

CONSUMER CONTRACTS AND EUROPEAN COMMUNITY LAW

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I. INTRODUCTION

The purpose of this paper is to complement the Symposium's discussion of UCC-specific consumer protection issues with an overview of recent consumer protection developments in the European Community ("Community"). The debate about consumer rights in the revision process of UCC Article 2 coincides with efforts in the European Community to adopt legislation concerning consumer contracts. To illustrate the policies and current status of Community consumer law, this paper focuses on legislative initiatives related to unfair contract terms and warranty rights in consumer contracts.

The paper consists of two parts. The first provides a general overview of consumer protection activities in the European Community. The first part's main theme is the relationship between Community law and Member State consumer protection laws. It explains why the Community's market integration efforts and diversity among Member States' consumer protection laws had a predominant influence on the current status of Community consumer protection laws.

The second part explores existing and proposed European Community legislation designed to ensure protection of consumer economic interests. Specifically, it critically discusses two Community harmonization measures governing warranties and warranty-related contract terms in consumer contracts.

The paper's conclusions are twofold: First, the Community's principal task remains the harmonization of existing Member State consumer protection laws. The Community is less likely to succeed in attempts to advance the level of protection beyond existing standards in Member State laws. The Community's constitutional background suggests that significant improvements in this area are better left to national laws and national courts. Practical experience supports this conclusion.

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Second, in the area of consumer contract rights, progress on the "federal" level toward greater consumer rights has been only incremental. The diversity of Member States' contract laws significantly restricts the Community's ability to advance consumer rights in this area.

II. THE EUROPEAN COMMUNITY, FEDERALISM, AND CONSUMER PROTECTION

Key to understanding the Community's consumer protection activities are the Community's market integration goal and the potential conflict between market integration and Member State regulation to protect consumer interests.¹

The drafters of the European Economic Community Treaty ("EEC Treaty")² apparently were satisfied that consumers would benefit from the effects of market integration in general. Increased supply of products and greater competition would drive prices down and improve the consumers' choice. Promotion of economic integration and free movement of goods therefore became the principal motivation for Community institutions to act in the area of consumer protection. At the outset, the desire to confer greater rights on consumers in the Community, independent of integration goals, played no important role.³

Consumer protection nevertheless has played a role in the Community's activities. Since the early 1970s, the Community has developed a consumer protection policy and adopted consumer protection related legislative acts.⁴

1. See also Xavier Lewis, *The Protection of Consumers in European Law*, 1992 Y.B. EUR. L. 139, 167 (1993); David Trubek, *Consumer Law, Common Markets and Federalism: Introduction and General Concepts*, in THIERRY BOURGOIGNIE & DAVID TRUBEK, *CONSUMER LAW, COMMON MARKETS AND FEDERALISM IN EUROPE AND THE UNITED STATES 2* (1987).

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter TEU or Maastricht Treaty], amended the EEC Treaty in several aspects. Article G(1) of the TEU, for example, changed the name of the European Economic Community to the European Community ("EC") and therefore changed the EEC Treaty into the EC Treaty. It also changed several provisions in the EC Treaty and introduced new provisions. For the consolidated version of the TEU and the EC Treaty, see 1992 O.J. (C 224) 1. Later references are to the Treaty refer to the EC Treaty as modified by the TEU unless otherwise noted as the EEC Treaty in which case the references) refers to the pre-TEU EEC Treaty. The European Union did not replace, however, the European Community. The European Union and the European Community coexist as two distinct legal systems, even though they share certain institutions. Consumer protection is exclusively based on EC law and the paper therefore uses only this term.

3. See *infra* notes 38-39 and accompanying text.

4. See *infra* Part II.B.1.

The following part explores the legal environment and the motives for Community consumer protection action. It focuses on the Community's market integration project and the relationship between Community law and Member State consumer protection laws. Member State consumer protection measures, on the one hand, came into conflict with the Community's market integration goal.⁵ On the other hand, advancements in market integration have become the catalyst for new measures to protect consumer interests on the Community level.⁶

A. Where Market Integration and Consumer Protection Collide: Free Movement Rules and National Consumer Protection

Member State regulations to protect local consumer interests may restrict free trade in products or services and therefore create obstacles to market integration. Free movement principles to ensure market access for products and services from other Member States limit a Member State's ability to effectively protect consumers by domestic legislation.⁷ "Negative" integration, based on deregulation and the removal of trade barriers, may even reduce the level of protection achieved by a Member State.

Pressure on Member State regulations was significant in particular with respect to product-related measures. It has been far less important with respect to restrictions resulting from diverse Member State contract laws.

1. Free Movement Rules

By far the most important Treaty provision with respect to free movement

5. See *infra* Part II.A.

6. See *infra* Part II.B.

7. Community legislation or legislative initiatives may also change the negotiating positions of interest groups in Member States and retard the passage of advanced consumer protection legislation. Evidence provided by Member States suggests that in some cases opponents of new legislation successfully argued that going beyond the Community-wide level of protection would harm the competitive position of the domestic industry. See, e.g., Agnès Chambraud et al., *The Importance of Community Law for French Consumer Protection Legislation*, 17 J. CONSUMER POL'Y 23, 28-29 (1994) (discussing opposition to proposed introduction of class action à la americaine into French law); Hans Peter Lehofer, *Minimum Implementation of Minimum Directives? Consumer Protection in Austria in the Context of European Integration*, 17 J. CONSUMER POL'Y 3, 12 (1994) (national action delayed, in particular in the interest of industry, because of expected EC initiatives); see also Trubek, *supra* note 1, at 4 (suggesting that political reasons may inhibit the independent passage of consumer-protection laws in Member States since the greater mobility of production factors may enable a firm to threaten to move to another Member State if the first Member State's consumer-protection laws create an unfavorable business climate).

rules is Article 30. It prohibits Member States from adopting or maintaining import restrictions and measures with equivalent effect. Pursuant to the prior wide interpretation of Article 30 given by the Court of Justice of the European Communities ("Court"), every Member State measure that actually or potentially, directly or indirectly restricts intra-Community trade fell within Article 30.⁸

Accordingly, a number of Member State measures designed to protect consumer interests were found to violate Article 30. Examples are advertising restrictions,⁹ prohibitions from door-to-door sales,¹⁰ prohibitions from offering free gifts to promote sales,¹¹ and restrictions concerning food ingredients.¹²

In 1993 the Court limited the scope of Article 30. The Court held in *Keck v. Mithouard* that Member State measures that regulated only the marketing and not the contents or appearance of products fell outside Article 30, provided they equally affected imported and domestic products.¹³ *Keck* marked an important development under Article 30. It may not be highly significant for most consumer protection measures, however, with the possible exception of advertising restrictions.¹⁴

There is no explicit exception for consumer protection related measures from Article 30's prohibition of import restricting measures.¹⁵ Faced with the

8. Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837. It used to be irrelevant whether Member State measures distinguish between imported and domestic products. The ECJ even denied that a de minimis exception might limit the scope of Article 30. *See, e.g.*, Case C-145/88, *Torfaen Borough Council v. B & Q plc.*, 1989 E.C.R. 3851; Joined Cases 177 & 178/82, *van de Haar*, 1984 E.C.R. 1797.

9. Case C-362/88, *GB-INNO-BM v. Confédération du commerce luxembourgeois*, 1990 E.C.R. I-667; Joined Cases C-1/90 & C-176/90, *Aragonesa de Publicidad Exterior SA v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, 1991 E.C.R. I-4151.

10. Case C-382/87, *Buet v. Ministère public*, 1989 E.C.R. 1235 (forcing trader to discontinue particularly effective selling scheme may restrict imports even if prohibition applies to domestic and imported products alike).

11. Case C-286/81, *Oosthoek's Vitgeversmaatshappij BV*, 1982 E.C.R. 4575.

12. *See infra* note 22.

13. Joined Cases C-267 & C-268/91, *Keck v. Mithouard*, 1994 E.C.R. I-6097.

14. The exact effects of *Keck* are still undetermined. It is clear, however, that any kind of import restriction imposed on specific products, restrictions on the use of foreign languages or any other measure that affects imported goods more than domestic goods will not benefit from the *Keck*'s narrowing of Article 30's scope. Measures that restrict the freedom to provide services are not affected by *Keck* either.

15. Article 36 of the Treaty provides for exceptions from Article 30's prohibition for a limited number of reasons, including, for example, the protection of public health, intellectual property rights or cultural objects. The Court held that the Article 36 list is exhaustive.

dilemma of an overly broad definition of “unlawful restrictions on intra-Community trade” and the lack of an explicit exception for Member State regulations in several important policy areas,¹⁶ the Court recognized that certain “mandatory requirements,” including the protection of consumer interests, may justify restrictions on intra-Community trade. Member State measures to protect consumer interests may therefore justify restrictions on intra-Community trade, provided that they are necessary and proportional.¹⁷

The broad application of Article 30, combined with the Court-created exceptions from Article 30’s prohibition, effectively enabled the Court to examine a wide range of Member State regulations for their compatibility with Community law. A significant number of Member State consumer protection measures were found incompatible with Community law. Examples are Member State prohibitions from using certain ingredients in foods,¹⁸ restrictions on permissible names and packaging,¹⁹ and advertising restrictions.²⁰

Importantly, the Court was in the position to examine and invalidate laws that were in fact based on protectionist motives, even though Member States attempted to defend them on consumer protection grounds. The Court’s strict scrutiny of Member State consumer protection provisions and its differentiation between “real” consumer protection measures and those with a protectionist motive arguably was a major contribution to the market integration goal.²¹

A fundamental concept in the Court’s free movement jurisprudence is the principle of mutual recognition. The mutual recognition principle assumes

16. Other possible exceptions from Article 30 that are not listed in Article 36 concern environmental protection measures and laws against unfair competition.

17. See, e.g., Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars*, 1994 E.C.R. I-1923; Case C-126/91, *Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH*, 1993 E.C.R. I-2361; Case 120/78, *Rewe-Zentral v. Burdesmonopolverwaltung für Branntwein* (“Cassis de Dijon”), 1979 E.C.R. 649.

18. See, e.g., Case C-178/84, *Commission v. Federal Republic of Germany*, 1987 E.C.R. 1227 (purity of beer); Case C-788/79, *Gilli*, 1980 E.C.R. 2071 (only vinegar made from wine permitted).

19. See, e.g., Case C-315/92, *Verband Sozialer Wettbewerb e.V. v. Clinique Laboratories SNC*, 1994 E.C.R. I-317 (prohibition from using name “Clinique” for cosmetic products); Case C-261/81, *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, 1982 E.C.R. 3961 (prohibition against marketing margarine in containers not having a cubic form).

20. Case C-126/71, *Yves Rocher*, 1993 E.C.R. I-2361 (prohibition from advertising with comparative prices); Case C-362/88, *GB-INNO-BM v. Confédération du commerce luxembourgeois*, 1990 E.C.R. I-667 (prohibition from advertising sales promotions); Case C-152/78, *Commission v. France*, 1980 E.C.R. 2299 (prohibition against advertising of certain groups of alcoholic drinks).

