

CONSUMER PROTECTION IN THE EUROPEAN UNION: AN ANALYSIS OF THE DIRECTIVE ON THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

FRANCES E. ZOLLERS,* SANDRA N. HURD**
& PETER SHEARS***

1. INTRODUCTION

The European Union (“EU”) is in the final stages of putting into place a Directive on consumer goods and associated guarantees¹ that will provide a minimum level of warranty protection for consumers throughout the EU. The Directive aims to give all consumers the ability to purchase goods anywhere in the common market, confident that, should the goods prove faulty or of poor quality the buyer will be able to obtain satisfaction from the seller. The Directive sets forth two categories of guarantees: legal guarantees, which create remedies for consumer goods that do not conform to the contract of sale, and commercial guarantees, which create remedies for consumer goods that do not conform to the seller’s express promises about the goods.² This Article first explores the evolution of consumer policy in the EU since the establishment of the European Economic Community and, second, examines the Directive itself. It then proceeds to examine the provisions of the Directive and compares them to commercial sales law in the United States.

* Professor of Law & Public Policy, School of Management, Syracuse University.

** Professor of Law & Public Policy, School of Management, Syracuse University.

*** Director of Legal Studies, Plymouth Business School, University of Plymouth.

¹ Amended Proposal for a Directive of the European Parliament and of the Council on the Sale of Consumer Goods and Associated Guarantees [hereinafter April 1998 Directive].

² See *id.*, arts. 2 & 3 (requiring seller to deliver goods in conformity with the contract of sale and holding sellers liable for any lack of conformity).

Finally, it analyzes whether the provisions of the Directive are sound consumer policy.

2. EVOLUTION OF CONSUMER POLICY IN THE EUROPEAN UNION

One of the mandated tasks of the European Economic Community ("EEC"), since its inception under the Treaty of Rome, has been to promote the "harmonious development of economic activities, a continuous and balanced expansion, an increased stability, [and] an accelerated raising of the standard of living."³ The goal has been to create a single economic market. Consumer protection was not seen as an integral part of that process.⁴ That is not to say, however, that consumers were entirely forgotten. The drafters of the Treaty of Rome were apparently satisfied that consumers would generally benefit from the effects of market integration.⁵

2.1. *First Attempts*

It was not until fifteen years after the establishment of the EEC, that the European Parliament⁶ officially called for a "coherent and effective consumer protection policy."⁷ Three years after that, the Council of Ministers,⁸ ("Council") the EEC's

³ Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 2, 298 U.N.T.S. 11, 15 [hereinafter Treaty of Rome].

⁴ The only direct reference to consumers is in Article 39 referring to the Community's agricultural policy, citing the goal of ensuring "reasonable prices in supplies to consumers." *Id.* at 30.

⁵ Andreas P. Reindl, *Consumer Contracts and European Law*, 75 WASH. U. L.Q. 627, 628 (1997) (discussing the relationship between the European Community, federalism, and possible benefits to consumer protection efforts).

⁶ The European Parliament is one of the four principal institutions of the European Union. Although it has limited constitutional powers, the European Parliament exercises its influence on the legislative and budgetary processes. While its approval is not necessary for significant legislation, it must still be consulted. See NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN COMMUNITY* 110-11 (1989) (discussing the powers of the European Parliament).

⁷ This Parliamentary Statement was quoted in the introduction to the Council Resolution on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, 1975 O.J. (C 92) 1,2, para. 1 (referencing a 1972 debate in the European Parliament).

⁸ The Council of Ministers is the principal decision-making body. See NUGENT, *supra* note 6, at 43 (describing the main institutions of the EEC and Euratom Treaty).

legislative body, passed a resolution outlining its preliminary program for a consumer protection and information policy⁹ detailing the objectives and general principles of a consumer policy. The Council noted that although consumer protection was an established concern in the EEC,¹⁰ the notion of a consumer policy was relatively recent, having developed “in response to the abuses and frustrations arising at times from the increased abundance and complexity of goods and services afforded the consumer by an ever-widening market.”¹¹

The Council recognized that the role of the consumer had changed dramatically since the European Community was first established. As a mere unit in a mass market, the consumer had become “the target of advertising campaigns and of pressure by strongly organized production and distribution groups.”¹² Consequently, producers and distributors exerted more control than consumers over market conditions, resulting in a shift of power from the consumer to these larger economic players.¹³ The changed conditions made it imperative that the EU take steps to ensure that consumers are better informed of their rights and protected from abuses by those in the distribution chain of consumer goods.

Among the five basic rights¹⁴ of consumers articulated in the Council’s Resolution are two that specifically set the stage for the Directive: The right to protection of economic interests and the right of redress. The right to the protection of economic interests includes protection against the abuse of power by a seller.¹⁵ Specifically, it includes protection from one-sided standard contracts and the unfair exclusion of essential rights; protection against damage to consumers’ economic interests caused by

⁹ See Council Resolution on a Preliminary Programme, *supra* note 7.

¹⁰ The resolution includes a compilation of actions of interest to consumers taken by the Community and Council Directives of interest to consumers. See Council Resolution on a Preliminary Programme, *supra* note 7, at 12, 13, apps. 1, 2.

¹¹ *Id.* at 3, para. 6.

¹² *Id.*

¹³ See *id.*

¹⁴ The five rights are listed as (a) the right to protection of health and safety, (b) the right to protection of economic interests, (c) the right of redress, (d) the right to information and education, and (e) the right of representation (the right to be heard). See *id.* at 2, para. 3.

¹⁵ See *id.* at 6, para. 19.

defective products or unsatisfactory services; and reliable after-sales services for consumer durables including providing spare parts necessary to effect repairs.¹⁶ The right of redress includes provisions for advice and assistance in making complaints as well as "swift, effective and inexpensive procedures" for rectifying injury and damage resulting from the purchase or use of defective goods or unsatisfactory services.¹⁷

In 1981, the Council followed up with a second resolution, the purpose of which was "to enable the Community to continue and intensify its measures [with respect to consumer protection and information] and to help establish conditions for improved consultation between consumers on the one hand and manufacturers and retailers on the other."¹⁸ Reconfirming the consumer rights and principles created in the previous Resolution, it emphasized the need to have consumers participate in economic decision making and implementation,¹⁹ and suggested that agreements between and among interest groups would be an effective means to achieve consumer protection goals.²⁰ Interestingly, rather than focusing on the disparities between sellers and consumers, the 1981 Resolution stressed the downturn in economic conditions prevailing at the time in the EU:

[I]n the current difficult economic situation, a situation characterized by a slowdown in incomes growth, continuing unemployment, and the various economic consequences of the energy dependence which affects most Member States, consumers are obliged to pay more attention to the way in which they use their income, particularly as regards the quality of goods and services bought, so as to derive maximum benefit from it.²¹

¹⁶ *See id.*

¹⁷ *Id.* at 8, para. 32.

¹⁸ Council Resolution on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy, 1981 O.J. (C 133) 1, 2, para. 2.

¹⁹ *See id.* at 2, para. 4.

²⁰ *See id.* at 3, para. 6.

²¹ *Id.* at 2, para. 3.

2.2. *Consumer Protection Gains Momentum*

Although consumer protection efforts remained a concern in the interim, it was not until a number of years after the second Resolution that significant action began on the consumer protection front. Two important events signaled the start of a new era in consumer protection. The first was a 1986 Council Resolution recognizing the difficulties encountered by consumers invoking guarantees on products purchased in other Member States.²² The second was the 1987 passage of the Single European Act (“SEA”).²³ Until its passage, legislative efforts relating to consumer protection had to be based on Article 100 of the Treaty of Rome.²⁴ The fact that Article 100 provides a limited legal basis for consumer protection, and its requirement of a unanimous vote by the Council of Ministers, has operated to hinder consumer protection initiatives.²⁵ The SEA took a significant step by authorizing the Community to adopt legislation in furtherance of the creation of the internal market and provided an expanded basis for consumer-related legislation.²⁶ Additionally, it changed the voting requirement in the Council of Ministers from unanimity to a simple majority,²⁷ making it easier to pass such legislation.

It was only three years later that the first consumer policy Action Plan, which considerably raised awareness of consumer protection, was passed.²⁸ In 1992, the last year of the Action Plan, the European Parliament directed the Commission of the European Union (“Commission”)²⁹ “to review the laws of the

²² Council Resolution Concerning the Future Orientation of the Policy of the European Economic Community for the Protection and Promotion of Consumer Interest, 1986 O.J. (C 167) 1.

²³ Single European Act, 1987 O.J. (L 169) 1 (Official Publication of the Single European Act).

