce multilingual guarantee documents, it seems rather onerous to require a retail seller to arrange for the translation of their guarantee, just because they happen to be able to communicate with a customer in another language. For comparison, Article 6(4) of the Consumer Sales Directive permits Member States to specify the languages in which guarantee documents have to be written in respect of goods sold in their territory, an option taken up by fourteen countries.²²

As already implied by the use of the word ‘document’, the guarantee document has to be provided in textual form on a durable medium. Both are terms that are defined in the DCFR. ‘Textual form’ means a statement ‘expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the statement and its reproduction in tangible form’.²³ ‘Durable medium’ is defined as ‘any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information’.²⁴ The key point is that a consumer has to be able to refer to the guarantee statement when necessary, and this provision seeks to provide an appropriate rule to ensure this.

A failure to comply with these requirements does not affect the validity of the guarantee, and a consumer can still require the guarantor to honour his obligations under the guarantee.²⁵ It is further provided that a consumer can require a guarantor to provide a guarantee document that complies with the requirements of Articles IV.A.-6:103(1) and (2), which seems to be an interesting form of ‘specific performance’. This is expressed to be ‘without any right to damages which

²⁰ Article IV.A.-6:103(1)(d).

²¹ Article IV.A.-6:103(1)(e).

²² SCHULTE-NÖLKE et al., 437.

²³ Definitions in Annex.

²⁴ *Ibid.*

²⁵ Article IV.A.-6:103(3).

may be available'.²⁶ Finally, the provisions of Article IV.A.-6:103 are deemed to be mandatory, that is, they may not be excluded or varied to the detriment of the consumer.²⁷

2.4 Coverage of the Guarantee (Article IV.A.-6:104)

Article IV.A.-6:104 contains default provisions, which apply where the guarantee document does not contain provisions to the contrary. Thus, if nothing is said about the duration of the guarantee, then the default period is the shorter of either five years or the estimated life span of the goods.²⁸ Why this particular time period was chosen is not clear, and while it is not uncommon, it does seem to be longer than many guarantees currently offered. The reference to 'estimated life-span' as an alternative measure seems to be a sensible balance for goods that will last for a shorter period than five years, but it might be difficult to work out just how long that might be in practice and could therefore give rise to some discussion between consumer and guarantor.

Second, the guarantor's obligations become effective if, during the period of the guarantee,²⁹ the goods 'become unfit for their ordinary purpose or cease to possess such qualities and performance capabilities as the guarantee holder may reasonably expect',³⁰ except where this is caused by misuse, mistreatment or accident.

Third, the guarantor's obligations would be to repair or replace the goods, provided that the conditions of the guarantee are satisfied.³¹ Finally, the guarantor is to bear all the costs involved in invoking and performing the guarantee.³²

While the idea of a 'default guarantee' may sound attractive, there is once more rather limited support for such a rule in the national laws of the Member States. The Consumer Sales Directive does not contain any default provisions. It seems that only the laws in Poland and Slovenia,³³ as well as Malta,³⁴ contain default provisions. In the case of the former two countries, these are found in respect of 'mandatory guarantees', rather than voluntary guarantees. There is no clear justification for establishing a default guarantee generally, or for the particular default positions adopted in this Article, in the national laws of the Member States. One would have therefore have to look elsewhere for convincing reasons to introduce such a default

²⁶ Article IV.A.-6:103(4).

²⁷ Article IV.A.-6:103(5).

²⁸ Article IV.A.-6:104(a).

²⁹ Which might either be a stated period, or the default period under para. (a).

³⁰ Article IV.A.-6:104(b).

³¹ Article IV.A.-6:104(c).

³² Article IV.A.-6:104(d).

³³ PELS, 377.

³⁴ SCHULTE-NÖLKE et al., 447.

guarantee, but this may be difficult; indeed, any default guarantee could have the effect of setting a minimum standard for all guarantees that guarantors might feel compelled to adopt but that could make offering a guarantee less attractive for some manufacturers or retailers.

2.5 Limitation to Specific Parts (Article IV.A.-6:105)

Article IV.A.-6:105 provides that where the guarantee only covers a specific part or specific parts of the goods, then this has to be made clear in the guarantee document, otherwise the guarantee will apply to all of the goods and the restriction will not be binding. In essence, this is a straightforward transparency rule. According to the PEELS notes, there is only one country that has adopted a clear rule in this respect (Sweden),³⁵ so such a rule is not particularly common. It also seems redundant: An exclusion such as this would have to be clearly stated in the guarantee in accordance with general rules of law, and if it is absent, then the presumption would indeed be that the guarantee covers all of the goods. It does not seem to be a particularly controversial rule because what it says is self-evident, but for the same reason, the need for this specific provision may be doubted.