21. JOSEPHINE SHAW, *EUROPEAN COMMUNITY LAW* 292 (1993).

that products that are marketable in one Member State generally are marketable throughout the Community, unless the Member State of import can justify restrictions on intra-Community trade.²²

Consumer advocates have occasionally questioned whether the Court has gone too far in its market integration efforts.²³ They have expressed concern that the Court's case law and the application of the mutual recognition principle may undermine the existing level of protection in some Member States.²⁴

2. Free Movement of Contract Laws

Restrictions on intra-Community trade may also arise because cross-border transactions are potentially subject to a variety of different national contract laws. The problem is particularly acute if a service provider or seller enters into agreements with consumers in another Member State.²⁵

22. See, e.g., Case 120/78, *Cassis de Dijon*, 1979 E.C.R. 649; see also, e.g., Case C-315/92, *Clinique*, 1994 E.C.R. I-317. Thus, the responsibility for supervising product quality and safety and the product's conformity with regulations is shifted to the Member State where the product is put on the market the first time. The mutual recognition principle is therefore also known as the country-of-origin principle.

The only area where the ECJ followed a more conservative approach is health related measures that were based on scientific evidence. See, e.g., Case C-344/90, *Commission v. France*, 1992 E.C.R. I-4719 (nitrates in cheese); Case 304/84, *Ministère public v. Muller*, 1986 E.C.R. 1511 (additives in foodstuffs); Case 53/80, *Officier van Justitie v. Kaastabrief Eyssen*, 1981 E.C.R. 409 (prohibition from using nisin in cheese). But see Joined Cases C-13/91 & C-113/91, *Debus*, 1992 E.C.R. I-3617 (restrictions from using sulphur dioxide in beer found disproportionate because not supported by scientific evidence).

23. For an example of a close case in which the court appeared less concerned with local consumer interests than with market integration policy, see Case C-407/85, *3 Glocken GmbH v. USL Centro-Sud*, 1988 E.C.R. 4233. The issue before the court was whether Italian legislation that permitted only the use of durum wheat for pasta and thus prevented the marketing of German pasta under the name "pasta" in Italy was compatible with Community law. The Advocate General and several Member States had suggested that legitimate consumer protection motives justified the restriction on intra-Community trade and that deregulation would result in consumer confusion, even with labelling requirements. The court disagreed and held that imports could not be restricted. Labelling requirements were sufficient in the court's view to protect consumer interests.

24. See Trubek, *supra* note 1, at 3-4 (observing that individual Member States may have become increasingly reluctant to individually adopt consumer-protection measures as a consequence of the ECJ's aggressive market integration case law which made challenges to new regulatory laws more likely); see also Monique Goyens, *Consumer Protection in a Single European Market: What Challenge for the EC Agenda?*, 29 COMMON MKT. L. REV. 71 (1992) (mutual-recognition principle may reduce level of consumers protection); Hans-W. Micklitz & Stephen Weatherill, *Consumer Policy in the European Community: Before and After Maastricht*, 16 J. CONSUMER POL'Y 285, at 290 (1993).

25. Regarding the freedom to provide services, the relevant Treaty provisions are Articles 59 through 66. They prohibit Member State restrictions on the freedom to provide services across borders.

Frequently, choice-of-law rules will provide for the mandatory application of domestic contract rules to consumer contracts. This will prevent the "exporting" of the seller's or service provider's contract law.²⁶

In principle the issue should be highly significant in the Community, given the diversity of Member State contract laws. It may complicate cross-border activities, in particular from the point of view of sellers and service providers. Diversity of Member States' contract laws may also affect consumers' interests if one shares the assumption that the lack of knowledge of a foreign contract law may prevent a consumer from entering into a transaction in another Member State. Indeed, the Commission has argued that the diversity of contract laws restricts the "free movement of consumers."²⁷

Mandatory Member State choice-of-law rules rejecting the application of another Member State contract law and requiring the application of domestic consumer protection legislation to protect its consumers may conflict with Community law, in particular with the freedom to provide services. A strict application of the country-of-origin concept would suggest that service providers should be able to offer their services in other Member States under the contract rules of their home Member State.²⁸

Interestingly, the issue of the contract law applicable to cross border transactions played a far less important role in the Court's case law than product-related restrictions. The court never held that mandatory choice of law rules in favor of domestic consumers infringed Community law. On the contrary, the 1980 Rome Convention concerning the law applicable to

Articles 59 and 60 prohibit not only any form of discrimination against foreign service providers, but any kind of restriction, unless such restriction is justified in the public interest, including consumer interests. See Case C-180/89, *Commission v. Italy*, 1991 E.C.R. I-709 (tourist guides); Case 205/84, *Commission v. Federal Republic of Germany*, 1986 E.C.R. 3755 (insurance). Article 59's prohibition from restricting intra-Community services may be even stricter than the parallel prohibition in Article 30 concerning intra-Community trade in products. See Case C-384/93, *Alpine Invs. BV v. Minister van Financiën*, 1995 E.C.R. I-1141.

26. For a brief discussion of choice-of-law problems in connection with consumer contracts, see Commission of the European Communities, *Green Paper on Guarantees for Consumer Goods and After-Sale Services*, COM(93) 509 final, at 67-71 [hereinafter *Warranty Green Paper*]; see also Bernd von Hoffmann, *Consumer Contracts and the 1980 Rome EC Convention on the Law Applicable to Contractual Obligations*, 15 J. CONSUMER POL'Y 365 (1992).

27. See, e.g., *Warranty Green Paper*, *supra* note 26, at 14.

28. On the country-of-origin concept and its importance for market integration, see *supra* note 22 and accompanying text. Several German commentators argued, for example, that banks should benefit from the country-of-origin principle and be able to offer services (their "legal product") throughout the Community subject to their domestic contract law. See Manfred Wolf, *Privates Bankvertragsrecht im EG-Binnenmarkt: Auswirkungen der II. EG-Bankrechts-Richtlinie auf privatrechtliche Bankgeschäfte*, 44 WERTPAPIER MITTEILUNGEN 1941 (1990).

contracts²⁹ as well as Community legislation recognized that restrictions on the parties' freedom to choose the applicable law are justified on consumer protection grounds. The Rome Convention recognized the right to apply, under certain conditions, the law of the consumer's country of residence to sales and service contracts with consumers.³⁰ Secondary Community law in the area of insurance law also restricts the free choice of law in favor of the mandatory application of the law of the consumer's country of residence to protect consumer interests.³¹

Rules concerning the applicable contract law also depend on the harmonization of Member State contract laws. The greater the diversity, the more justified appear the mandatory choice-of-law rules to protect domestic consumers. This relationship first became apparent when attempts to harmonize Member State insurance contract laws failed in the late 1970s.³² As a consequence of the failed harmonization efforts, existing Community directives in the insurance sector recognize the diversity between Member State contract laws and permit Member States to provide for the mandatory application of domestic contract law where the policyholder is a consumer.³³

The widely accepted reliance on choice-of-law rules for consumer

29. Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1 ("Rome Convention"). The Rome Convention entered into force in 1991. See, e.g., Ole Lando, *The EC Convention on the Law Applicable to Contractual Obligations*, 24 COMMON MKT. L. REV. 159 (1987).

30. Article 5 of the Rome Convention provides that the mandatory rules of the consumer's country of residence apply to consumer contracts. If the seller solicited the consumer in the consumer's country of residence and the contract was actually concluded there or if the consumer traveled from his country of residence to another country and that journey was arranged by the seller, then the seller's agent acted in the consumer's country of residence. The parties' choice of another law is valid only if it is permissible under the choice-of-law rules of the consumer's country of residence.

31. Second Council Directive on the coordination of laws, regulations and administrative procedures relating to direct insurance other than life insurance and laying down provisions to facilitate the effective exercise of the freedom to provide services and amending Directive 73/239/EEC, 1988 O.J. (L 172) 1, art. 7 (as amended by Council Directive 92/49/EEC, 1992 O.J. (L 228) 1) [hereinafter Second Non-Life Directive].

32. For the relevant Commission proposals, see 1979 O.J. (C 190) 2, amended by 1980 O.J. (C 355) 30.

33. See Second Non-Life Directive, 1988 O.J. (L 172) 1, art. 7. The insurance directives incorporate an interesting set of hybrid rules. Administrative supervision, on the one hand, is based on the country-of-origin principle with supervision in the insurance company's home country. Contract choice-of-law rules, on the other hand, are much more restrictive. Free choice-of-law principles are limited to insurance contracts for commercial risks, unless a given Member State allows for more flexible choice-of-law rules in the case of consumer contracts. For a discussion of choice-of-law problems in insurance contracts under EC law, see Wulf-Henning Roth, *EC Treaty Article Fifty-Nine and Its Implications for Conflicts Law in the Field of Insurance Contracts*, 1992 DUKE J. COMP. & INT'L L. 129; Ben Smulders & Paul Glazener, *Harmonization in the Field of Insurance Law Through the Introduction of Community Rules of Conflict*, 29 COMMON MKT. L. REV. 775 (1992).

protection is significant also in a second context. Restrictions on the free provision of services that may result from diverse contract laws and mandatory choice-of-law rules apparently have not been significant in the common market. At least, service providers or sellers have not initiated litigation against the Member State choice-of-law rules on the grounds that they infringe Community law. Neither have they successfully lobbied for Community action. This absence of major controversies may explain in part why the Community's market integration efforts have in the past not prioritized projects to harmonize Member State contract laws.³⁴

B. Positive Market Integration: "Federal" Consumer Protection

It is important to note that market integration has not only focussed on the enforcement of free movement principles against Member State measures that restricted intra-Community trade. Market integration has also induced consumer protection initiatives on the Community level to ensure a minimum level of protection throughout all Member States. The Community has therefore become a source of "positive" market integration in the area of consumer protection.³⁵ There are several explanations for this relationship between negative and positive market integration.

First, negative market integration alone is insufficient to complete the single market. In cases where consumer protection motives justify Member State restrictions on intra-Community trade, for example, harmonization on the Community level is required to reduce trade barriers. Although the removal of trade barriers and creation of equal competitive market conditions are the principal goals of such harmonization measures, they will incidentally affect consumer protection. Consumer protection directives frequently mention this dual purpose.³⁶

The mutual recognition principle, moreover, cannot be applied in all cases where differences between Member State laws exist. The above discussion of

34. See also *infra* note 45 and accompanying text.

35. "Positive" market integration refers to regulatory measures on the EC level or at least harmonization of Member State regulatory measures in the area of consumer protection.

36. See, e.g., Council Directive on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products ("Product Liability Directive"), 1985 O.J. (L 210) 29 (recital 1 states that different liability standards for defective products distorts competition, restricts intra-Community trade, and results in different levels of consumer protection).

Member State contract law is an example of this problem. Here, again, harmonization is necessary to create equal market conditions.³⁷

Commentators have also argued that strict scrutiny of national laws under free movement principles has encouraged Member States to accept greater Community involvement. As Member States lose the ability to individually adopt consumer protection measures that do not violate Community law, they consider action at the Community level the most effective way to ensure protection of consumer interests.³⁸

Finally, the creation of a single, integrated market has increased the demand for "independent" consumer rights. In particular, those who do not believe that market liberalization and increased competition alone will automatically ensure that consumers are in fact the market integration project's ultimate beneficiaries, demanded Community measures that are not directly related to the removal of trade barriers to create a "consumer-friendly" single market. They have criticized the Community's focus on market integration as a justification for consumer protection measures.³⁹

The next part will briefly describe the Community's consumer protection programs and legislative measures, with particular emphasis on measures to protect the economic interests of consumers. It will then analyze two factors that explain the limited scope of the Community's consumer protection activities: First, the restrictions on the Community's legislative powers and, second, the institutional arrangement that has limited the influence of those Community institutions and organizations that have been the strongest supporters of consumer rights.