²⁴ See Treaty of Rome, *supra* note 3, at 54. Article 100 “authorizes legislation in connection with the functioning of the common market.” Reindl, *supra* note 5, at 640.

²⁵ *Id.* (discussing the impact of the 1987 Single European Act and its differences from Article 100).

²⁶ See *id.*

²⁷ See *id.*

²⁸ See Three Year Action Plan of Consumer Policy in the EEC (1990-1992), COM(90)98 final 1 (seeking to reassure consumers that their interests were being adequately represented in the EEC).

²⁹ The Commission is the principal policy initiator of the EU. See

various States on guarantee schemes,” and to make proposals to ensure a minimum European standard.³⁰ The Commission was further directed “to retain contractual guarantees that go further than this as a special form of competition and not be regulated by European law.”³¹ That same year, the Council requested the Commission’s opinion³² on the desirability of approximating consumer guarantees.³³

These initiatives were contemporaneous with the most significant breakthrough in moving consumer protection forward—the 1992 Treaty on European Union (“The Maastricht Treaty”).³⁴ The Maastricht Treaty elevated consumer protection to the status of Union policy, requiring the Union to contribute to the attainment of a high level of consumer protection through “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.”³⁵ This language allows the EEC to adopt consumer protection measures, without requiring a direct connection with market integration.³⁶ Some question remains as to whether Maastricht will enlarge the EEC’s ability and/or willingness to adopt consumer protection legislation.³⁷ Some commentators argue that the decisive factor will be the political commitment of the Member States to adopt consumer protection schemes.³⁸

NUGENT, *supra* note 6, at 43.

³⁰ European Parliament Resolution on Consumer Protection and Public Health Requirements to be taken into Account in the Completion of the Internal Market, 1992 O.J. (C 94) 217, 221.

³¹ *Id.*

³² See NUGENT, *supra* note 6, at 145 (citing Treaty of Rome, art. 189, *supra* note 3).

³³ See Council Resolution on Future Priorities for the Development of Consumer Protection Policy, 1992 O.J. (C 186) 1, 3 (inviting the Commission to evaluate a list of priorities, set forth in the Resolution, designed to create consumer confidence in a single market).

³⁴ Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 [hereinafter Maastricht Treaty].

³⁵ *Id.* at art. 129a(1)(b), C224/48.

³⁶ See Reindl, *supra* note 5, at 641 (discussing the factors which influenced the Community’s consumer protection agenda).

³⁷ See *id.* (contrasting views on the practical impact of Article 129(a)(1) of the Maastricht Treaty).

³⁸ See *id.*

Despite these concerns, the second three-year Action Plan, passed the year after Maastricht, concentrated on issues directly related to enabling consumers to participate fully in the internal market. This led to the Commission's 1993 publication of the Green Paper concerning guarantees and after-sales services.³⁹ Three years later, the Commission proposed the Directive on the sale of consumer goods and associated guarantees.⁴⁰

2.3. *The Green Paper*

The decidedly consumer focus found in the 1993 Green Paper originates both from the mandate the Commission had from the second three-year Action Plan⁴¹ and the urgings the Commission received from the other EU institutions to take measures with respect to guarantees and after-sales services.⁴² The Green Paper reviews the disparate law on guarantees in the then twelve Member States and offers suggestions designed to overcome the imbalances among them.⁴³ Legal guarantees in the EU vary greatly from one Member State to another. For example, the duration of a legal guarantee ranges from an indeterminate period in France, Belgium, Luxembourg, the Netherlands, and Finland, to six years in the UK and Ireland, two years in Sweden, one year in Denmark, and Italy, and only six months in Germany, Spain, Portugal, Greece, and Austria.⁴⁴

³⁹ See Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM(93)509 final [hereinafter Green Paper].

⁴⁰ Commission Proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Guarantees, 1996 O.J. (C 307) 8, 9 [hereinafter 1996 Directive] (declaring its purpose as approximating the laws of the member states in order to ensure a uniform minimum level of consumer protection in the internal market).

⁴¹ See Second Commission Three-Year Action Plan Placing the Single Market at the Service of European Consumers, COM(93)378 final, (11) at 7 (stating that the community must consolidate existing law and adopt new uniform measures in order to place the single market at the service of consumers).

⁴² See Green Paper, *supra* note 39, at 5 (referring to formal requests by the Council, the European Parliament, and the Economic and Social Committee inviting the Commission to take action).

⁴³ See *id.* at chs. IV, VI (describing existing members' states' laws in this area and setting forth possible actions at the Community level).

⁴⁴ See *Consumer Policy: Showdown in Parliament Over Sales and Contracts and Guarantees*, EUR. REP., Mar. 7, 1998, available in LEXIS, Europe Library, EISENG File (reporting the European Parliament's vote on the Directive).

The Green Paper envisions claims against the manufacturer for breach of legal guarantees.⁴⁵ This is in contrast to the April 1998 Directive, which held the seller liable to the consumer for breach of the contract of sale,⁴⁶ except in those cases where the manufacturer had created a commercial guarantee through public statements and the seller was not aware and could not reasonably have been aware of them.⁴⁷ Sellers could limit their potential liability, however, by pursuing whomever they obtained the product from in the distribution chain.⁴⁸ However, this is not the same as giving the buyer direct access to the source of the defect. Although the Green Paper discusses guarantees *and* after-sales services, nothing in the April 1998 Directive addresses the latter. While the Green Paper saw the two as “closely-linked,”⁴⁹ the April 1998 Directive has left treatment of after-sales services for another day.⁵⁰

There are several points of departure between the Green Paper and the April 1998 Directive. The Green Paper was designed to open a discussion about guarantees and after-sales services, not to create a draft Directive.⁵¹ It has been successful in meeting that purpose. The Green Paper compiled, probably for the first time, the variations among the Member States' laws. It demonstrated how the reluctance of consumers to buy goods

⁴⁵ See Green Paper, *supra* note 39, at 87 (maintaining that suits for breach of legal guarantees are most logically brought against the manufacturer rather than the vendor).

⁴⁶ See April 1998 Directive, *supra* note 1, at art. 3(1).

⁴⁷ See *id.* at art. 2(4).

⁴⁸ See April 1998 Directive, *supra* note 1, at art. 3a.

⁴⁹ Green Paper, *supra* note 39, at 7.

⁵⁰ See Opinion of the Economic and Social Committee on the ‘Proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Guarantees,’ 1997 O.J. (C 66) 5 [hereinafter Committee Opinion], (noting the Committee’s lament about the lack of comprehensiveness of the 1996 Directive, including the omission of after-sales services). The Commission discussed this during the preparatory stage but omitted it from the April 1998 Directive. See *id.*; see also Reindl, *supra* note 5, at 642 n.69 (suggesting that after-sales services were abandoned in light of the subsidiarity principle); Reindl, *supra* note 5, at 662 (suggesting insufficient acceptance by business that reform in after-sales services was justified). The Economic and Social Committee is composed of members appointed by Member States to represent three groups: employers, employees, and various other coalitions such as farmers and consumers. See NUGENT, *supra* note 6, at 180.

⁵¹ See Committee Opinion, *supra* note 50 at C 66/6 (discussing the relationship between the Green Paper and Committee Directives).

away from home given their uncertainty about what protections came with the goods impaired the concept of a single market.⁵² More importantly, it took the first steps toward a structure for a unified system of guarantees.

In hindsight, the Green Paper can be seen as a consumers' wish list of guarantee protection. Not surprisingly, political realities intruded, and the final version of the Directive does not deliver all the provisions advocated in the document. However, the initial version of the Directive served as a good starting point, and successive revisions have brought it closer to the objectives enunciated in the Green Paper. Additionally, consumer groups throughout the Union have utilized the Green Paper as a guide to mark their opposition to portions of the Directive and their advocacy for further regulation in the area of guarantees.⁵³ Consequently, the Green Paper has framed the debate over the reach of the Directive and will continue to provide a roadmap for those seeking guarantee protection within the EU.

3. THE DIRECTIVE

The Directive, first proposed on October 16, 1996, received extensive commentary by Member States and consumer groups, as well as in scholarly literature.⁵⁴ An amended Directive, which

⁵² A 1990 study carried out by the Commission on trans-frontier consumer complaints showed that between 50% and 75% of those complaints concerned defective products and between 10% and 75%, depending on the Member State, concerned difficulties in invoking a commercial guarantee or securing after-sales services. See Green Paper, *supra* note 39, at 8, 9. In a 1991 Eurobarometer survey, 53% of the respondents indicated that they feared the difficulties encountered in exchanging or repairing goods purchased in another country. See *id.*

⁵³ See Committee Opinion, *supra* note 50, at C 665; Robert Bradgate, *Consumer Guarantees: The EC's Draft Directive*, 1 WEB J. CURRENT LEGAL ISSUES 1 (1997) (last visited Jan. 22, 1999) <<http://webjcli.ncl.ac.uk/1997/issue1/bradgate1.html>> (arguing that the main features of the Directive are similar to English law).