2.6 Exclusion/Limitation of Liability for Non-Compliance with Maintenance Instructions (Article IV.A.-6:106)

A further transparency rule is Article IV.A.-6:106, which permits the guarantor to exclude or limit his liability under a guarantee for any failure of, or damage to, the goods, which is caused by failure to maintain the goods in accordance with any instructions given. Such an exclusion/limitation has to be clearly stated in the guarantee document to be effective. Again, this is a provision that is generally not found in the national laws of the Member States. The Consumer Sales Directive leaves it up to the guarantor to specify the conditions on which a guarantee is offered. As with Article IV.A.-6:105, this is a self-evident rule – any exclusion from or limitation to the scope of a guarantee must be stated clearly.

Strangely, this provision does not deal with circumstances where having to comply with the maintenance instructions in question might operate unfairly on the consumer, although the comments to the corresponding PEELS provision give the example of an unreasonable obligation to have maintenance carried out by an authorized provider only.³⁶ Such a restriction could probably be dealt with by using the provisions on unfair contract terms, and if it is unfair, then it would not be binding on the consumer.

³⁵ PEELS, 381.

³⁶ *Ibid.*, 383.

2.7 Burden of Proof (Article IV.A.-6:107)

Article IV.A.-6:107 deals with the burden of proof once a consumer has invoked a guarantee within the guarantee period. The guarantor has the burden of proving that:

- (a) the goods met the specifications contained in the guarantee document, or in the relevant advertising;
- (b) the failure or damage to the goods was caused by misuse, mistreatment, accident, a failure to maintain, or any other cause for which the guarantor is not responsible.

This provision is also deemed to be a mandatory rule.

Once again, support in the national laws of the Member States for this rule is limited, with only the laws of Denmark, Estonia, Finland, Germany, Sweden, and the Netherlands containing rules that have the effect of reversing the burden of proof.³⁷ The comments to the PELS provision note that one of the major advantages of a guarantee is that it ‘automatically covers’ any defect that appears during the guarantee period. Surely, this is not the case for all guarantees and would depend on the precise undertaking given by the guarantor in the guarantee statement. In addition, it is stated that a consumer has to show that a defect exists in the first place,³⁸ that is, he would have to demonstrate that the condition for invoking the guarantee is met. This could render this rule largely redundant, particularly if the guarantee is limited to very specific problems only.

2.8 Prolongation of Guarantee Period (Article IV.A.-6:108)

A final provision deals with the extension of the guarantee period in circumstances where the goods were not available to the consumer because a defect or failure in the goods had to be remedied under the guarantee. In those circumstances, the guarantee period is extended for a period equivalent to the time when the consumer could not use the goods because of the fault.

This is also an issue not regulated in the Consumer Sales Directive, although according to the PELS notes, several countries (Estonia, France, Hungary, Czech Republic, Slovenia, and Sweden) appear to contain rules that have dealt with this issue.³⁹ Intuitively, it seems sensible to introduce an explicit rule dealing with this question, although one cannot help but wonder whether such a provision could be applied usefully in practice.

³⁷ *Ibid.*, 386.

³⁸ *Ibid.*, 385.

³⁹ *Ibid.*, 388.

3. Evaluation

The provisions on consumer goods guarantees in the DCFR are a mixed bag of useful provisions that clarify the scope of the rules introduced by the Consumer Sales Directive and additional rules proposed as ‘best solutions’. There are instances where the drafting of the provision could be clearer, and these have been identified above.

The main concern, however, is with regard to the method by which particular provisions were deemed to be the ‘best solution’. In some instances, there was plenty of support for a rule in the national laws of the Member States; however, as highlighted above, there are several provisions with, at best, scattered support in national laws. While it is not entirely clear how one determines that a provision qualifies as a ‘best solution’ where the national laws contain similar rules dealing with the same topic, it is even more questionable how one can do this where national laws are largely silent on a particular issue. If there is no clear basis in the national laws of the Member States (which includes the *acquis*), then there has to be some other solid foundation for proposing a rule as a ‘best solution’. As long as the DCFR has not been published with notes and comments, one has to refer to the relevant volume of the *Principles of European Law*, or of the *Acquis Principles*, to identify the reasons for adopting a particular provision. Unfortunately, at least in the context of consumer goods guarantees, consulting the PELS notes and comments reveals nothing useful. There is concern that for many provisions of the DCFR, the criteria applied in determining what qualifies as a ‘best solution’ remain unarticulated, suggesting a lack of ‘proper justification in terms of principle, policy or technique’.⁴⁰