37. See *supra* note 25 and accompanying text.

38. See, e.g., Goyens, *supra* note 24, at 71; see also Thierry Bourgoignie, *Consumer Law and the European Community: Issues and Prospects*, in BOURGOIGNIE & TRUBEK, *supra* note 1, at 111. Bourgoignie argues that the "regulatory-gap thesis," originally created in the U.S. debate of federalism, is also applicable in the Community. After the constituent units agreed to open their borders, central law may be the only effective form of adopting new regulation because a single market will make regulation at the constituent unit level ineffective. Bourgoignie refers to the example of Denmark and the United Kingdom as new Member States in the 1970s which supported the Commission's consumer protection efforts. *Id.* at 119-20.

39. See, e.g., Goyens, *supra* note 24, at 73 (criticizing the Commission's 1990 three-year action plan because it viewed consumer protection primarily as an aspect of market integration without giving priority to issues that are not directly linked with the completion of the internal market); Bourgoignie, *supra* note 38, at 145; Micklitz & Weatherill, *supra* note 24, at 294 (observing that even in the late 1980s, market integration and the role of consumers as beneficiaries of the common market increasingly influenced the definition of the Community's consumer protection policy, whereas the focus on consumer rights diminished).

1. Consumer Policy Programs and Legislation

The Community has in the past twenty years adopted a number of consumer policy declarations and programs. The Council adopted consumer protection programs in 1975 and 1981.⁴⁰ Resolutions addressing consumer protection issues followed.⁴¹ Since 1990 the Commission has adopted three consumer protection action plans.⁴²

The 1975 program included an ambitious consumer protection agenda in five separate areas, including the right to information and education, the right of representation, consumer access to justice, and consumer health and safety.⁴³ It already mentioned the protection of economic interests, including consumer contract issues such as unfair contract terms and guarantees, as an area of priority Community action.⁴⁴

Among the three-year action programs which the Commission adopted since 1990, perhaps the most significant is the 1995 program that introduced new issues on the Community agenda, such as the position of consumers in the information society and the protection of consumer interests with regard to public services.⁴⁵

An analysis of concrete legislative acts reveals a different picture. Many of the items listed in the consumer protection programs did not result in concrete measures, at least not within the short term. The Commission first proposed legislative measures in the mid-1970s. The first directives relating to the

40. Council Resolution, First Program, 1975 O.J. (C 92) 1; Council Resolution, Second Program, 1981 O.J. (C 133) 1.

41. *See, e.g.*, Council Resolution concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests, 1986 O.J. (C 167) 1 (based on the Commission Paper, A New Impetus for Consumer Protection Policy, COM(85)354 final); Council Resolution, 1988 O.J. (C 293) 1; Council Resolution on Future Priorities for Relaunching Consumer Protection Policy, 1989 O.J. (C 294) 1. For further references, see Lewis, *supra* note 1, at 148.

42. Commission of the European Communities, First Three-Year Action Plan, COM(90)98, at 17 (mentioning general terms of contract, access to justice and teleshopping); Commission of the European Communities, Second Three-Year Action Plan, COM(93) 378; Priorities of Consumer Policy 1996-1998, COM(95) 519.

43. Council Resolution, 1975 O.J. (C 92) 1. For a summary, see DOMINIK LASOK & J.W. BRIDGE, *LAW & INSTITUTIONS OF THE EUROPEAN UNION* 726-28 (6th ed. 1994).

44. Council Resolution, First Program, 1975 O.J. (C 92) 1; *see also* Council Resolution, Second Program, 1981 O.J. (C 133) 1. The items requiring legislation listed in the first program included unfair contract terms and contract terms that excluded consumer contract rights, abusive credit terms, misleading advertising, after-sale services and protection against defective products.

45. Communication from the Commission, Priorities of Consumer Policy 1996-1998, COM(95) 519 final.

protection of consumer economic interests, however, were adopted about ten years later.⁴⁶ After the adoption of the first program, it took fifteen years for the Commission to adopt a proposal to harmonize contract terms, including warranty-related terms.

Nevertheless, the Community has been able to adopt six directives related to the protection of the consumer's economic interests. These directives include product liability;⁴⁷ door-to-door sales;⁴⁸ misleading advertising;⁴⁹ consumer credits;⁵⁰ package travel, package holidays, and package tours;⁵¹ time share agreements;⁵² and unfair contract terms.⁵³ Other proposals are currently pending.⁵⁴

A possible "test case" for the Community's ability to adopt further legislation to advance consumer protection is the issue of consumer access to justice. Access to justice and enforcement of rights undoubtedly are key issues for effective consumer protection.⁵⁵ In fact, these issues have been on the Community agenda since the first consumer protection program in 1975. Procedural law, however, traditionally has been a domain of Member State competence.⁵⁶ Also Member States did not accept any limitation of their exclusive powers concerning the organization of courts and administrative agencies. This might explain why the Community has not yet been able to adopt any concrete measures.⁵⁷ In 1996, however, the Community finally

46. *See, e.g.*, Commission Proposal for a Product Liability Directive, 1976 O.J. (C 241) 9. The directive was finally adopted in 1985. Council Directive, 1985 O.J. (L 210) 29.

47. Council Directive, 1985 O.J. (L 210) 29.

48. Council Directive 85/577, 1985 O.J. (L 372) 31.

49. Council Directive 84/450, 1984 O.J. (L 250) 17.

50. Council Directive 87/102, 1987 O.J. (L 42) 48.

51. Council Directive 90/314, 1990 O.J. (L 158) 59.

52. Directive 94/47 of the European Parliament and the Council, 1994 O.J. (L 95) 29.

53. Council Directive 93/13, 1993 O.J. (L 95) 29.

54. Proposal for a Directive on the protection of consumers in respect of distance contracts, 1992 O.J. (C 156) 5, 14, *amended by* 1993 O.J. (C 308) 18 *and* COM(96) 36 final. The directive was adopted in January 1997 when the Council and Parliament reached an agreement on the final text. *See* AGENCE EUROPE NO. 6894, at 10 (Jan. 17, 1997); Proposal for a Directive on sales of consumer goods and guarantees, 1996 O.J. (C 307) 8; *see infra* note 163 and accompanying text.

55. *See, e.g.*, Lewis, *supra* note 1, at 172.

56. Community law has so far imposed on Member States only a prohibition from adopting or maintaining discriminatory procedural rules and the obligation to provide effective remedies to enforce rights based on Community law.

57. An exception is the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 1, a treaty concluded among Member States which regulates issues like jurisdiction of courts and recognition of judgments in disputes involving nationals from different Member States. Article 14 of the Brussels Convention enables a consumer plaintiff to bring an action in the courts of the Member State where she is domiciled.

took the first steps to improve consumer access to justice.⁵⁸

From the relatively short list of concrete legislative acts it is apparent that the Community's aim is not a systematic harmonization of Member State contract laws or the creation of a comprehensive consumer protection code. Harmonization has occurred instead in areas where differences between Member State laws arguably resulted in the most obvious trade distortions. The Commission recently affirmed that legislative acts were not intended to create a harmonized European contract law out of the current diversity of different Member State laws.⁵⁹

The analysis of the directive relating to unfair contract terms in the second part will demonstrate, moreover, that Community directives in general have not significantly advanced the level of protection, when compared with existing Member State laws.⁶⁰

2. *Factors Influencing the Community's Consumer Protection Agenda*

The following part explores explanations for the Community's limited scope of legislative initiatives concerning the protection of consumer economic interests, compared with more ambitious consumer protection policy. The discussion focusses on two factors: The constitutional background of the Treaty and the interests of the institutions involved in the legislative process.

a. Constitutional Powers

The Community's limited constitutional powers explain at least in part why all consumer protection measures in the Community traditionally have

58. See Commission Proposal for a Parliament and Council Directive on Cessation Actions Relating to the Defense of Collective Consumer Interests, 1996 O.J. (C 107) 3; AGENCE EUROPE, No. 6859, at 10 (Nov. 23, 1996) (reporting political discussions within Council about cross-border collective consumer actions and settlements of consumer disputes in the internal market).

59. See, e.g., Commission Proposal for a Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM(95) 520 final, at 7 [hereinafter *Warranty Directive Proposal*].

60. See *infra* Part III.B.2. This paper concentrates on the unfair contract terms directive, Council Directive, 1993 O.J. (L 95) 29, and will not focus on other directives related to consumer protection that arguably did have a positive effect on the level of protection. One example is the Council Directive on Package Travel, 1990 O.J. (L 158) 59, which combined various Member State consumer protection techniques. The result is a relatively high standard of protection that includes information obligations, a reversal of proof that inadequate performance or partial nonperformance was not the travel organizer's or the travel agent's fault and the establishment of an obligatory liability funds.

pursued a dual goal of facilitating intra-Community trade and improving consumer protection. The EEC Treaty provided no explicit mandate to adopt consumer protection measures. It mentioned the protection of consumer interests only in connection with the removal of barriers to trade. The Community's competence to act in consumer protection matters was "incidental" to the power to adopt market integration measures and legislate in other policy areas such as agricultural policy and competition policy.⁶¹ This lack of authorization to legislate in a specific area is significant because Community law in principle is based upon the concept of enumerated powers.⁶²

Until 1987, legislative measures relating to consumer protection had to be based on Article 100, which authorizes legislation in connection with the functioning of the common market. Article 100 not only provides a limited legal basis for consumer protection legislation. It also became a major reason for the delay in the adoption of Community measures, because it requires a unanimous vote by the Council. A single Member State therefore could oppose the adoption of new legislation.

In 1987 the Single European Act⁶³ introduced Article 100a into the EEC Treaty. Article 100a authorizes the Community to adopt legislation in connection with the creation of the internal market. Article 100a has almost entirely replaced Article 100 and become the exclusive basis for consumer related legislation. Importantly, Article 100a requires the Council's approval only by majority vote. Yet, Article 100a still is concerned with market

61. See, e.g., EEC Treaty, *supra* note 2, art. 39 (supply of agricultural products must reach consumers at reasonable prices); *id.* art. 85(3) (exemption from Article 85(1)'s prohibition of restrictive agreements permissible only if consumers will benefit); see also Bourgoignie, *supra* note 38, at 89, 98-101 (consumer interests are considered as a by product of more fundamental Community policies such as intra-Community trade and increased competition); Micklitz & Weatherill, *supra* note 24, at 292.

The Product Liability Directive, 1985 O.J. (L 210) 29, provides a good illustration for the Community's focus on market integration aspects. Article 9(1)(b) of the directive provides that the directive's strict liability regime shall apply only to property damages exceeding 500 European Currency Units ("ECU"). If the directive were solely a consumer protection instrument, Member States presumably would have discretion to improve the consumer's position by lowering or deleting the 500 ECU threshold. In the Commission's view, however, Member States must maintain this minimum threshold. The Commission argues that the directive also aims at creating equal competitive conditions for producers.

62. Community legislative acts moreover must refer to a specific EC Treaty provision as their legal bases to be valid. See, e.g., Case 45/86, *Commission v. Council*, 1987 E.C.R. 1493. *But see* Bourgoignie, *supra* note 38, at 124-26 (arguing that Community institutions' recognition of promotion of consumer interests as Community objective granted the EC the authority to act in this area).

63. 1987 O.J. (L 169) 1 (official publication of Single European Act).

integration and the removal of trade barriers. It provides no legal basis for consumer protection measures independent of the market integration goal.