⁵⁴ See *id.* (arguing that the main features of the Directive are similar to English law); Elspeth Deards, *The Proposed Guarantees Directive: Is It Fit for the Purpose?*, 21 J. CONSUMER POL'Y 99, 101-10 (1998) (assessing the potential significance of the Directive for consumers in the UK); European Consumer Law Group, *European Consumer Law Group Opinion on the Proposal for a Directive on the Sale of Consumer Goods and Associated Guarantees*, 21 J. CONSUMER POL'Y 91 (1998) (critically analyzing each aspect of the Directive and offering suggestions); Reindl, *supra* note 5, at 639, 661-71; George T. Brady, Comment, *Consumer Protection in the European Community: Hope for the Consumer or Unfulfilled Promises?*, 23 N.C. J. INT'L L. & COM. REG. 155, 196-

took into account many of the suggestions for revisions, was proposed by the Commission on March 31, 1998.⁵⁵ This proposal went to the European Parliament and its response was forwarded to the Council of Ministers. On April 23, 1998, the Council of Ministers passed yet another version,⁵⁶ which will become the "common position." This version will be returned to the European Parliament for approval before it can be adopted by the Council as a Directive.⁵⁷

The European Parliament will probably act before the end of the year, with a view to final passage in 1999.⁵⁸ Nigel Griffiths, the former Consumer Affairs Minister from the United Kingdom ("UK") and chair of the Council, expressed his commitment to passing the Directive before the end of the year: "Our objective is to improve consumers' rights at home and abroad and to ensure that all consumers have the same minimum rights wherever they buy goods in the European Union. This Directive brings real benefits under the UK's Presidency objective of creating a 'People's Europe.'"⁵⁹ Although the Directive will likely not be passed as soon as Mr. Griffiths anticipated, the timing is critical; the legislation could be shelved either by Austria, which currently holds the presidency of the Council, or Germany, the next country in line for the six-month presidency. Once the Directive has been published in the Official Journal of the European Communities, Member States will have three years to adopt its provisions.⁶⁰

3.1. Preamble

The Preamble makes clear the extent to which awareness of consumer interests exists. Consumers who want to purchase

98 (1997) (noting the great amount of work the Directive will need for implementation).

⁵⁵ Amended proposal for a European Parliament and Council Directive on the Sale of Consumer Goods and Associated Guarantees, 1998 O.J. (C 148) 11 [hereinafter March 1998 Directive].

⁵⁶ See April 1998 Directive, *supra* note 1.

⁵⁷ See *Minister Secures Agreement for Europe-wide Consumer Guarantees Directive*, M2 PRESSWIRE, Apr. 24, 1998, available in LEXIS, Europe Library, Allnews File.

⁵⁸ See *id.*

⁵⁹ *Id.*

⁶⁰ See April 1998 Directive, *supra* note 1, at art. 8.

goods in Member States other than their State of residence are specifically identified as playing “a fundamental role in the completion of the internal market.”⁶¹ In order for consumers to play their role, their economic interests must be protected. Attaining a high level of consumer protection requires overcoming the difficulties faced by consumers shopping across borders, the most significant difficulty being contract disputes over non-conforming goods.⁶²

3.2. *Article One*

In Article One, the Directive articulates its scope and defines basic terms. The stated purpose of the Directive is “the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.”⁶³ The Directive defines a consumer as “any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession.”⁶⁴ The term “consumer goods” is broadly defined to include “any tangible moveable item.”⁶⁵ There are, however, three exceptions: (1) goods sold “by way of execution or otherwise by authority of law;” (2) water and gas, unless they are sold in “limited volume or set quantity;” and (3) electricity.⁶⁶ The Directive permits the Member States to provide by derogation that “used goods sold at public auction where consumers have the opportunity of attending the sale in person” are not consumer goods.⁶⁷ Even if a Member State chooses to exclude such goods, items purchased at an auction where the consumer does not have the opportunity to attend, an internet auction for example, nevertheless would be covered by the Directive.

⁶¹ *Id.* at pmb1.

⁶² *See id.*

⁶³ *Id.* at art. 1(1).

⁶⁴ *Id.* at art. 1(2)(a). The previous version provided that the purposes for which the consumer was acting not be “directly” related to the consumer’s trade, business, or profession. March 1998 Directive, *supra* note 55, at art. 1(2)(a).

⁶⁵ April 1998 Directive, *supra* note 1, at art. 1(2)(b).

⁶⁶ *Id.*

⁶⁷ *Id.* at art. 1(3).

A seller is defined by the Directive as “any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession.”⁶⁸ Producers are covered by some of the provisions of the Directive and are defined as “the manufacturer of goods, the importer of the goods into the territory of the European Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods.”⁶⁹

The most significant definition in the Directive is that of guarantee. A guarantee is “any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to exchange, repair or handle goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.”⁷⁰ The March Directive had added the word “commercial” to modify “guarantee,” adopting the language used by commentators, as well as the Commission, to make the distinction between commercial and legal guarantees.⁷¹ Although the word “commercial” no longer appears, the guarantee created is essentially the commercial guarantee contemplated by the earlier version.

3.3. *Article Two*

Article Two creates legal guarantees by mandating that the seller must deliver goods to the consumer that conform to the contract of sale and describes four situations in which consumer goods are presumed to conform.⁷² The first situation is when the goods comply with the seller’s description and possess the qualities of any goods the seller has “held out to the consumer as a sample or model.”⁷³ The second definition of conformity is a guarantee that goods are fit for any particular purpose. Goods must be fit for any particular purpose “for which the consumer requires them and which he made known to the seller at the time

⁶⁸ *Id.* at art. 1(2)(c).

⁶⁹ *Id.* at art. 1(2)(d).

⁷⁰ *Id.* at art. 1(2)(e).

⁷¹ March 1998 Directive, *supra* note 55, at art. 1(2)(d). See e.g., Brady, *supra* note 54, at 166-67 (referring to the guarantee as a commercial guarantee).

⁷² April 1998 Directive, *supra* note 1, at art. 2(1).

⁷³ *Id.* at art. 2(2)(a).

of conclusion of the contract, except where the circumstances show that the buyer did not rely on the seller's explanations."⁷⁴ The third situation is when they are "fit for the purposes for which goods of the same type are normally used."⁷⁵ The fourth type of conformity is if the goods:

show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.⁷⁶

This consumer expectation test was advocated in the Commission's Green Paper⁷⁷ and received broad support from consumer representatives.⁷⁸ Opposition from industry was apparently strong enough that the first version of the Directive did not include it,⁷⁹ but it has since appeared in subsequent versions.⁸⁰

There is no lack of conformity if the statement reads as follows: "at the time the contract was made, the consumer was aware or could not reasonably be unaware" that the goods did not conform to the contract.⁸¹ In other words, the buyer who buys a good after having inspected it under circumstances in

⁷⁴ *Id.* at art. 2(2)(b). The March version of the Directive did not contain the final clause, although it was present in the 1996 version. See 1996 Directive, *supra* note 40, at art. 2(2)(c). Its reappearance invites wrangling over what inferences may properly be drawn from the circumstances surrounding the sale about the degree to which the buyer relied on the seller's commentary about the goods.

⁷⁵ April 1998 Directive, *supra* note 1, at art. 2(2)(c).

⁷⁶ *Id.* at art. 2(2)(d).

⁷⁷ See Green Paper, *supra* note 39, at 85-86. The Green Paper uses the phrase "consumer's legitimate expectations." *Id.*

⁷⁸ See European Consumer Law Group, The EU Green Paper on Guarantees for Consumer Goods and After-Sale Services— A Response, 17 J. CONSUMER POL'Y 363, 364 (1994).

⁷⁹ See Reindl, *supra* note 5, at 664 n.178.

⁸⁰ See March 1998 Directive, *supra* note 55, at art. 2(2)(c); April 1998 Directive, *supra* note 1, at art. 2(2)(d).

⁸¹ *Id.* at art. 2(3).

which she knew or should have known of the non-conformity should not be able to complain. Further, the immediate seller is not bound by public statements if he can show that any one of three circumstances exists: first, that he was not and could not reasonably be aware of the statement; second, that the statement was corrected at the time of sale; or, third, that the statement could not have influenced the consumer's decision to buy the goods.⁸²

In addition, any lack of conformity resulting from incorrect installation, if installation is part of the contract and is done by the seller or under his responsibility, is the equivalent of lack of conformity of the goods with the contract.⁸³ The March 1998 version of the Directive included incorrect installation by the consumer if such incorrect installation resulted from a lack of conformity in the written installation instructions provided to the consumer.⁸⁴ This provision, however, is not in the latest version of the Directive.