There could be reasons other than a firm basis in the national laws for adopting a particular rule in the DCFR, such as research findings from economics, business studies, or consumer studies. Indeed, one of the criticisms levelled at the (interim) DCFR was that it failed to take into account research findings from other disciplines, which could inform the development of legal rules.⁴¹ Moreover, even those provisions that have a basis in the *acquis* or in national law could be assessed against such research findings in order to consider whether they serve their intended purpose.⁴² This, it seems, was not done at all, or at least not consistently, in the DCFR – while empirical evidence should perhaps not be the main basis for the ‘model rules’, it should at least be taken properly into account.⁴³

The area of ‘consumer guarantees’ is certainly one where available research appears not to have been considered fully. The role of guarantees has given rise to a

⁴⁰ WHITTAKER, 38.

⁴¹ H. EIDENMÜLLER et al., ‘The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems’, *Oxford Journal of Legal Studies* 28 (2008): 659–708.

⁴² F. GÓMEZ, ‘The Harmonization of Contract Law through European Rules: A Law and Economics Perspective’, *European Review of Contract Law* 4 (2008): 89–118, 105.

⁴³ F. GÓMEZ, ‘The Empirical Missing Link in the Draft Common Frame of Reference’, <www.indret.com>, 2009, 1 *InDret*.

considerable theoretical and empirical literature in disciplines such as economics, marketing science, and consumer behaviourism. Although space precludes a thorough engagement with this body of research in the present article, a brief flavour of the main strands is given in the following section. On the basis of this, it will be considered whether the DCFR provisions could justifiably be put forward as a ‘best solution’.

4. Theories of Consumer Guarantees

The purpose of this section is to provide a brief outline⁴⁴ of the different theories of the purpose of consumer guarantees that have emerged from the economics and social science literature. It will concentrate on the two dominant theories: First, there is ‘signalling theory’, which postulates that a guarantee is an indicator of product quality and therefore enables a consumer to ascertain the quality of goods before purchase. Second, there is a growing body of research⁴⁵ that regards consumer guarantees primarily as a mechanism for informal redress after purchase, if a fault with the goods has arisen. Having outlined the key features of these theories, it will be considered to what extent the DCFR provisions reflect the different functions of guarantees suggested by these theories.

4.1 Signalling Theory

According to ‘signalling theory’, guarantees can indicate to a consumer, before deciding on a purchase, that the corresponding goods are of a particular level of quality.⁴⁶ Thus, if a guarantee for a particular item is more generous to consumers, for example, in terms of duration or scope, than its competitors, then this might lead to the conclusion that the corresponding goods are also of better quality.⁴⁷ By using a guarantee as a signal, information about the quality of the goods can therefore be communicated reliably to consumers, unlike quality claims made in advertising.⁴⁸ The signalling function of a guarantee assumes that there is a true correlation between the substance of the guarantee and the level of quality, and that a ‘wrong’ signal would result in costs to the guarantor in the form of having to offer a repair or

⁴⁴ For a fuller discussion, see TWIGG-FLESNER, Ch. 3.

⁴⁵ See TWIGG-FLESNER, Chs 3–5 for a more detailed discussion of both theories and relevant empirical testing; see also G.L. PRIEST, ‘A Theory of the Consumer Product Warranty’, *Yale Law Journal* 90 (1982): 1297–1352, who also discusses ‘exploitation theory’ and his own ‘investment theory.’

⁴⁶ Cf. TWIGG-FLESNER, Ch. 3.

⁴⁷ Cf. J.L. WIENER, ‘Are Warranties Accurate Signals of Product Reliability?’, *Journal of Consumer Research* 12 (1985): 245–250.