Since 1993 the EC Treaty has explicitly recognized the Community's authority to adopt measures in the area of consumer protection, without requiring a direct connection with market integration.⁶⁴ Article 129a provides for the attainment of greater protection of consumers not only through internal market measures based on Article 100a, but also through specific consumer protection action to supplement and support Member State policies.⁶⁵

Whether the adoption of Article 129a will dramatically change the situation appears uncertain. In the view of some commentators, the inclusion of Article 129a represents a significant change in the legal environment. Their main argument is that Article 129a separates consumer protection from market integration and eliminates possible legal obstacles to expanding consumer protection legislation.⁶⁶

The more persuasive view is that Article 129a is unlikely to expand the Community's ability and willingness to adopt legislative measures. Article 129a certainly does not provide a broad mandate for future Community actions, and even before the adoption of Article 129a, no serious constitutional limits for Community action in the area of consumer policy existed.⁶⁷ A decisive factor in the past was and continues to be the political commitment of Community institutions and, in particular, Member States to adopt Community consumer protection measures.⁶⁸

The Maastricht Treaty actually may reduce the scope for Community activities in this area because the principle of subsidiarity was enshrined in the

64. In addition, Article 3(s), added by the TEU, identifies consumer protection as one of the Community's goals.

65. See EC Treaty, *supra* note 2, art. 129a(1)(b).

66. See, e.g., Lewis, *supra* note 1, at 150; Micklitz & Weatherill, *supra* note 24, at 298-99.

67. Legislative measures could always be based on Article 100 or Article 235 and, since 1987, on Article 100a. Article 100a's new voting rules brought a change that arguably was more significant than the introduction of Article 129a, because the majority vote requirement permits the Council to adopt legislation in connection with the establishment of the internal market over the opposition of one or a few Member States.

68. See *infra* notes 74-81 and accompanying text; Micklitz & Weatherill, *supra* note 24, at 299 (acknowledge that Article 129a's practical impact is uncertain at best); see also Børge Dahl, *Consumer Protection Within the European Union*, 16 J. CONSUMER POL'Y 345, 348-51 (1993) (referring to the Danish government's interpretation of Article 129a which would not broaden the scope of an independent Community consumer protection policy); Lewis, *supra* note 1, at 151 (Community action based on Article 129a can only be minimal and may arguably only support, but not harmonize, existing Member State laws).

EC Treaty.⁶⁹

b. Institutions and Interests Represented

This is not the place to describe in any detail the composition and function of Community institutions.⁷⁰ The following part will briefly discuss how the most important Community institutions are represented in the Community's decision making process. It will demonstrate that the Member States still exercise decisive control over the legislative process. Institutions and organizations that favor greater Community involvement in consumer protection issues, like the European Parliament, have less influence.

i) Commission

The Commission frequently is described as the Community's executive branch.⁷¹ It plays a crucial role, however, in the legislative process. The Commission has the exclusive right to propose Community acts and has far reaching powers during the deliberations of its legislative proposals.⁷²

The Commission's commitment to a consumer protection policy has been

69. EC Treaty, *supra* note 2, art. 3b. Consumer advocates appear to be concerned about possible repercussion of the emphasis in subsidiarity on consumer protection on the Community level. *See, e.g.*, EUROPEAN PARLIAMENT, COMMITTEE ON THE ENVIRONMENT, PUBLIC HEALTH AND CONSUMER PROTECTION, REPORT CONCERNING THE APPLICATION OF THE SUBSIDIARITY PRINCIPLE TO ENVIRONMENTAL PROTECTION AND CONSUMER PROTECTION NO. A3-0380/92 (1992) (warning against use of subsidiarity to "renationalize" consumer protection activities); Leigh Gibson, *Subsidiarity: The Implications for Consumer Policy*, 16 J. CONSUMER POL'Y 323 (1993); Micklitz & Weatherill, *supra* note 24, at 304-16;

The Commission's second three-year action plan, COM(93)378 final, already put greater emphasis on subsidiarity. The Commission mentioned that two proposed directives concerning liability for services and comparative advertising were examined under the subsidiarity concept. Plans to harmonize after sale services were apparently abandoned in light of the subsidiarity principle. *See* Commission, Warranty Directive Proposal, COM(95) 520 final, at 8.

70. Examples of textbooks covering in great detail Community institutions are T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* (3d ed. 1994); LASOK & BRIDGE, *supra* note 43; SHAW, *supra* note 21; and DERRICK WYATT & ALAN DASHWOOD, *EUROPEAN COMMUNITY LAW* (3d ed. 1993).

71. Important Commission powers related to the role as executive branch include the implementation of Community legislation and enforcement of Community law by bringing actions before the Court of Justice against Member States in violation of their treaty obligations. *See* EC Treaty, *supra* note 2, art. 155.

72. The Commission can at any time before the Council has voted on a proposal withdraw or change a text, EC Treaty, *supra* note 2, art.189a(2). The Council moreover must vote with unanimity to amend a Commission proposal, EC Treaty, *supra* note 2, art. 189a(1).

decisive for Community initiatives in this area.⁷³ For the Commission, expanding activities into a new area provided the opportunity to search for additional legitimacy and develop its own policies in a generally popular area. Moreover, focussing on consumer protection enabled the Commission to define an area where it could act independently of the growing influence of Member State governments.

ii) Council and Member States

Member States are represented in the Council, which resembles the Community's legislative branch. The Council's approval is required for every piece of legislation, in most cases by a qualified majority of votes.⁷⁴ Moreover, Member States have expanded their influence on the legislative process beyond the limited role initially envisaged in the EC Treaty. Member State representatives today consult with Commission officials at an early stage of the legislative process and help shape proposals before the Commission officially submits them to the Council and Parliament.

Certain Member States have traditionally supported the development of a consumer protection policy on the Community level. In particular those Member States with a high level of consumer protection saw increased activities on the Community level as the most effective way to prevent the erosion of the achievements on the national level.⁷⁵

It is also true, however, that Member States (or the entire Council) have opposed consumer protection legislation in general or at least certain provisions in proposed legislation. This resistance may in part be caused by suspicion that Community measures will reduce existing standards of protection.⁷⁶ In other cases, opposition could also result from the Member

73. Because of the Commission's role during the drafting of legislative proposals, it is also the main target for "external influence" like business interests and consumer groups. Interestingly, participation by academics is not remarkably strong, at least it is not institutionalized.

74. The Council has for certain areas delegated such authority to the Commission. In rare cases, the EC Treaty directly authorizes the Commission to adopt legally binding measures. *See, e.g.*, EC Treaty, *supra* note 2, art. 90(3) (legislation related to state monopolies).

75. Bourgoignie, *supra* note 38, at 119-20 (referring in particular to Denmark and the United Kingdom).

76. VIVIENNE KENDALL, *EC CONSUMER LAW* 8 (1994). One example of diverging Member State and Community priorities that delayed Community action is the first attempt to legislate in the area of unfair contract terms. The Commission envisaged Community legislation for the first time in 1975. Member States, however, had already adopted legislation or had just started their legislative process. The Commission abandoned its plan. *See* COM(90)322 final, at 10.

State view that Community legislation is not necessary or is not compatible with existing Member State regulations.⁷⁷

Although some commentators believe that diversity between Member State laws is less significant than sometimes argued,⁷⁸ national interests always are difficult to overcome.⁷⁹ Differences presumably play a particularly important role in areas that involve traditional legal principles of law such as contracts, torts, and procedure.⁸⁰ Perhaps in these areas the perception that integration and harmonization on the Community level concurrently led to disintegration on the Member State level was strongest and therefore, opposition in the Council was most significant.⁸¹

iii) Parliament

The European Parliament, probably the most committed advocate of consumer interests among the Community institutions,⁸² always supported the Commission's consumer protection agenda. This was true even at a time when the Parliament had almost no influence on the decisionmaking process and its members were not elected by popular vote.⁸³ Promoting consumer protection served the Parliament's public image as an institution that identified itself with the needs of citizens in the Common Market.⁸⁴

The Parliament's powers increased with the adoption of the Single European Act and the introduction of the so-called cooperation procedure.⁸⁵

77. See *infra* note at 146 and accompanying text for an example of the Council's opposition to provisions in a proposed consumer protection directive.

78. Trubek, *supra* note 1, at 22.

79. Member States may have legitimate reasons to resist further Community action. To the extent that consumer interests are effectively protected by Member States, unduly active Community institutions may do more harm than good. See, e.g., Chambraud et al., *supra* note 7, at 23, 35.

80. Bourgoignie, *supra* note 38, at 145.

81. The Council Directive on unfair contract terms in consumer contracts, 1993 O.J. (L 95) 29, is an example of a directive where Member State resistance against Commission proposals resulted in a directive with generally vague language and a list of non-binding provisions. See *infra* note 141 and accompanying text; see also AGENCE EUROPE, NO. 6865, at 14 (Dec. 23, 1996) (European consumers' organization deploring that Member States have domestic measures to provide consumers access to justice, but have been unable to agree in the Council on Community-wide measures).

82. KENDALL, *supra* note 76, at 14-15.

83. The Parliament lacked for a long time any significant influence in the decisionmaking process. Its role was confined to a largely consultative position, whereas the Commission and the Council were the two principal players in the decision making process. *Id.* at 15.

84. Bourgoignie, *supra* note 38, at 116-19 (The European Parliament stood for idea of the "Common Market with a human face.").

85. KENDALL, *supra* note 76, at 15; see EC Treaty, *supra* note 2, art. 189c. Perhaps the most important new aspects were Parliament's right to discuss proposed legislation twice, which includes an

The TEU further strengthened Parliament's role with the introduction of the so-called codecision procedure which was added to the existing decisionmaking framework.⁸⁶

Parliament still lacks the right of initiative, however. The exercise of its veto right, moreover, depends on the approval of the veto by a majority of the members of Parliament. Thus, even though Parliament continues to call for increased efforts related to consumer protection and for a single European private law, it has only limited control over the legislation actually adopted.

iv) Consumer Organizations

Promoting ideas of stronger protection of consumer interests on the Community level was also limited because no true "consumer entrepreneur," an organization representing solely consumer interests, existed at the Community level. Consumer organizations exist and are active in a number of Member States, but they do not have a similar degree of organizational strength at the Community level. European consumer organizations therefore traditionally played an insignificant role in the drafting of new legislation. Commentators found that the lack of efficient organizations on the Community level, underrepresentation within the Commission services and the absence of formal participation rights in the decisionmaking process are the main reasons for this phenomenon.⁸⁷ Consumer interests were represented primarily by Community institutions like the Commission. The Commission, however, frequently must adopt compromise positions between conflicting positions in the legislative process.

In 1989 the Commission reorganized its consumer consultative body into the Consumer Consultative Council ("CCC") which improved the status within the Commission's organizational structures and also resulted in a broadening of functions. The CCC is supposed to advise the Commission on consumer matters. Yet, despite this formal role within the Commission's

examination of proposals in Parliamentary committees, and the right to propose amendments. The cooperation procedure does not allow, however, for full participation of Parliament or Parliament's veto right. Parliament's amendments may be included in the Commission's next proposal, but there is no obligation to do so. The Council may moreover change any of the Commission's amendments by a unanimous vote. *Id.*

86. EC Treaty, *supra* note 2, art. 189b. Under the codecision procedure Parliament may compel the Council to enter into negotiations if the two institutions fail to agree on proposed legislation. Parliament has an opportunity to veto proposed legislation if conciliation procedures fail.