3.4. *Article Three*

Article Three creates the rights of the consumer. The remedy scheme of the new version of the Directive departs significantly from earlier versions.⁸⁵ The seller is liable to the consumer for a

⁸² See *id.* at art. 2(4).

⁸³ See *id.* at art. 2(5).

⁸⁴ See March 1998 Directive, *supra* note 55, at art. 2(4).

⁸⁵ Under the March 1998 Directive, when the seller was notified of a lack of conformity, a hierarchy of remedies became available. The seller was required to offer to repair the goods free of charge within a reasonable period, or to replace the goods. See March 1998 Directive, *supra* note 55, at art. 3(1). The consumer was given the right to elect either of these remedies except under circumstances in which "only one specific claim appears economically appropriate having regard to the seller's interests, and reasonable to the consumer." *Id.* at art. 3(4). However, the consumer could demand replacement if repairing the goods would have reduced their value. See *id.* If neither of these remedies was possible, or if attempted repair did not correct the lack of conformity, the purchaser had the right to demand reduction of the purchase price or rescission. See *id.* This language was significantly different from the provisions of the 1996 Directive, which entitled the consumer to ask the seller to "repair the goods free of charge within a reasonable period, or to replace the goods, when this is possible, or to demand an appropriate price reduction or rescission of the contract." 1996 Directive, *supra* note 40, at art. 3(4). To avail herself or himself of any of these remedies, the consumer was required to notify the seller of any lack of conformity within one month from "the date on which he detected the lack of conformity or ought normally to

lack of conformity existing at the time of delivery of the goods.⁸⁶ When a lack of conformity exists, the consumer is entitled to one of four remedies: repair, replacement, price reduction, or rescission of the contract.⁸⁷ The consumer may require repair or replacement, free of charge, unless the remedy that the consumer chooses “is impossible or disproportionate.”⁸⁸ The chosen remedy is considered disproportionate if the costs imposed on the seller “are unreasonable taking into account the value the goods would have if there were no lack of conformity, the significance of the lack of conformity and whether the alternative remedy could be completed without significant inconvenience to the consumer.”⁸⁹ The Directive requires that repair or replacement be completed within a reasonable time “without any significant inconvenience to the consumer taking account of the nature of the goods and the purpose for which the consumer required the goods.”⁹⁰

The remedies of price reduction or rescission come into play if the consumer is not entitled to repair or replacement, or if the seller has not met the obligation to complete the repair or replace the good within a reasonable time and without significant inconvenience to the consumer.⁹¹ The consumer is not, however, entitled to rescission if the lack of conformity is minor.⁹²

The article sets up the consumer’s right to a remedy when the goods that he or she purchases do not conform to the contract.⁹³ The consumer may initially choose either repair or replacement,

have detected it.” *Id.* at art. 4(1). The right of replacement or rescission had to be exercised within one year. *See id.* at art. 3(4). In addition, the 1996 Directive provided that Member States could limit these rights for a minor lack of conformity. *See id.* A significant provision that appeared in the March 1998 Directive has been omitted. It provided that the seller bears the costs associated with repair or replacement, citing specifically “transport, travelling, labour or materials.” March 1998 Directive, *supra* note 55, at art. 3(6). This provision protected consumers from incurring the sometimes onerous expenses of returning a good, such as an automobile, to the place of purchase for repair.

⁸⁶ *See* April 1998 Directive, *supra* note 1, at art. 3(1).

⁸⁷ *See id.* at art. 3(2).

⁸⁸ *Id.* at art. 3(3).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See id.* at art. 3(4).

⁹² *See id.* at art. 3(5).

⁹³ *See id.* at art. 3(1).

but if the remedy the consumer chooses is unreasonably burdensome, the seller may instead supply an alternative.⁹⁴ If repair or replacement is unavailable or if the seller fails to act within a reasonable time, the consumer is entitled to a reduction in price or rescission of the contract.⁹⁵

3.5. *Article Three-a*

When the final seller is liable to the consumer for a lack of conformity "resulting from an act of commission or omission" by the producer, a previous seller in the chain of distribution, or any other intermediary, he or she is entitled to indemnification.⁹⁶ Those from whom the seller may require indemnification, as well as the available causes of action and procedural rules, are governed by national law rather than the Directive.⁹⁷

3.6. *Article Four*

Article Four sets out the applicable time limits. The seller is liable where the lack of conformity is discovered within two years of the delivery of the goods.⁹⁸ Significantly, the time limits commence upon delivery, not when the defect is or should be discovered. A consumer who buys a good for future use must be careful, therefore, that the time limit does not expire before he or she has used the good for the first time. The preamble notes that Member States may suspend the two-year period for discovery of a defect "in the event of repair, replacement, or negotiations between seller and consumer with a view to an amicable settlement."⁹⁹ This tolling of the time period was mandatory under the March version of the Directive.¹⁰⁰ If a Member State's national legislation imposes a time limit on consumers' remedies,

⁹⁴ See *id.* at art. 3(3).

⁹⁵ See *id.* at art. 3(4).

⁹⁶ *Id.* at art. 3a.

⁹⁷ See *id.*

⁹⁸ See *id.* at art. 4(1). The March 1998 Directive provided that the two-year period for manifestation of a defect be suspended from the time the consumer notified the seller of the defect until the seller's obligations were fulfilled. See March 1998 Directive, *supra* note 55, at art. 5. This suspension also applied until the conclusion of any legal or alternative dispute resolution action taken by the consumer. See *id.*

⁹⁹ April 1998 Directive, *supra* note 1, at Recitals Re Article 4(1).

¹⁰⁰ See March 1998 Directive, *supra* note 55, at art. 5.

it may not be less than the two-year period mandated in the Directive.¹⁰¹ Member States may provide, however, that a consumer must notify a seller of a lack of conformity within two months of the date on which he or she detected it.¹⁰² A lack of conformity that manifests itself within six months of delivery is presumed to have existed at the time of delivery, in the absence of proof to the contrary, unless the presumption is inconsistent with the nature of the goods or the lack of conformity.¹⁰³ Perishable products certainly fall within this exception.

3.7. *Article Five*

This article covers the commercial guarantee and provides that any guarantee “must legally bind the offerer under the conditions laid down in the guarantee statement and the associated advertising.”¹⁰⁴ Under this article, persons other than the seller can make a guarantee and thus be liable under its terms for breach. The guarantee must do two things. First, it must “state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that the consumer’s rights under these are not affected by the guarantee.”¹⁰⁵ Second, it must “set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.”¹⁰⁶ The guarantee document must be made available to the consumer upon her or his request in writing or “feature in another durable medium available and accessible to [her or] him.”¹⁰⁷

¹⁰¹ See April 1998 Directive, *supra* note 1, at art. 4(1).

¹⁰² See *id.* at art. 4(1a).

¹⁰³ See *id.* at art. 4(2).

¹⁰⁴ *Id.* at art. 5(1). Omitted from this version is the following language, which appeared in the March version: “and must place the beneficiary in a more advantageous position than that resulting from the rules governing the sale of consumer goods set out in the national provisions applicable.” March 1998 Directive, *supra* note 55, at art. 6.

¹⁰⁵ April 1998 Directive, *supra* note 1, at art. 5(2).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at art. 5(3).

3.8. *Article Six*

Under this article, any contractual terms or agreements that waive or restrict the consumer's rights under the Directive, made with the seller before the consumer has notified her or him of any lack of conformity, are not binding on the consumer.¹⁰⁸ However, Member States may allow sellers and consumers, in the case of secondhand goods, to agree to a shorter period of liability although not less than one year.¹⁰⁹ This article also requires Member States to ensure that consumers are not deprived of the Directive's protections if the law of a third country is applicable to the contract when the "contract has a close connection with the territory of the Member States."¹¹⁰

3.9. *Article Seven*

This article clarifies the relationship between the provisions of the Directive and the Member States' national laws. First, Article Seven makes clear that any rights created by the Directive may be exercised without prejudice to other rights that consumers have "under the national rules governing contractual or non-contractual liability."¹¹¹ This is a nod to those Member States, for example Belgium and the UK,¹¹² that already offer more by way of consumer protection than is required by the Directive. Second, it permits Member States to retain or adopt more stringent provisions than appear in the Directive, as long as they are compatible with existing treaties, in order to ensure a high level of consumer protection.¹¹³

The Directive creates both legal and commercial guarantees for consumers, and an array of remedies for their breach. These rights provide a minimum level of protection for consumers as they engage in cross-border shopping and smooth out some of the variations in the Member States' national laws. Although the Directive does not go as far as many of the Member States in the

¹⁰⁸ See *id.* at art. 6(1).