⁴⁸ Cf. S. GROSSMAN, ‘The Informational Role of Warranties and Private Disclosure about Product Quality’, *Journal of Law and Economics* 24 (1981): 461–483.

replacement under the guarantee.⁴⁹ Signalling theory assumes that guarantees can be an integral part of the competitive process between different manufacturers. A benefit of this process would be an increase in the overall level of quality, because a manufacturer would not offer a more generous guarantee unless there is sufficient confidence in the quality of his goods to minimize the risk of having to provide a remedy under the guarantee.⁵⁰

Although the basic tenet of signalling theory remains popular, there is growing evidence that it does not fully withstand empirical scrutiny. At a basic level, it may be difficult for consumers to understand the precise terms of a guarantee and, therefore, to evaluate correctly the signal that it may have been intended to send.⁵¹ Moreover, the guarantee statement is rarely available before purchase, despite existing legislation requiring this, and will only be seen by a consumer after purchase.⁵² It is often more important to a consumer that a guarantee is provided than to know precisely what the guarantee contains.⁵³ Empirical studies suggest that the number of actual situations where guarantees act as a 'true' signal of quality is limited.⁵⁴ Often, a manufacturer may not actually intend to utilize a guarantee as a means of signalling quality; this may be because the longer the guarantee period, the greater the possibility that any faults that arise might have been caused by something other than a manufacturing fault and therefore be beyond the control of the guarantor. Indeed, consumers will take varying degrees of care of goods, and a more careless attitude could increase the chances of faults that were not due to manufacturing problems but caused by the consumer.⁵⁵ So while signalling theory remains important, it needs to be borne in mind that the signalling function of guarantees is affected by a range of different factors.

⁴⁹ M. SPENCE, 'Consumer Misperceptions, Product Failure and Producer Liability', *Review of Economic Studies* 44 (1977): 561-572.

⁵⁰ J.A. EDDY, 'Effects of the Magnuson-Moss Act upon Consumer Product Warranties', *North Carolina Law Review* 55 (1977): 835-877.

⁵¹ M.J. TREBILCOCK, 'Manufacturers' Guarantees', *McGill Law Journal* 18 (1972): 1-44.

⁵² Article 6(3) of the Consumer Sales Directive (99/44) appears to permit a consumer to request sight of a guarantee statement before purchase. Compare the detailed presale availability rules in the US under the Magnuson-Moss Warranty Act; see TWIGG-FLESNER, Ch. 6.

⁵³ R.S. ADLER, 'The Last Best Argument for Eliminating Reliance from Express Warranties: "Real-World" Consumers Don't Read Warranties', *South Carolina Law Review* 45 (1994): 429.

⁵⁴ J.L. GERNER & W.K. BRYANT, 'Appliance Warranties as Market Signals', *Journal of Consumer Affairs* 15 (1981): 75-86; C.A. KELLEY, 'An Investigation of Consumer Product Warranties as Market Signals of Product Reliability', *Journal of the Academy of Marketing Science* 16 (1988): 72-78.

⁵⁵ W. EMONS, 'On the Limitation of Warranty Duration', *Journal of Industrial Economics* 37 (1989): 287-301.

4.2 Guarantees as an Informal Redress Mechanism

The alternative view of guarantees is that, rather than operating as some sort of quality signal, they are primarily a mechanism for providing redress informally, should the goods develop a fault during the guarantee period. While it is true that a consumer will have specific legal rights that should protect him in this situation, experience shows that enforcing legal rights can be problematic without the assistance of lawyers, and ultimately a judge, if the retailer refuses to comply. Where a guarantee is given, it provides an alternative mechanism to seek redress informally, often directly from the manufacturer, or via the retailer.

Empirical evidence in support of this theory is growing,⁵⁶ and its fundamental assumptions appear to be in line with consumer behaviour.⁵⁷ The literature on consumer complaining behaviour identifies essentially three categories of response to a consumer problem: take no action, private action (such as deciding not to buy goods from the particular brand, or from the particular retailer, again),⁵⁸ and public action⁵⁹, which includes a demand for redress, a simple complaint to the retailer or manufacturer without seeking redress, some other venting reaction (e.g., a letter to a newspaper or an entry on a relevant website).⁶⁰ The choice of response depends on a number of different factors,⁶¹ such as the frequency with which the problem occurs, the price, the estimated life span of the goods,⁶² how difficult it is to seek and obtain redress,⁶³ and the likely response of the manufacturer or retailer to a complaint.⁶⁴ A consumer would tend to address his complaint to the person most likely to respond to a complaint by providing suitable redress. If it is easier for a consumer to contact the guarantor and to seek redress at low or no cost, then it is more likely that the guarantor rather than the retailer would be the consumer's first port of call.⁶⁵

⁵⁶ Seminally, J. BRAUCHER, 'An Informal Resolution Model of Consumer Product Warranty Law', *Wisconsin Law Review* (1985): 1405-1480; TWIGG-FLESNER, Ch. 4.