87. See, e.g., KENDALL, *supra* note 76, at 19; Bourgoignie, *supra* note 38, at 190-194; Trubek, *supra* note 1, at 4.

preparatory procedures, the influence of consumer representatives in the Community legislative process is still limited. They are hardly a "legislative force" in the Community legislative process.⁸⁸

C. Instruments to Harmonize Member State Laws: Directives and Their Effects on Consumer Protection in National Laws

1. The Nature and Effects of Directives

The Community's preeminent instrument to achieve greater uniformity among existing Member State laws is the directive.⁸⁹ This applies also to consumer protection. Directives are like framework legislation directed toward Member States. They provide specific results that Member States have to achieve. The implementation of the directive's goals remains the obligation of the Member States.⁹⁰ Member States therefore have discretion to decide how to ensure that a directive's provisions are effectively implemented into their national legal orders. It is even possible that nothing need be done if a Member State's existing legislation is already sufficient.⁹¹

Directives clearly are the most appropriate instrument for achieving a minimum level of harmonization in an area with highly diverse existing Member State law such as contract law or consumer protection law. Directives are less intrusive than directly and generally applicable legislative acts like regulations. At the same time, directives need not be comprehensive because a directive's provisions will become effective within a Member

88. See, e.g., Goyens, *supra* note 24, at 77-79 (criticizing limited role of consumer interest groups in Community legislative process). For a discussion on institutional consumer representation, see Lothar Maier, *Institutional Consumer Representation in the European Community*, 16 J. CONSUMER POL'Y 355, 362-73 (1993) (discussing the CCC's impact on legislative proposals).

89. The second legislative instruments with general application are regulations. Regulations are similar to federal laws and become directly applicable in all Member States after their adoption by Community institutions. See EC Treaty, *supra* note 2, art. 189(2).

90. *Id.* art. 189(3).

91. This is subject to the requirement of legal certainty. Internal, nonbinding decrees issued by administrative agencies, for example, are not sufficient to implement directives. Whether a long-standing court practice might satisfy the legal certainty requirement is an open question, although there is a strong argument that it should be sufficient.

With regard to the unfair contract terms directive, 1993 O.J. (L 95) 29, for example, several Member States saw no need to amend their national laws. An example of a directive leaving the Member States broad discretion is the Council Directive on package travel: It requires that organizers and travel agents must provide security for the refund of money paid by the consumer and for repatriation in the case of insolvency. 1990 O.J. (L 158) 59, art. 7. How the Member States ensure that funds are available to cover the risk of insolvency is left to their discretion.

State's existing legal system.⁹² Legislating by directives may also increase consumer access to legal redress because it consolidates consumer protection measures in Member State laws. National courts and general practitioners familiar with national law are more likely to find and apply Community law provisions that have been transformed into national law.⁹³

Directives are not ideal in every respect, however. To become fully effective, directives must be implemented by Member States. Member State failure to timely implement directives has traditionally been an area of great concern. In particular, nonimplementation undermines the goal of creating equal conditions in those areas covered by a directive throughout the Community.

2. *Nonimplemented Directives and the Rights of Consumers*

The Court developed peculiar rules designed to strengthen the position of individuals vis-à-vis Member States that did not implement directives in time and to hold those Member States responsible. In effect, nonimplemented directives therefore have some effects in national legal systems and before national courts. Several judgments involve consumer protection directives that a Member State had failed to implement.⁹⁴

The Court held that provisions of nontransposed directives can be enforced against the Member State that failed to implement a directive in time.⁹⁵ No such effects exist, however, between two private individuals. In other words, an individual cannot rely on provisions of a nonimplemented directive in a law suit against another individual.⁹⁶ National courts are under

92. One example is the Proposed Council Directive on Warranties and Guarantees, 1996 O.J. (C 307) 8. Instead of harmonizing all aspect of a consumer contract, including issues like formation or unconscionability, the directive narrowly focusses on the scope of warranties and remedies. The other aspects are left to national contract laws. *See also infra* notes 163-64 and accompanying text.

93. For similar considerations with respect to consumer protection and the UCC, see Jean Braucher, *Politics and Principle in the Drafting of UCC Consumer Protection Provisions*, 29 UCC L.J. 68 (1996) (favoring consolidating consumer protection in UCC which is most accessible to lawyers in general practice).

94. *See, e.g.*, Joined Cases C-178/94, C-179/94, C-188/94 & C-190/94, *Dillenkofer v. Germany* (E.C.J. Oct. 8, 1996) (not yet reported), available at <<http://europa.eu.int/cj/en/act/9626em.htm#C-78/95>> (visited on Oct. 23, 1996); Case C-91/92, *Paola Faccini Dori v. Recreb Srl.*, 1994 E.C.R. I-3325 (door-to-door sales directive).

95. In EC lingo, directives have "vertical direct effects." *See, e.g.*, Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357; Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, 1982 E.C.R. 53; Case C-41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337.

96. Directives have no "horizontal direct effects." *See, e.g.*, *Paola Faccini Dori*, 1994 E.C.R. I-3325 (consumer suing seller of language course); Case 152/84, *Marshall v. Southampton & South-*

an obligation, however, to interpret their domestic laws in light of a directive's provisions to achieve as much as possible the results envisaged in the directive.⁹⁷ Finally, if a Member State has failed to implement a directive and an individual was not able to enforce his or her rights against another individual envisaged by the directive, the Member State may become liable for damages resulting from its failure to act in time.⁹⁸

What follows is a brief example to explain how the above rules concerning nonimplemented directives apply in connection with consumer protection directives. The example demonstrates that the limited effects of nonimplemented directives are particularly significant in the case of consumer protection directives. Enforcement in the "vertical relationship" against the Member State usually is not useful for consumers in the case of directives that concern, for example, contract rights or rights under tort law. Without implementation, consumers cannot enforce their rights against sellers or service providers. State liability to recover damages might not be an attractive option, given the usually small claims involved in actions brought by consumers.

The 1985 directive on door-to-door sales,⁹⁹ for example, provides for the consumer's right to cancel contracts covered by the directive within a period of at least seven days. Also, the consumer must receive a written notice with the information about the cancellation right.¹⁰⁰ Italy failed to implement the directive in time. An Italian consumer agreed to buy a language course that was offered to her at a train station. Within four days she attempted to cancel

West Hampshire Area Health Authority, 1986 E.C.R. 723.

97. See, e.g., Case C-106/89, *Mareleasing SA v. La Comercial Internacional de Alimentación SA*, 1990 E.C.R. I-4135; Case 14/83, *von Colson & Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891. The duty of interpreting national law in conformity with provisions of non-implemented directives can of course go very far. It may have almost the same result as direct horizontal regulation. In *Mareleasing*, for example, the Court held that provisions of Spanish law providing for the nullity of a company established for a fraudulent purpose could not be applied because the relevant company law directive which Spain had failed to implement included no such ground of nullity. The directive therefore prevented the company's creditor from obtaining a judgment against the property of the company's founder and owner. Thus, it had effects between two individuals. The Court has, however, always maintained that there is a difference between the duty to interpret national law in light of a directive's provisions and the concept of direct horizontal effects.

98. See, e.g., Joined Cases C-178/94, 179/94, 188/94 & 190/94, *Dillenkofer* (Oct. 8, 1996) (not yet reported) (failure to implement directive is serious breach of Community law that triggers Member State liability for damages suffered by individual).

99. Council Directive to protect the consumer in respect of contracts negotiated away from business premises, 1985 O.J. (L 372) 31.

100. *Id.* arts. 4-5.

the contract, but the seller insisted on her payment, correctly arguing that under Italian law their contract was valid and a cancellation did not exist. The Court held that the consumer could not directly rely on the directive's provisions to cancel the contract.¹⁰¹ The Court emphasized the national court's obligation to interpret national law in light of the directive's provisions,¹⁰² but it appears doubtful whether this remedy was helpful for the consumer's cause. The consumer might, moreover, sue the Italian Government for damages resulting from Italy's failure to implement the directive, provided all conditions for state liability were met.¹⁰³

3. *Effects of Directives on Harmonization and Enforcement*

The use of directives to achieve greater harmonization among Member State consumer protection laws has significant consequences for the enforcement of consumer protection legislation. First, even with full implementation, the harmonizing effects of Community legislation is limited. National courts will apply implementing legislation in light of their experience with domestic law which may result in diverse interpretation of directive provisions. The more vague the language of the directive, the less likely are harmonizing effects. It is unclear, for example, how much uniformity will be achieved under the unfair contract term directive where courts must interpret concepts like "unfairness" or "inappropriate" exclusion of contract rights.¹⁰⁴

The Treaty does in this respect confer the important task on the Court to ensure a harmonized application of Community law. Pursuant to Article 177 of the EC Treaty, national courts may ask the Court for an interpretation of

101. Case C-91/92, Paola Faccini Dori, 1994 E.C.R. I-3325 (lack of "horizontal direct effects").

102. *Id.*

103. It was unclear in this case, however, whether there was the necessary causal link between the Member State's failure to implement the directive and the consumer's damages. The directive may not have covered the situation in which the parties entered into their contract. It is easier for consumers to recover damages against a Member State Government under the facts of Joined Cases C-178/94, 179/94, 188/94 & 190/94, *Dillenkofer* (Oct. 8, 1996) (not yet reported). In this case Germany had failed to correctly implement article 7 of the Directive on package travel, 1990 O.J. (L 158) 59, which requires Member States to ensure that travelers receive a refund of their payments in case of the tour operator's or agent's bankruptcy. As a consequence, several Germans who did not receive their initial down payment when their tour organizer went bankrupt sued the German government. The Court held that in principle Germany was liable for damages.

104. See, e.g., Goyens, *supra* note 24, at 76 (interpretation by national authorities and courts in light of their domestic experience may limit harmonization effects of Community legislation). See also *infra* note 148 and accompanying text.

Community law.¹⁰⁵ Article 177's importance for Community law in general cannot be overestimated. Not only can it be an effective way of ensuring the harmonized application of Community law in all Member States, but it enables the Court in collaboration with national courts and individuals to indirectly control Member State law for its conformity with Community law.¹⁰⁶ Whether it can effectively fulfill these functions in most actions brought by consumers involving Community law questions is another matter, given the additional time¹⁰⁷ and litigation costs resulting from Article 177 reference procedures.¹⁰⁸

Another problem related with the enforcement of directives is the Member State failure to correctly implement directive provisions that are designed to confer individual rights on consumers. The instruments developed by the Court to strengthen the position of the individual in the case of nonimplementation may have only limited effects in the case of most consumer protection directives.¹⁰⁹

Third, because directives become effective only through national implementing legislation, only national courts and national agencies directly enforce consumer protection laws. There is, for example, no Community agency charged specifically with enforcing Community consumer protection laws or receiving complaints from consumers. The Commission exercises only indirect control by examining whether Member States implemented directives correctly and in a timely manner.¹¹⁰ This situation reinforces the

105. If a national court finds that an answer is necessary to decide the case pending before it, it may stay the national proceedings and refer a question concerning the interpretation or validity of Community law to the Court. The Court decides only the Community law issues and the final decision is rendered by the national court. *See* EC Treaty, *supra* note 2, art. 177. An Article 177 reference question is almost the reverse situation to the case of *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995), where the federal court of appeals certified questions concerning New York state law to the New York Court of Appeals. Under Community law, the national court "certifies" questions concerning Community law to the "federal" court.

106. Article 177 reference questions have also enabled the Court to establish several fundamental principles of Community law such as the supremacy and direct effect of Community law.

107. The average time Article 177 cases are pending before the Court is about 20 months.

108. It is perhaps significant that not a single reference question under Article 177 has been asked with regard to the Product Liability Directive, 1985 O.J. (L 210) 29, which Member States had to implement by 1988. Only three known cases involved consumer protection directives discussed in this paper. (The Court decides over 200 cases per year, and more than 50% of those are based on Article 177.)

109. *See, e.g., supra* note 99 and accompanying text.

110. The Commission receives complaints from consumers. *See, e.g.,* Warranty Green Paper, COM(93)322 final, annex VI (listing samples of consumer complaints brought before the Commission). The Commission, however, has no enforcement powers with respect to consumer

perception that consumer protection is a local task that is carried out on a Member State level.