¹⁰⁹ See *id.*

¹¹⁰ *Id.* at art. 6(2).

¹¹¹ *Id.* at art. 7(1).

¹¹² See Green Paper, *supra* note 39, at annex I (surveying the existing domestic legal situation across European nations with respect to consumer guarantees and after-sales services conditions).

¹¹³ See April 1998 Directive, *supra* note 1, at art. 7(2).

actual protections provided,¹¹⁴ it clearly sets the tone and expectation for a high level of consumer protection throughout the EU.

4. COMPARISON TO U.C.C. WARRANTIES AND OTHER PROVISIONS

The Directive's legal guarantees have a familiar ring to those versed in the Uniform Commercial Code ("U.C.C."). The Directive's legal guarantees are, in U.C.C. terminology, the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.¹¹⁵ Given the thirty-plus year history of the U.C.C. in the United States,¹¹⁶ a review of the warranty sections and what they have come to mean might prove instructive to gauge the future of the Directive's guarantee provisions.

Unlike the Directive, the U.C.C. is not a consumer protection statute. It applies to all sales of goods, no matter what type of goods and no matter who the buyer and seller are.¹¹⁷ As such, it is not aimed at consumer protection, but rather at unifying the law covering sales. The warranty provisions are a small piece of the entire statute. Compare the scope of the Directive, which is aimed at consumer goods sold to a consumer and which specifies that the seller be a merchant seller.¹¹⁸ Given the differing policies of the two documents—unification of sales law on the one hand and unification plus consumer protection on the other—there are bound to be differences in scope and approach. That said, there are sufficient similarities to make comparison instructive.

First, as with the Directive, the U.C.C. did not break new

¹¹⁴ See Green Paper, *supra* note 39, at annex I.

¹¹⁵ See generally U.C.C. § 2-314(2); § 2-315 (1998) (stating the requirements of the implied warranty of merchantability and of fitness, respectively).

¹¹⁶ See generally U.C.C., Table of Jurisdictions Wherein Code Has Been Adopted (1998) (citing the effective dates for the U.C.C. in various American states as generally in the 1960s).

¹¹⁷ See generally U.C.C. § 2-301 (1998) (describing the general obligations of parties to a sales contract, referring to the parties as simply "seller" and "buyer" with no further refinements).

¹¹⁸ See April 1998 Directive, *supra* note 1, at art. 1(2) (defining "consumer" as "any natural person who . . . is acting for purposes which are not [directly] related to his trade, business or profession" and defining merchant "seller" as "any natural or legal person who, under a contract, sells consumer goods in the course of his trade").

ground in all the jurisdictions it affected. Its predecessor, the Uniform Sales Act, imposed implied warranties in those states that adopted it.¹¹⁹ For other states, the U.C.C. was the first venture into the uncharted waters of *caveat venditor*.¹²⁰ Such will be the case with the Directive. For some Member States, the Directive restates or merely modifies existing law.¹²¹ Other Member States will experience a complete turnaround in existing law when they pass their harmonizing legislation.¹²² But unlike individual states adopting the U.C.C., Member States do not have a piece of model legislation with which to work. The Directive provides results to be achieved and leaves the Member States to determine how best to implement those goals. A fair amount of uniformity may be lost in the implementation from state to state. However, because most Member States are civil law countries without a strong common law tradition,¹²³ the quest for uniformity will come primarily through the passage of harmonizing legislation.

The Directive's legal guarantee language and the U.C.C.'s warranty of merchantability language are not precisely the same, but there are certain parallels. The Directive provides that goods must be "fit for the purposes for which goods of the same type are normally used."¹²⁴ Compare U.C.C. Section 2-314's language of "fit for the ordinary purposes for which such goods are used."¹²⁵ The point of both sections is to protect the buyer's expectation that the goods are of sound quality and durability, and sold at a fair price. The goods are not necessarily perfect and may wear out over time, but not necessarily faster than similar goods. If those expectations are not realized, the legal guarantee

¹¹⁹ See UNIF. SALES ACT §§ 13-16 (1906). The Uniform Sales Act did not achieve the universality among the states eventually enjoyed by the U.C.C. Thirty-six states and the District of Columbia adopted the Act. See David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 275 (1998).

¹²⁰ See Owen, *supra* note 119, at 275 n.11 (defining *caveat venditor* as an implied warranty of freedom from defects against the seller, if the product was purchased at a "sound price," citing *Lane v. Trenholm Bldg. Co.*, 229 S.E.2d 728, 730 (1976)).

¹²¹ See Green Paper, *supra* note 39, at Annex I.

¹²² See *id.*

¹²³ The common law Member States (Ireland and the United Kingdom) already imply warranties in sales contracts. See *id.* at 21-22.

¹²⁴ April 1998 Directive, *supra* note 1, at art. 2(2)(c).

¹²⁵ U.C.C. § 2-314(2)(c) (1998).

has been breached and the buyer has recourse against the seller. Both contemplate a quality level that is neither too optimistic nor too pessimistic in scope. To help standardize that quality level, both the U.C.C.¹²⁶ and the Directive¹²⁷ employ the consumer expectation test.

The Directive's fitness guarantee states that the goods must be "fit for any particular purpose for which the consumer requires them and which he had made known to the seller at the time of conclusion of the contract . . ." ¹²⁸ Somewhat more complicated is the U.C.C.'s warranty of fitness for a particular purpose:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.¹²⁹

Several conditions must occur, however, before this warranty comes into existence: 1) the seller learns of the buyer's purpose, either directly or through facts and circumstances; 2) the seller realizes that the buyer is relying on him or her to select the appropriate goods; and 3) the buyer does, in fact, rely on the seller to select the appropriate goods.¹³⁰ The foregoing is a somewhat more involved process than the Directive's, which does not require that the seller realize that the buyer is relying on his or her expertise.¹³¹ The Directive's language, however, does require that information about the buyer's particular purpose be transmitted explicitly to the seller¹³² rather than permitting the guarantee to arise when the seller should have inferred the buyer's special purpose. Additionally, unlike the warranty of

¹²⁶ See U.C.C. § 2-404 (American Law Institute, Discussion Draft, April 14, 1997, note 4 (making key changes to Article 2 of the U.C.C.)) [hereinafter REVISED U.C.C.].

¹²⁷ See April 1998 Directive, *supra* note 1, at art. 2(2)(d).

¹²⁸ *Id.* at art. 2(2)(b).

¹²⁹ U.C.C. § 2-315 (1998).

¹³⁰ See *id.*

¹³¹ See generally April 1998 Directive, *supra* note 1, at arts. 2, 3.

¹³² See *id.* at art. 2(2)(b).

merchantability, the U.C.C.'s warranty of fitness does not explicitly require a merchant seller.¹³³ However, because of the warranty's other requirements, it would be unlikely to arise in circumstances that do not include a merchant seller.¹³⁴ The U.C.C. is in contrast to the Directive, which imposes its guarantees on professional sellers only.¹³⁵

Both the Directive and the U.C.C. provide for express warranties (the commercial guarantees of the Directive).¹³⁶ In both documents, the express warranties are activated when sellers (sellers or producers in the Directive)¹³⁷ make explicit affirmations about the goods beyond the implied affirmations. Buyers have an action for breach when those explicit promises are not kept.¹³⁸

Unlike the Directive, the U.C.C. permits the exclusion or modification of warranties.¹³⁹ Considering the scope of the statute, it is not surprising that it permits sellers to structure their deals. The Directive, as a consumer statute, assumes that consumer buyers are in no position to bargain for exclusions or limitations of warranties and thus prohibits sellers from excluding or limiting them.¹⁴⁰

Although the two pieces of legislation are more similar than different, there are two significant points of departure where the U.C.C.'s warranty protection outstrips the Directive's and both merit discussion. One is the extension of warranty protection beyond the immediate buyer and seller. The other is the recital of remedies that are available to the buyer for breach of warranty. It is tempting to speculate that similar extended protections will

¹³³ See U.C.C. § 2-315 (1998).

¹³⁴ See *id.*

¹³⁵ See April 1998 Directive, *supra* note 1, at art. 1(2)(c) (describing the merchant seller covered by the Directive as "any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession").

¹³⁶ See, e.g., April 1998 Directive, *supra* note 1, at art. 2(2)(a); U.C.C. § 2-313 (1998) (defining express warranties by the seller as those created by affirmation, promise, description, or sample).