⁵⁷ A. BEST & A.R. ANDREASEN, 'Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress', *Law and Society Review* 11 (1977): 701-742.

⁵⁸ Cf. J.G. BLODGETT & R.D. ANDERSON, 'A Bayesian Network Model of the Consumer Complaint Process', *Journal of Service Research* 2 (2001): 321-338.

⁵⁹ K. MOREL, T. POIESZ & H. WILKE, 'Motivation, Capacity and Opportunity to Complain: Towards a Comprehensive Model of Consumer Complaint Behaviour', *Advances in Consumer Research* 24 (1997): 464-469.

⁶⁰ W.O. BEARDEN & J.B. MASON, 'An Investigation of Influences on Consumer Complaints Reports', *Adv. C.R.* 11 (1984): 490-495.

⁶¹ V.S. FOLKES, 'Consumer Reactions to Product Failure: An Attributional Approach', *JCR* 10 (1984): 398-409.

⁶² A. BROADBRIDGE & J. MARSHALL, 'Consumer Complaint Behaviour: The Case of Electrical Goods', *International Journal of Retail & Distribution Management* 23 (1995): 8-18.

⁶³ BEST & ANDREASEN, 701-742.

⁶⁴ M.L. RICHINS & J.V. BRONISLAW, 'Seeking Redress for Consumer Dissatisfaction: The Role of Attitudes and Situational Factors', *JCP* 8 (1985): 29-44.

⁶⁵ BEARDEN & MASON, 490-495.

A guarantee therefore acts as an indicator to consumers just how willing the guarantor really is to receive and respond to complaints. If the guarantee makes it easy to seek redress, consumers will perceive the guarantor as willing to respond and address any complaints in that direction, rather than trying to enforce their legal rights against a reticent retailer. According to this view, guarantees are of primary relevance *after* purchase once a problem has occurred, and the signalling value of guarantees is, at best, secondary.⁶⁶

4.3 Relationship with Legal Rules

A legislative provision based on the signalling function of a guarantee needs to make it clear to a consumer what sort of level of quality might be expected from the corresponding goods. In order for a guarantee to operate as a signal, the emphasis has to be on aspects that might convince a consumer about the quality of the goods, such as the guarantee's duration. In order to facilitate this, it might be possible to standardize most of the terms of a guarantee and only leave open those aspects that reflect the main signal of the guarantee.⁶⁷ This will generally be the duration of the guarantee.

In contrast, in order to promote the use of guarantees as an informal redress mechanism, any relevant legislative provisions should focus on transparency and clarity of the guarantee statement, rather than creating standardized guarantees. A consumer has to be able to tell from the guarantee document whether the guarantor would be prepared to provide a remedy if the corresponding goods developed a fault during the guarantee period. According to this approach, consumers would only consult the guarantee after purchase, and only if a problem had arisen, so there is no need to minimize the amount of information on which a consumer has to focus. There is also no need to regulate the substance of a guarantee, because that would distort the consumer's perception as to the likely responsiveness of the guarantor to a complaint.

4.4 Implications for the DCFR Provisions

Neither of the two positions outlined above provides particular support for the model adopted in the DCFR.⁶⁸ A set of rules that would seek to utilize the quality-signalling function of a guarantee would have to reduce the freedom given to a guarantor to determine the substance of the guarantee to a small number of variables, primarily

⁶⁶ Cf. W. WHITFORD, 'The Function of Disclosure Regulation in Consumer Transactions', *WisLR* 68 (1973): 400-470.

⁶⁷ EDDY, 835-877.

⁶⁸ See also T. ZERRES & C. TWIGG-FLESNER, 'Bedeutung und Funktion des Art. 6 VerbrKfRL für Verbrauchergarantien - Eine Rechtsvergleichende Theoriegeleitete Betrachtung', *Zeitschrift für vergleichende Rechtswissenschaft* 105 (2006): 19-54, 52-54.

its duration.⁶⁹ This would require the adoption of detailed provisions for a ‘standard guarantee’, leaving only matters such as the length of the guarantee period to be determined by the guarantor. Such a model was adopted in the United States in the Magnuson-Moss Warranty Act 1975 but has not been particularly successful.⁷⁰

The ‘informal redress’ model requires a less interventionist approach,⁷¹ relying primarily on transparency and disclosure. Indeed, it would be more important to have a disclosure rule requiring information on the procedure for claiming and associated costs, than to lay down any specific rules in that respect. Such an approach could tolerate the transparency rules in Articles IV.A.-6:105 and 106 but would not offer support for default guarantees such as that in Article IV.A.-6:104, or a specific rule on the prolongation of the guarantee period (Article IV.A.-6:108), because that would not assist a consumer in identifying the likely responsiveness of the guarantor to complaints about faulty goods.