III. CONSUMER PROTECTION IN COMMERCIAL CONTRACTS

A. Introduction

The absence of an underlying, Community-wide harmonized law of contracts or commercial law is perhaps the most significant aspect of the Community's efforts to harmonize certain areas of consumer contract rights.¹¹¹ There is certainly support in Europe for broader harmonization efforts that would eventually create a single European contract law. In particular, the European Parliament has endorsed the idea of a European civil law code.¹¹² Private initiatives, moreover, to create a harmonized European law of contract or commercial law have existed for several years.¹¹³ The Commission, however, recently affirmed that the Community's harmonization efforts will focus on narrowly defined areas of contract law. In the proposal for a harmonized system of warranties and guarantees in consumer contracts, the Commission emphasized that legislation will not affect other contract law issues such as formation and nonperformance.¹¹⁴

The Community's consumer protection measures therefore cannot build on a harmonized system of contract laws. Instead, diversity among Member State contract laws and a nonuniform, although generally high level of consumer protection, characterizes the European situation. This suggests that "federal" legislative initiatives must focus on harmonization in narrowly defined areas where positive effects on market integration are most likely to

protection laws.

111. See also *supra* note 59 and accompanying text.

112. See, e.g., European Parliament, Resolution Concerning the Harmonization of Certain Areas of Member State Private Laws, 1994 O.J. (C 205) 18 (a follow-up resolution to the 1989 European Parliament, Resolution on Action to Bring into Line the Private Law of the Member States, 1989 O.J. (C 158) 400).

113. Most notable is the Commission on European Contract Law's project to draft a uniform European contracts law code. Established in 1980, the Commission on European Contract Law, sometimes called the "Lando Commission" after its chairman and one of the principal promoters, is a private group of law professors from most Member States. Interestingly, the Commission relies also on the UCC and the *Restatements of Law* as models for the future European Code, both for substantive rules and the formal aspect of rules. As of 1996, the Commission has not published a final text.

114. Warranty Directive Proposal, COM(95)520 final at 7; see also the Commission Proposal for a Council Directive on Unfair Terms in Consumer Contracts, COM(90)322 final, at 13 (time not ripe for harmonization of law of obligations or sale of goods).

be successful. Overly ambitious plans that require significant changes in Member State contract laws are likely to fail, or result in unspecific measures with little harmonizing effects on Member State contract laws, despite the general consensus that consumer protection is a desirable goal.¹¹⁵

This situation might explain why Community achievements appear less remarkable in the area of consumer contracts. It might be the Community's best strategy to narrowly focus on specific areas for harmonization and leave the bulk of consumer protection measures to Member States because consensus about advanced consumer protection measures may be easier to achieve on a national level.¹¹⁶

To illustrate the difficulties the Community faces in its efforts to harmonize contract laws in Europe, the following part discusses Community legislative initiatives concerning consumer warranty rights. It will first discuss the Community's 1993 unfair contract terms directive and argue that the directive's ability to harmonize Member State laws and improve consumer protection appears highly doubtful. Critical parts of the directive are nonbinding and important provisions are not sufficiently specific. Ostensibly the directive failed to overcome significant differences between national legal systems. Member State resistance also prevented the inclusion of provisions concerning consumer warranty rights in the directive.

The discussion then turns to the currently pending project to harmonize consumer rights under Member State warranty laws. A lack of consensus has already forced the Community to abandon the project's most ambitious consumer protection goals such as direct producer liability for breach of warranty. The currently pending legislation still includes elements concerning consumer contract warranty rights. This part will also demonstrate certain similarities between the proposed EC legislation and the discussion about consumer protection within the UCC reform project.

115. See *infra* notes 139-58 and accompanying text for a discussion of the unfair contract term directive's warranty related provisions, and *infra* notes 195-200 and accompanying text, for abandoned plans to abolish the privity requirement for warranty claims.

116. See also Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565, 1567-68 (1994) (quoting William Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811, 812 (1993), and describing consumer protection in the United States as a basically local task). See *infra* notes 197-98 and accompanying text for an example of more advanced Member State legislation regarding warranty rights. Several Member States have already adopted legislation that provides for direct warranty claims against producers without requiring privity of contract. The Community has at the moment not been able to reach consensus on this issue, but national laws may at a later stage become the basis for Community harmonization legislation.

B. Consumer Warranty Rights and Unfair Contract Terms

1. Community Programs and Member State Action

The first consumer policy program in 1975 already envisaged Community legislation "to protect consumers against the abuse of the power of sellers, in particular ... the unfair exclusion of essential rights in contracts."¹¹⁷ Obviously, a legislative project with this scope could have affected warranty rights of consumers. The Commission soon thereafter initiated discussions about a possible harmonization of unfair terms in consumer contracts. Around the same time, however, a number of Member States adopted consumer protection legislation on their own or considered reforms on a national level. The Commission failed to find the necessary support among Member States. It also lacked resources to proceed with a proposal for a directive.¹¹⁸

As Member States went ahead with individual legislation to protect economic interests of consumers, differences between national laws increased. A brief example illustrates the variations between warranty-related consumer protection provisions that three Member States adopted around the time when the Commission for the first time considered Community action. Differences appear significant in particular with regard to formal and procedural aspects.¹¹⁹ In substance, differences may have been less important, although no empirical data are available that analyzed and compared decisions of national courts in this area.¹²⁰

117. 1975 O.J. (C 92) 1.

118. See Communication from the Commission, Unfair Terms in Contracts Concluded with Consumers, COM(84)55 final at 12. The developments in the 1970s are a good example of the legislative process under the Community's "Realverfassung." The Commission in principle has the monopoly of drafting and proposing legislation. The Member States' role would be limited to approving legislation in the Council. In reality, however, Member State influence exists at a much earlier stage because the Commission consults with Member State representatives during the drafting process. The Community's legislative agenda therefore frequently reflects Member State interests.

119. In the 1990 proposal of the unfair contract term directive, for example, the Commission observed considerable variations among Member State laws with respect to unfair contract terms. COM(90)322 final at 12.

120. A large scale, Commission-sponsored project to study consumer legislation in EC Member States resulted in a comparative study in 1981. The study focussed, however, on the evaluation of legislative activity and administrative implementation and largely excluded case-law analysis. See NORBERT REICH & HANS-W. MICKLITZ, CONSUMER LEGISLATION IN THE EC COUNTRIES (1980).

The 1993 Commission Warranty Green Paper's survey of Member State laws reveals significant similarities in several substantive aspects of warranty law. See COM(93)509 final at 22-23 (most Member States introduced mandatory provisions in favor of consumers); *id.* at 28-29 (definition of defect in most Member States based on notion of fitness for ordinary use envisaged in the contract); *id.*

In Germany, the civil code's warranty provisions require a seller to provide products free of defects that diminish the products' value or their capacity for normal use or use as provided in the contract. The 1976 Standard Contract Terms Act¹²¹ which applies to all standard contracts without distinction between consumer contracts and contracts between merchants declares exclusions of warranty claims invalid. Only in certain circumstances may the general contract terms limit the buyer's rights to the right to have the products repaired or replaced.¹²²

France has more recently relied on the administrative law provisions of the 1978 Law on the Protection and Information of Consumers of Products and Services¹²³ to protect consumers against unfair contract terms. The law authorized the Council of State to define contract terms that are considered unfair and prohibited in consumer contracts.¹²⁴ Terms that conflict with the Council's list are unenforceable. A Council of State Decree implementing the Act provides that clauses limiting the liability of a seller who fails to fulfill its obligations are unenforceable.¹²⁵ In addition, French case law has achieved an almost identical result under Civil Code provisions. Article 1641 Code Civil makes the seller liable for any latent defects that make the product unsuitable for the intended use or reduce the product's value to the buyer. French courts have established that the seller cannot exclude the liability for latent defects in consumer contracts.¹²⁶

No civil law code exists in the United Kingdom. Instead, several statutes deal with specific aspects of contract law.¹²⁷ The 1979 Sale of Goods Act

at 39 (right to demand repudiation of contract or reduction in price exists in all Member States, although rights of having product repaired or replaced exists only in about half of the Member States); *id.* at 42 (significant differences with respect to warranty periods).

121. Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB Gesetz) (Dec. 9, 1976) (BGBl. I 3317).

122. *Id.* § 11, ¶ 10(a), (b). The Act also includes a general prohibition of standard contract terms that place one party at such a disadvantage that is incompatible with the requirements of good faith. *Id.* § 9(1).

123. Loi sur la protection et l'information des consommateurs de produits et de services, Act No. 78-23 (Fr. Jan. 10, 1978).

124. *Id.* arts. 35-38. The Council's decisions are mandatory only with respect to consumer contracts.

125. Decree 78-464 art. 2 (Fr. Mar. 24, 1978).

126. C. Civ. art. 1643 (Fr.) in principle allows the exclusion of the seller's liability for latent defects, but the courts have held that such exclusion is valid only in contracts between merchants specialized in the same field.

127. *E.g.*, Supply of Goods (Implied Terms) Act, 1973 (Eng.); Sale of Goods and Services Act, 1982 (Eng.) Sale of Goods Act, 1979 (Eng.).

provided that goods bought from a business seller must be of merchantable quality, must be fit for the intended purpose where the seller was aware that reliance was placed on its skill and judgment, and must comply with the seller's description. The merchantable quality standard was replaced by a satisfactory quality standard by the Sale and Supply of Goods Act of 1994.¹²⁸ The 1977 Unfair Contract Terms Act provides that contract terms that reduce the effect of statutory implied terms in contracts are per se invalid in consumer contracts.¹²⁹

These different systems to ensure consumer protection support the argument that even a reasonably well-informed consumer will hardly understand her contract rights in a cross-border transaction. Creating a Community-wide set of minimum rights might therefore be at least a first step toward making the benefits of a single market readily accessible for consumers. The differences also illustrate some of the difficulties in the Community's harmonization efforts.

2. *The Unfair Contract Terms Directive*

a. *The Commission's First Proposal*

A first concrete step toward (partial) harmonization of consumer rights under Member State warranty laws occurred within the framework of the 1993 unfair contract terms directive.¹³⁰ The first Commission proposal, published in 1990,¹³¹ consisted of a short operative text with a very general definition of "unfairness" and an annex with a binding¹³² list of unfair terms. Unfair contract terms had to be unenforceable in Member State contract laws.¹³³

Contract terms in consumer contracts were considered unfair if they caused a significant imbalance in the parties' rights, made the contract's

128. Sale of Goods Act, 1979, § 14(b) (Eng.), as amended, Sale and Supply of Goods Act, 1994, § 1(1) (Eng.).

129. Unfair Contract Terms Act, 1977, § 6 (Eng.). The Act otherwise provides that liability can be excluded in contracts, with the exception of liability for death or personal injury, provided such exclusion is reasonable.

130. Council Directive 93/13/EC on unfair terms in consumer contracts, 1993 O.J. (L 95) 29.

131. Proposal for a Council Directive on unfair terms in consumer contracts, 1992 O.J. (C 243) 2.

132. The binding character of the annex was not explicit. The preamble suggested, however, that a binding annex was "desirable to identify certain types of terms which must not be used in contracts concluded with consumers."