¹³⁷ See April 1998 Directive, *supra* note 1, at arts. 1(2)(c) - (d).

¹³⁸ See April 1998 Directive, *supra* note 1, at art. 3 (describing the various rights of the consumer in the event of lack of conformity with the contract).

¹³⁹ See U.C.C. § 2-316 (1998). For example, the seller might utilize expressions such as "as is," or "with all faults," to negate an inference of even an implied warranty.

¹⁴⁰ See April 1998 Directive, *supra* note 1, at art. 6(1).

be read into the Directive; that is, however, not a foregone conclusion.

As a result of Section 2-318 revisions precipitated by case law developments in the area of product liability,¹⁴¹ U.C.C. warranty protection extends beyond the purchaser and seller of a good. Stated as a menu of options from which individual states select, Section 2-318, at a minimum, permits members of a buyer's family or guests in the household to claim under the warranty.¹⁴² Each option extends the warranty's reach a little further. Alternative B extends warranty protection to any natural person who may reasonably be expected to use, consume, or be affected by the good and who suffers personal injury occasioned by the breach.¹⁴³ Alternative C, the broadest of the three options, extends warranty protection to any person (not necessarily a human being) who is injured and who could reasonably be expected to use, consume, or be affected by the goods.¹⁴⁴

A similar extension is probably not in the offing under the Directive. Despite significant criticism from commentators, consumer groups, and others,¹⁴⁵ the Directive very clearly limits those who can claim breach under the legal guarantee to those who are in privity with the seller.¹⁴⁶ Neither the manufacturer of the good nor intermediate distributors are bound by the legal guarantees, although any entity in the chain of distribution is bound by commercial guarantees it may make.¹⁴⁷ Moreover, users beyond the ultimate buyer are out of luck if they suffer the consequences of a breach of guarantee.¹⁴⁸ Whatever may be the

¹⁴¹ This trend began with the 1960 decision in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) and was furthered by Dean Prosser's seminal article. See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

¹⁴² See U.C.C. § 2-318, Alternative A (1998). This alternative obviously assumes a consumer buyer and therefore a consumer good. Note that the warranty does not extend vertical privity beyond the immediate seller, but extends horizontal privity to a defined group of non-privity parties.

¹⁴³ See U.C.C. § 2-318, Alternative B (1998). This alternative contemplates as the injured party a human being who has suffered physical injury.

¹⁴⁴ See U.C.C. § 2-318, Alternative C (1998). Because the injured party could be a fictitious person, the injury can be purely economic, unlike the other alternatives.

¹⁴⁵ See sources cited *supra* note 54.

¹⁴⁶ See April 1998 Directive, *supra* note 1, at arts. 1(2)(c), 3.

¹⁴⁷ See *id.* at art. 3a (binding the contractual chain of distribution).

¹⁴⁸ Remote buyers and users will have claims in product liability if the

state of the law in the United States, it seems that privity is alive and well in Europe, at least insofar as the guarantees with which the Directive is concerned.

The U.C.C. remedies available for breach of warranty are more generous than the Directive's. Specifically, the U.C.C. permits the buyer to claim incidental and consequential damages occasioned by the breach, including damages for physical injury.¹⁴⁹ Even though a contract generally can limit or modify the available remedies, a limitation on consequential damages for physical injury in the case of consumer goods is considered *prima facie* unconscionable.¹⁵⁰ This provision was absolutely key to the eventual importation of the U.C.C.'s warranty provisions into U.S. product liability law.¹⁵¹ Many have noted the connection between the Directive and the emerging product liability law in the EU.¹⁵² However, the Directive very specifically limits the buyer's remedies to a choice of repair, replacement, reduction in price, or rescission of the contract.¹⁵³ Clearly the point of the Directive is to provide a remedy for a consumer's dashed expectations, and not to provide a remedy for any product liability claims that may arise with respect to the good. Therefore, it is unlikely that the EU will see an extension of remedies analogous to the U.C.C.'s in the context of this Directive. This is not to say that subsequent legislation may not be proposed that would provide such an extension, but, if it occurs, it will likely be in furtherance of product liability law in the EU, and not of guarantee law.

The foregoing suggests that the U.C.C. provides a good model for the workings of legal and commercial guarantees in the EU, insofar as the provisions are compatible. However, one must be

good does physical harm, but are foreclosed from recovery for nonconformity of the good to the contract. See Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 O.J. (L 210) 28, 29 [hereinafter Council Directive of 25 July 1985].

¹⁴⁹ See U.C.C. § 2-715 (1998).

¹⁵⁰ See *id.* at § 2-719.

¹⁵¹ See Owen, *supra* note 119, at 275 (describing the development of product liability law).

¹⁵² For an example of emerging product liability law, see Council Directive of 25 July 1985, *supra* note 148, at 29, for an example of emerging product liability law where producers can be found liable for defective products.

¹⁵³ See April 1998 Directive, *supra* note 1, at arts. 3(3)-(4).

cautious in assuming that all the developments leading to the current U.C.C. will be mirrored in the EU. Perhaps mindful of what the U.C.C. has come to signify, the Directive on guarantees is specifically and explicitly limited to prevent a similar evolution.

This discussion would not be complete without reference to the attempts to revise U.C.C. Article 2.¹⁵⁴ The National Conference of Commissioners on Uniform State Laws is undertaking a project to redraft the Article.¹⁵⁵ The project is ongoing and no final set of revisions has emerged from the drafting committee.¹⁵⁶ However, certain trends can be detected, some of which have a direct bearing on the U.C.C. sections related to the Directive. Consequently, comparisons between the applicable revised sections and the Directive are useful.

Minor word changes to the implied warranty of merchantability¹⁵⁷ do not seem to alter the comparison previously undertaken. No changes are proposed to the implied warranty of fitness for particular purpose.¹⁵⁸ Similarly the provisions to exclude warranties and limit remedies and the expansion of the warranties beyond those in privity do not change the previous comparison.

One instance where the revisions to Article 2 bring the statute more in line with the Directive is in the area of express warranties. Under certain circumstances, advertising can create express warranties,¹⁵⁹ thus paralleling the Directive's notion of public statements creating guarantees. According to the recently revised statute, the warranties created by public statements may extend to remote buyers,¹⁶⁰ as may other forms of express

¹⁵⁴ See generally REVISED U.C.C., *supra* note 126.

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*

¹⁵⁷ REVISIONS OF UNIFORM COMMERCIAL CODE ARTICLE 2 - SALES § 2-404 (National Conference of Commissioners on Uniform State Laws 1998) [hereinafter REVISED U.C.C.]. One change is that for goods to be merchantable, they must be "fit for the ordinary purposes for which goods of that description are used." *Id.* at § 2-404(b)(3).

¹⁵⁸ REVISED U.C.C. § 2-405.

¹⁵⁹ *Id.* at § 2-403(a) (providing that any representation made by a seller, including advertising, which relates to the goods and becomes part of the basis for the bargain creates an express warranty).

¹⁶⁰ *Id.* at § 2-408(c). The circumstances for this happening are if the remote buyer purchases from someone "in the normal chain of distribution with knowledge of the representation" and that a reasonable person would expect that the goods would perform as promised. *Id.* at § 2-408(c)(1), (2).

warranties.¹⁶¹ Unlike the Directive, however, revised Article 2 also provides that express warranties may extend beyond remote purchasers even when made through a medium other than public communication. Specifically, warranty protection extends to any member of the remote buyer's family or guest in the household.¹⁶² No such extension is contemplated by the Directive. It should be noted that, in the case of these so-called "pass through" warranties, the remote buyer gets no more or no less by way of protection than the immediate buyer. In other words, the seller is free to place limitations on the warranty that will restrict the remote buyer and others, even though the two parties never dealt face-to-face.¹⁶³ So, while revised Article 2 is somewhat more permissive than the Directive with respect to the parties who may make a claim under an express warranty ("guarantee" in Directive language), it is more restrictive in that sellers may limit the effect of their warranties and that the limitation will be binding on everyone down the chain. In the event of litigation, traditional notions of unconscionability may change that result in individual cases, but the bare-bones language of the revision permits the limitation.¹⁶⁴

5. IMPACT OF THE DIRECTIVE

A British negotiator trumpeted to the press that the Directive "will be the biggest change to consumer rights for [twenty] years."¹⁶⁵ This claim may be more hyperbole than an honest assessment of its impact. As the Directive draws closer to implementation, it is worthwhile to reflect on what it does and does not accomplish, what its impact on consumers and sellers in the EU will be, and whether it reflects sound consumer policy.