Thus, had the drafting team for this part of the DCFR taken into account the rich empirical literature on the function of consumer guarantees, the ‘model rules’ that would have emerged might have been more in line with the practical use of guarantees.

5. DCFR and the *Acquis* Review

Although the primary purpose of this article is to critique the DCFR provisions on consumer guarantees, a brief look at their (ir)relevance for the *Acquis* review is merited. This final section, therefore, considers the extent to which the DCFR rules in this area are, or could be, utilized in the *acquis* review. The draft Consumer Rights Directive (‘pCRD’; COM (2008) 614 final) does not draw on any of the additional provisions in the DCFR.⁷² In the pCRD, the term ‘commercial guarantee’ is used instead of the simple ‘guarantee’ adopted in the Consumer Sales Directive. The definition remains very similar to the current definition, although one change is made: the qualification that the guarantee is ‘given without extra charge’ is not retained. This means that guarantees that can be purchased also fall within the scope of the pCRD. This matches the position in Article IV.A.-6:101(1) DCFR.

Although Article 29 pCRD essentially restates Article 6 of the Consumer Sales Directive, there are some changes.⁷³ Thus, the reference to the consumer’s

⁶⁹ Cf. TREBILCOCK, 1-44, 29; TWIGG-FLESNER, 67.

⁷⁰ See, e.g., E.M. MOORE & F.K. SHUPTRINE, ‘Warranties: Continued Readability Problems after the 1975 Magnuson-Moss Warranty Act’, *J. Cons. Aff.* 27 (1993): 23; TWIGG-FLESNER, Ch. 6.

⁷¹ TWIGG-FLESNER, Ch. 5.

⁷² This raises a wider question about the professed link between the (D)CFR and the *Acquis* review, which cannot be discussed here. See M. HESSELINK, ‘The Consumer Rights Directive and the CFR – Two Worlds Apart?’, *ERCL* 5 (2009).

⁷³ See also C. WILLETT, ‘Direct Producer Liability’, in *Modernising and Harmonising Consumer Contract Law*, eds G. Howells & R. Schulze (Munich: Sellier, 2009), 194–198.

legal rights is now linked directly to the rights given by Article 26 pCRD (remedies), rather than requiring merely a general statement about the existence of these rights. The proposed Consumer Rights Directive addresses the question of transferability of the guarantee, although not very clearly. Article 29(2)(c) pCRD states that if the guarantee is restricted to the original purchaser, there has to be clear information on this in the guarantee statement. This is subject to Chapter V on contract terms and paragraph 1(j) of Annex III in particular. This rebuttably presumes that a term ‘restricting the consumer’s right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader’ is unfair and consequently not binding on the consumer. The effect would appear to be the same as that of Article IV.A.-6:102(2), but the DCFR provision has the advantage of clarity and might therefore usefully be considered as a template (assuming that there is a clear justification for such a rule⁷⁴.) As far as most of the DCFR provisions are concerned, however, the pCRD contains no corresponding articles. In light of the criticism made about the DCFR rules, this is not an unwelcome development, although it does raise questions about the future use of the DCFR.

6. Conclusions

The DCFR provisions on consumer goods guarantees go significantly beyond the minimum requirements already established in Article 6 of the Consumer Sales Directive. That in itself need not be problematic; however, as the preceding discussion has shown, many of the additional provision seem to lack a sound basis: Neither is there sufficient commonality in the national laws of the Member States, nor has it been demonstrated that there are other sound reasons for proposing some of these rules. Others seem redundant because they are stating the obvious, such as the two disclosure provisions on specific parts and maintenance instructions.

Perhaps the desire to specify fairly detailed rules on guarantees is motivated by the fact that the DCFR does not contain any rules on direct producer liability. As guarantees are often given by producers, introducing more detailed rules on guarantee might offer a ‘back-door’ towards tighter regulation of the producer’s position. However, that would be inappropriate. Any regulation of guarantees should either respond to identified problems, or support the specific purposes that such guarantees might fulfil. Unfortunately, the DCFR rules on consumer goods guarantees do neither.

⁷⁴ Cf. the discussion above.

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