133. *Id.* at 3, art. 3.

performance unduly detrimental to the consumer or significantly different from what the consumer could expect, or were incompatible with good faith principles.¹³⁴ The proposed list of unfair contract terms included clauses that denied consumers the right to obtain goods in conformity with the contract and fit for the purpose for which they were sold.¹³⁵ The annex also black-listed contract terms that prevented consumers from relying on certain remedies if the seller breached warranty obligations.¹³⁶

The European Parliament strongly supported the Commission's proposal and even suggested expanding the scope of consumer protection measures. Responses by Member States and commentators, however, were less enthusiastic. Member States apparently were not prepared at that time to accept far-reaching changes in their national contract laws. Their reaction was not surprising given the very complex task of harmonizing twelve Member State laws governing unfair contract terms and the relatively poor quality of the Commission's first proposal.¹³⁷ The following three-year legislative process resulted in significant changes to the directive, including the warranty-related provisions.¹³⁸ In terms of harmonizing Member State laws, the final results were hardly encouraging.

b. The Directive's Warranty-Related Provisions

The directive's final text was adopted in 1993 and became effective on January 1, 1995.¹³⁹ The directive defines the notion of "unfair contract terms" as nonnegotiated contract terms that cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Member

134. *Id.* art. 2.

135. *Id.* at 4, annex (c).

136. *Id.* The proposal further envisaged that sellers could not exclude their liability for any damage caused by nonperformance. *Id.* annex(e).

137. See, e.g., Hans Erich Brandner & Peter Ulmer, *The Community Directive on Unfair Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission*, 28 COMMON MKT. L. REV. 647 (1991); see also *infra* notes 149-51 and accompanying text (criticizing use of vague language to define unlawful contract terms and criticizing ambiguities about scope of directive).

138. One commentator observed an increasing "Germanization" of the directive because it became increasingly similar to the German Standard Contract Terms Act, *supra* note 121, the "most sophisticated" consumer protection law. See Peter Ulmer, *Zur Anpassung des AGB-Gesetzes and die EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen*, 4 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 337 (1993). Other changes included, for example, a reduced scope of application as the directive applies only to contract terms in pre-formulated contracts and not to individually negotiated contract terms. See 1992 O.J. (C 243) at 3, art. 3.

139. 1993 O.J. (L 95) 29, 32, art. 10.

States must ensure that preformulated unfair contract terms in consumer contracts are unenforceable.¹⁴⁰ The annex includes a list of unfair contract terms, including a scaled-down warranty-related provision. According to paragraph 1(b), a contract term is unfair if it inappropriately excludes or limits the consumer's rights vis-à-vis sellers in the case of nonperformance or inadequate performance.

The lack of specific language in key provisions raises doubts as to whether the directive is an effective consumer protection instrument. This applies in particular to the warranty related provision.

i) Nonbinding List of Unfair Terms

The first significant change to the Commission's initial proposal occurred when the Council suggested that the list of unfair clauses in the directive's annex be nonbinding and include only examples of unfair clauses. Over the Parliament's opposition and insistence on a mandatory list,¹⁴¹ the Commission ultimately accepted the Member States' position. In the final version, the annex's list of unfair terms is merely indicative.¹⁴² The directive does not oblige Member States to adopt the entire list into their national laws. For that reason alone, its actual harmonizing effects appear questionable.¹⁴³

ii) Mandatory Contract Terms Without Harmonization of Warranty Rights

Perhaps even more significantly, the directive prohibits only the exclusion of certain consumer contract rights and fails to ensure that consumers have the same minimum rights in all Member States in the first place. Interestingly, the Commission appears to have realized that merely prohibiting the exclusion of warranty rights had insufficient harmonizing effects so long as minimum warranty rights themselves were not harmonized. The Commission's 1992 amended proposal included a provision that defined minimum warranty rights in the directive's main text. Article 6(1) provided for the consumer's right to receive goods "in conformity with the contract and

140. *Id.* at 31, art. 3 (defining unfair contract term); *id.* art. 6 (requiring unenforceability).

141. See SECOND REPORT CONCERNING THE COMMISSION'S PROPOSAL FOR A DIRECTIVE ON UNFAIR TERMS IN CONSUMER CONTRACTS, NO. A3-0295/91, at 7 (1994) [hereinafter HOON REPORT].

142. 1993 O.J. (L 95) at 31, art. 3.

143. See, e.g., European Parliament, Second Report, A3-0409/92, at 6 (Dec. 4, 1992) (stating that definition of annex as indicative list undermines directive's harmonization goal).

fit for the purpose for which they were sold."¹⁴⁴ In the case of breach of warranty, the consumer's remedies had to include the right to choose between reimbursement, replacement, price reduction, and repair.¹⁴⁵

Member States, however, rejected the proposed inclusion of positive warranty rights. Presumably, it would have required significant changes in several Member State laws. The fact that the proposed provision was not the result of an in-depth study of the problem arguably contributed to the opposition of the positive warranty rights.¹⁴⁶

The directive's final concept of making certain terms in consumer contracts mandatory may be a useful step to ensure greater consumer protection.¹⁴⁷ Whether it will be sufficient to achieve the directive's declared goal of increasing consumer confidence in the Common Market is another question. The diversity of substantive provisions in national contract laws within the Community will most likely continue to inhibit enforcement of consumer rights in cross border transactions.¹⁴⁸

iii) Vague Language in the List of Prohibited Contract Terms

The initial proposal's list of provisions concerning unfair terms was criticized in particular because the list included too many general terms which would have largely defeated the annex's purpose.¹⁴⁹ This criticism still applies. Several of the annex's provisions consider contract terms that exclude consumer rights unfair only if they are "inappropriate."

144. Commission documents failed to provide an explanation for the rather cursory definition of the scope of warranties.

145. See Amended Proposal for a Council Directive on unfair terms in consumer contracts, COM(92)66 final. The Commission somehow misleadingly labelled the amendment a "clarification" of the first proposal. *Id.* at 3.

146. The Council reasoned that the issue of guaranteed harmonization required more careful consideration and invited the Commission to examine opportunities for future harmonization schemes. Council Statement in Connection with the Adoption of the Directive on Unfair Terms of Apr. 8, 1992, cited in Warranty Green Paper, COM(93)509 final at 12.

147. Member States took this first step long before the Community, see *supra* notes 121-29 and accompanying text. Mandatory provisions may also achieve greater market efficiency. On market failures based on consumers' informational deficits and high enforcement costs, see Braucher, *supra* note 93, at 75-76.

148. Another area outside the directive's application are oral modifications of contract terms. If consumer warranty rights are orally excluded, the directive does not apply because the exclusion is not based on a preformulated contract term. National laws will most likely place limits on the seller's ability to rely on oral exclusions of consumer rights. The directive, however, will have no harmonizing effects in this case.

149. Brandner & Ulmer, *supra* note 137, at 659-60.

The “inappropriateness” standard will force national courts to consider all circumstances to decide the lawfulness of a contract term. A national court may conclude that excluding certain warranty-related rights in consumer contracts is justified in certain circumstances. Limiting the scope of the warranty, for example, or excluding the warranty of merchantability may not always appear “inappropriate.” A fuzzy concept like the “inappropriate” exclusion of rights tends to undermine the benefits of a codified list of terms considered to be unfair to consumers,¹⁵⁰ although commentators in the United States have suggested that ambiguities in statutory language might actually help consumers in court.¹⁵¹

iv) Scope of Warranty v. Remedies for Breach of Warranty

The extent of the prohibition from excluding consumer contract rights is also unclear.¹⁵² A strictly textual interpretation suggests that the annex prohibits as unfair only those contract terms that exclude certain remedies in the case of breach of warranty, but not the seller’s disclaimers or modifications of warranties.¹⁵³

The directive’s legislative history, however, might support the interpretation that paragraph 1(b) of the annex covers both disclaimers of warranties and exclusions of remedies.¹⁵⁴ This ambiguity might prevent a uniform implementation of the provision in Member State contract laws.

150. *Id.* at 660 (“vague concepts . . . should be avoided” to define unfairness); Braucher, *supra* note 93, at 78.

The Directive adds another element of uncertainty by stating that contract terms be regarded unfair only if they are contrary to the requirement of good faith. Council Directive, 1993 O.J. (L 95) 29, art. 3. A warranty disclaimer would therefore fall outside the directive’s prohibition of unfair contract terms if a court considers that the disclaimer is not against good faith.

151. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 4-3 to 4-8, at 210-36 (4th ed. 1995) (arguing that uncertainty created by ambiguous terms in the Code has permitted activist courts to reach decisions favorable to consumers).

152. See 1993 O.J. (L 95) at 33, annex (1)(b).

153. Annex(1)(b) refers only to rights in the event of non-performance or inadequate performance (comparable to U.C.C. § 2-719 (1995)), and does not address a modification or exclusion of warranties (and has therefore not the same function as U.C.C. § 2-316 (1995)). A seller might therefore avoid the problematic area of excluding remedies by narrowly defining the scope of warranties.

154. It is arguable that Annex(1)(b) has replaced Article 6 of the Commission’s second proposal. Commission Amended Proposal, 1992 O.J. (C 73) 7. Article 6 prohibited the limitation of warranties and exclusion of remedies.

v) *Plain and Intelligible Language Requirements*

Criticism of the Commission's initial proposal was directed in particular at the definition of "unfair terms." The proposed unfairness test in Article 2(1) was so broad that it appeared to include contractual provisions that defined the parties' principal duties. This provision would have required courts, under the notion of unfair contract terms, to inquire into the adequacy of consideration.¹⁵⁵

The directive's final text addresses this problem. It fails, however, to entirely avoid the ambiguities in the initial proposal. Article 3(3) still incorporates the controversial language of the first draft which appeared to apply the unfairness test to the consideration of a contract.¹⁵⁶ Article 4(2) provides, however, that the notion of unfairness shall not refer to the definition of the subject matter or the adequacy of the price, provided these terms are in plain, intelligible language.

Although Article 4(2) indicates that the notion of unfairness is not concerned with the parties' main duties, the relationship between Articles 3(3) and 4(2) and their effects on warranty-related contract terms remains somehow unclear. If a disclaimer of the warranty of merchantability, for example, is considered part of the definition of the seller's main obligation towards the consumer, it would fall outside the scope of the directive pursuant to Article 4(2). A consumer, however, might benefit from the plain and intelligible language requirement in Article 4(2). She might argue that a contract term which does not clearly distinguish between a description of the product and the limitation of the purchaser's warranty-related rights fails to meet Article 4(2)'s clear language requirement. In this case the unclear term arguably would be subject to Article 3(1)'s unfairness review.¹⁵⁷ Ambiguities created by these two provisions will not facilitate enforcement of consumer protection laws.¹⁵⁸

155. Commission Proposal, 1990 O.J. (C 243) 2, 3, art. 2 (contract terms considered unfair if they caused significant imbalance in the parties' rights); *see also*, Brandner & Ulmer, *supra* note 137, at 655.

156. 1993 O.J. (L 95) at 31, art. 3 (contract term considered unfair if it causes "significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer").

157. Article 4(2) is a specific application of the general plain and intelligible requirement incorporated in Article 5. Article 5 adds as a rule of interpretation that ambiguous terms be interpreted in favor of the consumer. *Id.* arts. 4, 5.

158. Consumer protection provisions should be as specific as possible to increase voluntary compliance by sellers and make enforcement of consumer rights more feasible. *See Braucher, supra*

c. Conclusions

For several reasons one wonders whether the directive will achieve its declared goals of increasing consumer confidence in transactions outside their Member State and of encouraging consumers to use the advantages offered in a single market. Certainly with regard to warranty-related rights the directive's harmonizing effects are negligible, given the directive's vague language, the absence of a definition of minimum warranty rights in consumer contracts and the nonbinding nature of the provisions in the annex. That several of the directive's provisions fail to meet the directive's own plain and intelligible language requirements is a reason for additional concern.