A threshold question is whether the Directive's mandates are

¹⁶¹ *Id.* at § 2-408(b). In this instance the representation about the good must be "in a record packaged with or accompanying the goods and the seller" must reasonably expect the record to be transmitted to the remote buyer. *Id.*

¹⁶² *Id.* at § 2-408(b)(2)(A).

¹⁶³ *Id.* at § 2-408(b)(2)(B) (providing that the seller may limit its obligation to the remote consumer, provided that any limitation is furnished to the remote consumer with the record that makes the representation, or at the time of sale, whichever is later).

¹⁶⁴ *Id.*

¹⁶⁵ Marie Woolf, *Shoppers Win Europe-Wide Right to Refunds*, THE OBSERVER, Apr. 19, 1998, at 2 (describing how consumers might benefit from the Directive's broadening of guarantees for certain consumer goods).

even within the purview of the EU to undertake. The Maastricht Treaty includes an article that requires EU institutions to practice subsidiarity.¹⁶⁶ Subsidiarity is a concept analogous to federalism in U.S. law and restrains the Union from legislating in areas that can and should be handled at the Member State level. U.S. commentators cannot resist drawing a connection to the concept of enumerated powers and most especially to commerce clause jurisprudence under the U.S. Constitution.¹⁶⁷ Analyzing the meaning and implementation of subsidiarity¹⁶⁸ is beyond the scope of this paper, other than to note its potential application within the context of the guarantee Directive. Some commentators have mused over whether the Directive violates the subsidiarity principle.¹⁶⁹ In light of the variances among the Member States with respect to warranty protection, the Directive comports with the subsidiarity principle. This contention is supported by the explicit inclusion of consumer protection, also added by the Maastricht Treaty, into the goals of the single market. There are many, however, who would disagree with this analysis and would contend that in enacting the Directive, the European Community has acted outside its jurisdiction. Nevertheless, even beyond this preliminary issue, the Directive is subject to attack on both its substance and impact.

Despite all of the background study and reporting that

¹⁶⁶ See Maastricht Treaty, *supra* note 34, at art. 3b, C 224/9 (stating that “in accordance with the principle of subsidiarity, the European Community [shall take action] . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States. . .”).

¹⁶⁷ See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 423 (1994) (concluding that jurisprudence does not necessarily guarantee the proper balancing between the federal governments and states’ rights); Reindl, *supra* note 5, at 640 (describing how the European Community’s power to legislate stems from the concept of enumerated powers).

¹⁶⁸ For a thorough and well-written treatment of subsidiarity, including its comparisons to federalism, see Bermann, *supra* note 167, at 403.

¹⁶⁹ See Deards, *supra* note 54, at 114-15 (discussing how consumers may lose potential protection because Member States are unwilling to provide higher standards of protection than their neighboring Member States and the EEC is hesitant to pass legislation for fear of violating the principle of subsidiarity); Reindl, *supra* note 5, at 635-42 (suggesting the recent strengthening of the principle of subsidiarity may further limit the EC’s willingness to legislate); Brady, *supra* note 54, at 164-65 (describing how the principle of subsidiarity has made the European Community hesitant to pass consumer rights legislation).

occurred before the first version was proposed, the final version of the Directive is weak as regards legal guarantees. First, it provides fairly minimal levels of protection and severely circumscribes who is protected by and who is obligated to provide those minimum guarantees. National law can enhance the rights of buyers; indeed, some Member States' laws already do. Our concern is that the floor created by the Directive will become the de facto ceiling, especially in those Member States that do not currently provide the level of protection afforded by the Directive. The influence of local business interests can more easily be exerted at the Member State level than at the federal level in shaping the harmonizing legislation. However, this is an opportunity for Member States to make a good faith effort at consumer protection. It would be unfortunate if Member States used stingy harmonization to derail the policy of consumer protection or, perhaps even worse, to erect trade barriers.

Similarly, the Directive established a very weak standard in the area of commercial guarantees. The only requirements are that the commercial guarantees offer better protection than the legal guarantees, that they be available for perusal before purchase when the consumer so requests, and that they include certain information to enable consumers to invoke them.¹⁷⁰ Beyond these requirements, national law governs the guarantees, thus permitting variation among the Member States. While this portion of the Directive furthers the consumer protection policy, the goal of uniformity within the single market is left behind. EU policymakers hope that market forces will give those offering comprehensive commercial guarantees a competitive advantage. Nevertheless, one should be cautious about this assumption in light of the current practice of offering extended commercial guarantees at a price. The Directive curbs this practice and requires that, when given, the commercial guarantees within the Directive's parameters be offered free of charge.¹⁷¹ However, the selling of commercial guarantees is an example of the market promoting, rather than eliminating, opportunistic behavior by sellers. Extended guarantees are often not worth the money paid for them compared to the cost of repair and the incidents of

¹⁷⁰ See March 1998 Directive (amended proposal), *supra* note 55, at art. 6, C 148/19.

¹⁷¹ See April 1998 Directive, *supra* note 1, at art. 1(2)(c).

breakdown.¹⁷² The offering of additional protection accompanied by high-pressure selling is another way sellers part consumers from their money.¹⁷³ However, if the guarantees offer more than the legal minimum set out in the Directive, nothing prohibits the continued practice of offering extended guarantees at a price. We expect to see more not less of the practice. The policymakers obviously have more faith than we do in the market's ability, or willingness, to correct abuses.

The cost of compliance with the Directive is not irrelevant, especially in light of the fact that most of its obligations are imposed upon the seller, who may be a small business or individual. Producers will also experience compliance costs, but these costs are voluntarily taken when they make commercial guarantees, or public statements that amount to commercial guarantees. The Commission ordered a study on the economic impact of the Directive to help evaluate the predictions made by industry.¹⁷⁴ The report concluded that industry had substantially overestimated the costs of compliance.¹⁷⁵ It found that the clothing, shoe, leather, and furniture sectors would experience almost no additional costs, while other sectors would experience an increase of .5% to 6.6% (the latter in the computer industry).¹⁷⁶ If the study's conclusions are closer to reality than industry estimates, it can be said that compliance with the Directive will not be costless, however those costs will be manageable (even negligible in some sectors) and can probably be absorbed.

While we welcome the provisions added to the latest version of the Directive, especially insofar as they clarify the hierarchy of remedies and the obligations of the seller when a legal guarantee is invoked, there are still some unanswered questions. Perhaps the

¹⁷² See Rosanna Spero, *End Is Near for Warranty Deals*; *Money Mail*, DAILY MAIL (LONDON), June 3, 1998, at 48 (providing examples in which the cost of a warranty is greater than the cost of repairs).

¹⁷³ The Preamble to the latest version of the Directive acknowledges that commercial guarantees may be "a simple publicity ploy and deceive the consumer." April 1998 Directive, *supra* note 1, at pmbl.

¹⁷⁴ See, e.g., *Consumer Policy: Showdown in Parliament over Sales Contracts and Guarantees*, EUROPE INFORMATION SERVICE: EUROPEAN REPORT, Mar. 7, 1998, at No. 2297; Europe Information Service, *European Report*, Mar. 7, 1998, available in LEXIS.

¹⁷⁵ For example, some computer equipment retailers predicted a 60% increase. See *id.*

¹⁷⁶ *Id.*

notion of trans-border shopping creates obstacles that the Directive simply cannot remedy. Attempting to invoke the protections of the guarantees from a distance will always pose some difficulties for the buyer; returning to the place of sale for a refund, or returning the good for repair or replacement, is not costless. The Directive places the cost of repair and replacement squarely on the seller (unless the cost is disproportionate), and requires that the consumer not be significantly inconvenienced.¹⁷⁷ However, the language does not specifically mention the costs of travel or return of the goods to the seller, although an earlier version of the Directive did.¹⁷⁸ The Directive should explicitly mandate that these costs be paid by the seller in order to avoid possible arguments concerning the meaning of "significant inconvenience."

The Directive fails to allocate the admittedly amorphous costs of time and energy spent by the buyer initiating and following up on the repair or replacement process. One cost that the consumer may be willing to absorb is that of dropping in at a local shop for an exchange or repair. However, a consumer may not be willing to absorb, or even may be dissuaded from pursuing the remedies offered by the guarantee, by the costs of returning to a distant location, carrying on correspondence or phone calls, or bundling a good for return. We recommend that the Directive assess and account for additional hidden costs to the seller as well.

Sales consummated on the internet will pose similar challenges while these sales grow every year. While internet sales eliminate the need for consumers to travel across borders to purchase goods, all the hidden costs mentioned above will still apply if the goods do not satisfy the guarantees. Additionally, the internet is a market in its infancy, and sellers are just now testing its viability and potential. Consequently, sellers are transient, and many leave no paper trail as to their whereabouts. An internet buyer who resorts to guarantee protections may find that his or her seller has vanished into cyberspace. Traditional sellers may go out of business too, but there is usually some physical trail to help locate them. Often, that is not true with internet sellers. Because the Directive does not offer recourse against manufacturers or distributors, if the seller is unavailable to satisfy

¹⁷⁷ See April 1998 Directive, *supra* note 1, at art. 3(3), (4).

¹⁷⁸ See March 1998 Directive, *supra* note 55, at art. 3(6).

the conditions of the legal guarantees, the buyer is left without a remedy. The risk is significantly greater in internet sales. Thus, a provision giving the consumer recourse to others in the chain of distribution, if the seller is unavailable, would seem to be warranted, especially for internet buyers.

The goal of uniformity is only minimally realized by the Directive. Many opportunities for local law to deviate from the Directive exist by virtue of the Directive's references to existing national law. Therefore, the ideal of a uniform law of guarantee across the Union is more imagined than real. The situation has caused one disappointed member of the European Parliament to observe:

In practice consumers would still be unsure what their rights are in another country. Lawyers will love it. The directive's apparent two-year guarantee of reimbursement, replacement or repair in the case of faulty goods, far from being a universal boon, will land consumers in disputes with retailers all over Europe.¹⁷⁹

The Directive misses the mark of making the purchase of consumer goods seamless throughout Europe, despite all its good intentions. At best, it can be said that consumers will be more aware of their minimum rights. At worst, the situation is still chaotic and fraught with uncertainty for the intrepid European shopper. The last word has not been written on the Directive. It still must go to the Parliament and the Council before its final adoption. We can only hope that the concerns about these discontinuities embedded within the Directive will be addressed then and resolved.

Although there are specific provisions to criticize, by no means should the Directive be voted down. We cannot agree that it represents the biggest change to consumer rights in twenty years. It is, however, an important start on a program of consumer protection, albeit a small one. It is appropriate that consumer protection has finally been explicitly adopted as an EU policy. Among other things, it has the effect of bringing the

¹⁷⁹ Caroline Jackson MEP, Letter to the Editor, *Consumer Unfriendly*, SUNDAY TELEGRAPH (London), May 10, 1998, at 36.

consumer into the single market picture. While debates rage over macro issues such as monetary policy, merger guidelines, barriers to trade, and the like, the consumer must feel like he or she has gotten lost in the shuffle of moving to a single market. The Directive helps drive home the point that individuals are a part of and have much to gain from the overall unification effort. What could be more demonstrative than a law that affects such a familiar occurrence as purchasing a consumer good? It is an activity, unlike travel or setting up a business, that individuals undertake nearly every day. As such, the Directive's symbolic value may outstrip its legal significance.

While the Directive offers minimum levels of consumer protection and does not make substantial changes to existing Member States' laws, EU policymakers are clearly looking ahead to the possible inclusion of states from Eastern Europe and the former Soviet Union.¹⁸⁰ All fifteen current Member States of the EU already have some sort of guarantee associated with the sale of goods. The details and the scope of coverage vary, but the principle remains fairly constant throughout the Union. The same may not be true for the states seeking entrance into the EU. The Directive sets a threshold level requiring that a Member State must offer at least a minimum level of consumer protection to gain admission into the common market.

Finally, the Directive has a role to play in setting business practices. To be sure, the Directive only sets the legal stage for warranty protection. In order to give full force to the guarantees, businesses will have to operationalize the language to give their customers the full measure of protection. The Directive cannot always monitor the recalcitrant seller who refuses to abide by the Directive or sits on complaints hoping to wait out the consumer. It will be easy to ignore, at least at first, distant consumers who are demanding refunds, repairs, or replacements. A retailer will always pay closer attention to the local customer who can provide repeat business and whose complaints will be communicated to others in the local customer base. With the Directive as a legal mandate, business practices will eventually

¹⁸⁰ See European Commission, *Consumer Protection in the EU: Progress and Priorities for the Future*, (Background Report, Oct. 1996) (visited Jan. 18, 1999) <<http://www.cec.org.uk/pubs/br/br96/br9612.htm>> (listing development of consumer policy in central and eastern Europe as a priority for the European Commission).

conform to its prescriptions. There is no guaranty that buyers will not encounter slow or reluctant sellers, but, if they have the Directive to support their claims, they at least bargain from a position of strength. As the details of the Directive become integrated into day-to-day business practice, presumably consumers will experience smoother, or at least not unduly burdensome, procedures for seeking satisfaction. This, as much as anything, authenticates the Directive as sound consumer policy.

6. CONCLUSION

The last word has not yet been written on the Directive. Despite optimistic predictions that it could go into force by 1999, there are still a number of steps to take before the Directive becomes final. Any one of those steps could produce different provisions than those outlined here or kill the Directive's chances for passage altogether. Nevertheless, there is sufficient interest and debate surrounding the Directive that we believe passage in some form is likely. The question then becomes whether its passage will produce the results envisioned by its proponents.

One perplexing aspect of the Directive not likely to be changed is the many opportunities afforded Member States to derogate from its terms. If one purpose for treating guarantees at the Community level is to create uniformity in all the Member States, the drafters have lost momentum on this point. Given the ample opportunity to deviate from the Directive's terms, it is doubtful the desired uniformity can be realized. In many instances the purpose of permitting deviations is to allow Member States to provide a higher level of consumer protection than what is offered by the Directive. In other instances, it is simply to let domestic law govern what has traditionally been considered the province of local control, namely contracts. Whatever the motivations, the Directive by itself will not produce the desired result of a harmonized guarantee law throughout the EU, and that is to be lamented.

The failure to create producer liability for breach of the legal guarantees is likewise regrettable. Inasmuch as the EU has recognized consumers and has purported to create a high level of consumer protection via the Directive, the approach of limiting liability to only sellers is particularly surprising. Making a simple equity argument, producers are usually in a better position than sellers to make good on faulty wares. Consumers are often

buying a brand name, because of confidence in the brand name. If asked, consumers would probably reply that they expect recourse from the manufacturer of the product, as opposed to the seller, if it turns out to be defective. The Directive requires examination of producer liability within four years. That seems a remarkably long time to study the matter, especially when there are no assurances that the investigation will result in a change to the Directive's provisions on this point.

It should be obvious that passage of the Directive will not herald sweeping changes in consumer protection throughout the EU, not only because of the level of protection already existing in a number of Member States, but also because the provisions of the Directive do not set the bar very high. It is, however, sound consumer policy, and creating a minimum level of protection is useful on a number of fronts. First, it is an important early step toward the goal of creating a high level of consumer protection in the EU. Second, it signals consumers that the EU is responding to the difficulties they encounter as they try to take advantage of the single market by shopping across borders. Third, it will play a role over time in setting more consumer-oriented business practices. Finally, it sets the stage for a higher level of consumer protection in countries that want to become part of the EU but do not have a long or strong tradition of consumerism. With all that in mind, it will be important for the EU to follow up on a number of fronts.

The harmonization process must be monitored closely to gauge how Member States are bringing their laws in line with the Directive's provisions. Several concerns are implicated. First, are Member States meeting, but not exceeding, the level of consumer protection envisioned by the Directive? Are Member States that currently offer more protection lowering their standards? When the Member States pass domestic laws to harmonize with the Directive, do those laws, taken as a whole, create widely disparate levels of protection from state to state?

The EU should gather evidence of how consumers seek redress under the Directive and whether or not they are successful in doing so. Policy makers can then determine whether business practices have conformed to the Directive's mandates. The evidence should also reveal whether, despite its provisions, the Directive creates unintended burdens when consumers seek to invoke its remedies. It is not enough to gather the evidence. It

will be important for the EU to act on it.

There is additionally the question of the future of extended warranties. The availability of, costs associated with, and selling techniques accompanying extended warranties should be watched closely to determine whether consumers are being induced to purchase duplicative and unnecessary coverage.

Finally, the consumer focus should be more apparent in the Directive. This can be accomplished by creating producer liability, by clarifying how consumers can invoke the hierarchy of remedies, and by easing the burdens of returning the goods for replacement or repair. There is also an opportunity to create dispute resolution processes, other than litigation, that will handle disputes between buyers and sellers over each other's rights and duties.

We continue to cling to the Directive's symbolic value. It does signal the EU's interest in, if not commitment to, consumers. Presumably the foray into consumer protection, which this Directive symbolizes, will be followed by others. Only when there exists a compendium of efforts aimed at consumers can it be honestly said that the promise of consumer protection, as pledged in the Maastricht Treaty, has been realized.

* * * * *