3. *The Proposed Directive on Warranties and Guarantees*

The unfair contract terms directive's limited effect on warranties in consumer contracts highlighted the need for continued Community efforts.¹⁵⁹ In 1993, the Commission published a discussion paper related to warranties,¹⁶⁰ guarantees, and after-sale services in consumer contracts.¹⁶¹ The Warranty Green Paper's comprehensive scope had suggested that Community action in all three areas might be forthcoming. An earlier, internally circulated draft had an equally ambitious scope.¹⁶² The 1996 proposal for a directive on warranties,¹⁶³ however, is a scaled-down version which narrowly focuses on warranties, only marginally affects commercial guarantees, and does not

note 93, at 78-79; Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1599 (1994).

159. Harmonizing consumer rights under Member State warranty laws has been on the Community agenda since the early 1980s. The second EC Consumer Protection Program, Council Resolution, 1981 O.J. (C 133) 1, for example, called for proposals to improve the conditions of warranty on the part of the supplier and/or producer. *See also* Council Resolution on Future Priorities for Relaunching Consumer Protection Policy, 1989 O.J. (C 294) 1; Communication from the Commission, A New Impetus for Consumer Protection Policy, COM(85)314 final (referring to warranty related problems in particular in cross border purchase situations).

160. The Commission documents almost invariably refer to "legal guarantee" and do not use the synonymous term warranty. In the framework of this Symposium, however, it appears appropriate to continue to use the term warranty.

161. Warranty Green Paper, COM(93)509 final.

162. Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über den Verbrauchsgüterkauf, Garantien und Kundendienst [Proposal of October 1995] (unpublished, on file with the author) [hereinafter Internal Draft]. In addition to provisions covering commercial guarantees and after-the-sale services, the Internal Draft envisaged a warranty-like liability of the producer. *See supra* note 191 and accompanying text.

163. 1996 O.J. (C 307) 8.

mention after-sale services.¹⁶⁴

The proposed directive's features include a definition of the scope of warranties. The statute of limitation ends two years after the product has been delivered to the consumer. The buyer's remedies in the case of breach of warranty include repair and replacement of the good, price reduction, and rescission of the contract. To preserve her remedies, the consumer must notify the seller within one month after the defect becomes apparent. The consumer's warranty rights are nonwaivable. Concerning commercial guarantees, the proposed directive provides for a writing requirement and requires that the consumer's rights under the commercial guarantee exceed her warranty rights.

a. Beneficiaries

Language in the current proposal suggests that the directive may actually not be limited to consumer contracts. Article 2(1), for example, requires that "consumer goods" be in conformity with the contract. "Consumer goods" are defined as all goods that are normally intended for final use or consumption.¹⁶⁵ Goods which are purchased for final consumption by a merchant or business person would also fall under this definition. This solution apparently would be favored by the Commission.¹⁶⁶

Several other provisions, however, define the scope of the directive by the purchaser's capacity as a consumer. They refer, for example, to the rights of consumers, representations made to the consumer, and delivery to consumers.

164. The necessary consensus, including acceptance by business representatives that reform might be justified, apparently emerged only in the area of warranties. See Internal Draft, *supra* note 162, at x (indicating that business support existed only for a harmonization of warranties). Interestingly, there are certain parallels to the UCC reform debate. Reportedly, the law of warranties is an area where broad consensus exist about the need for specific consumer protection amendments. See Miller, *supra* note 116, at 1574 n.36.

165. 1996 O.J. (C 307) 8, art. 1.

166. See also Warranty Green Paper, COM(93)509 final at 83-84 (demonstrating Commission's preference for an objective criterion to define the directive's scope of application which is independent purchaser's capacity as private person).

The best argument in favor of a broad scope of application is related to the proposed directive's claim that differences between Member State warranty laws distort competition between sellers in Member States and require Community harmonization measures. See *id.* preamble. It would be inconsistent with that claim if the proposed directive applied only to consumer contracts and not to contracts between merchants. To eliminate distortion of competition, contracts between merchants arguably must be equally harmonized. The proposed directive moreover is not based on EC Article 129a, the Treaty's consumer protection Article, but on EC Article 100a, the basis for general legislation in connection with the EC's market integration project.

The directive's characterization as a consumer protection measure suggests the same conclusion. Expanding the directive's scope to all contracts for the purchase of "consumer products" would also be at odds with the directive's rationale that consumers need special protection as they are traditionally the weaker parties to a contract.

It appears therefore that the directive will in effect protect only "consumers" as purchasers.¹⁶⁷ Expanding the directive's scope beyond the goal of protecting consumers would result in an unnecessary interference with the freedom of contract where both parties act in the course of business.¹⁶⁸ Ambiguities in several provisions make it difficult, however, to find a conclusive answer.¹⁶⁹

b. The Directive's Warranty Provisions

i) Scope of Warranties

Article 2's definition of the scope of warranty is drafted after Article 35(1) and 35(2) of the UN Sales Convention.¹⁷⁰ Article 2(1) first states the obvious by requiring that products must be in conformity with the contract. Article 2(2) specifies four criteria to determine contract conformity. The first three are almost identical with Article 35(2) of the UN Sales Convention.¹⁷¹ Products must be in conformity with express warranties, based on the seller's description or samples and models.¹⁷² They must be fit for the ordinary purpose for which such products are normally used.¹⁷³ Products must

167. "Consumer" is a person who acts outside the course of business. 1996 O.J. (C 307) 8, art. 1.

168. The focus on consumer protection provides also the response to a hypothetical question that the Commission raised in the Warranty Green Paper. As an argument against limiting the directive's scope to purchasers acting outside the course of business (i.e. consumers), the Commission asks why a person buying a car should be subject to different rules, depending on whether she purchases the car for private or business purposes. Warranty Green Paper, COM(93)322 final at 84. The obvious response is that protective measures that interfere with the parties' freedom to contract should be the exception rather than the rule. Such measures typically are not justified where the buyer acts in the course of business.

169. Compare 1996 O.J. (C 307) 8, art. 2(1) (using the term consumer goods), with *id.* art. 3(2) (scope of warranties), and *id.* art. 3(4). (referring to "consumers").

170. Official Records of the United Nations Conference on Contracts for the International Sale of Goods, U.N. Doc. A/CN.97/19 (1981) (Official English version reprinted in 52 Fed. Reg. 6264 (1987)).

171. They therefore are also similar to the UCC definitions of the scope of warranties. See U.C.C. §§ 2-313, 2-314, 2-315 (1995).

172. 1996 O.J. (C 307) 8, art. 2(2)(a).

173. *Id.* art. 2(2)(b).

moreover be fit for a particular purpose for which the consumer acquired the products, provided the consumer disclosed such purpose to the seller, unless it is evident from the circumstances that the purchaser did not rely on the seller's statements.¹⁷⁴

The fourth point raises more interesting questions. Article 2(2)(d) requires that products be satisfactory, considering their quality, the price, and representations by the seller and producer. This provision is perhaps best understood in light of the Warranty Green Paper's discussion of Member State laws. The "satisfactory quality" standard was part of a suggested amendment to the U.K. 1979 Sales of Goods Act.¹⁷⁵ There, the proposed definition of "satisfactory quality" referred to standards that a reasonable person would regard as satisfactory, considering the products' description and price and other relevant circumstances. The reference to a "satisfactory quality" was designed in particular to include notions like appearance and finish and safety and durability in the definition of conformity with the contract.¹⁷⁶

The Commission in the Warranty Green Paper suggested to use a consumer expectation test to define the scope of warranties which appeared to be very similar to the satisfactory quality test in the Department of Trade and Industry ("DTI") Consultation Document. To define the notion of legitimate consumer expectation, the Commission offered a laundry list of factors including the product presentation, the price and brand, and the nature and purpose of the product.¹⁷⁷

The consumer expectation test does not appear as an independent factor in the Commission's official proposal.¹⁷⁸ This certainly is an improvement over the Commission's initial suggestion. A reference to all possible circumstances that may influence a consumer's expectations about the product would have

174. *Id.* art. 2(2)(c).

175. In 1994, the United Kingdom adopted the Sale and Supply of Goods Act, 1994, which introduced the satisfactory quality standard into English law.

176. See Dep't of Trade and Industry, Consumer Guarantees, A Consultation Document 4 (Feb. 1992) [hereinafter DTI Consultation Document], reprinted in Warranty Green Paper, COM(93)509 (Annex V).

177. Warranty Green Paper, COM(93)309 final at 85-86. Compare DTI Consultation Document, *supra* note 176, art. 18, draft amendment to sec. 14(2) of the Sale of Goods Act 1979.

178. Despite the Commission's apparent assurances that a "legitimate expectation test" would not be a remarkable development and broad support from consumer representatives, see, e.g., 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), opposition from industry apparently was strong enough to cause the Commission to reconsider its initial proposal.

been so vague that it probably would have done little to effectively improve consumer protection.¹⁷⁹

Article 2(2)(d) now uses a satisfactory quality and performance standard to define the scope of warranties. Assuming that the DTI Consultation Document is the source of Article 2(2)(d), product durability, together with the product's safety, appearance and finish, arguably are criteria to determine whether a product is in conformity with the contract under the proposed directive.

Article 2(2)(d) is also interesting because the producer's statements concerning the product's quality or performance are included in the test of a product's conformity with the contract. Although the producer's public statements cannot make the producer directly liable for a breach of express warranties, they may under certain circumstances result in the seller's liability for breach of warranty. Article 3(2) essentially provides that the seller will be liable if products fail to conform with the producer's statements, unless the seller demonstrates that the producer's statements did not become part of the bargain between the seller and the consumer.¹⁸⁰

Article 3(2) indicates that any producer's statement that "influenced" the consumer's purchasing decision may trigger the seller's warranty liability. The influence standard may be overly broad. Although the directive is silent on this issue, one probably must assume that statements expressing only the producer's subjective opinion or commendation of a product do not create a warranty. Presumably, warranty liability will arise only when the consumer's reliance on the producer's public statements was reasonable. The directive does not specify which party bears the burden of proof to demonstrate

179. See *supra* notes 149-51 and accompanying text, for a discussion of the limited effects of vague statutory terms on the level of consumer protection. Interestingly, the 1992 DTI Consultation Document, *supra* note 176, did raise the question about economic effects of a vague satisfactory quality standard to define the scope of warranties. *Id.* at 6 (expressing concerns about increased costs, in particular increased litigation costs, which would ultimately raise prices of products, making positive effects on consumer confidence doubtful). Similar considerations are notably absent in Commission documents.

180. Pursuant to Article 3(2), liability will arise if the seller cannot demonstrate that he did not know and could not have known the producer's statements, that he corrected the producer's statements at the time of the purchase, or that the purchasing decision was not influenced by the producer's statements. To the extent that public statements that the seller should have known about become part of the seller's agreement with the purchaser, Article 3(2) goes somewhat beyond the part-of-the-bargain concept. Article 3(2)'s requirements limit the seller's indirect liability for express warranties to cases where the consumer relied on the producer's public statements. See *infra* note 202.

whether the seller's public statement was puffery or an affirmation of the product's quality.

ii) Breach of Warranty versus Product Defectiveness

It is interesting how little attention the relationship between warranty liability under the proposed warranty directive and liability in tort for defective products received during the preparation of the proposed warranty directive. This appears remarkable, considering that a Community-wide harmonized system of strict liability in tort for damages caused by defective products has existed since 1985¹⁸¹ and that the Commission initially considered imposing a warranty liability on the producer towards remote buyers.

There are of course reasons that explain at least in part the lack of any significant interest in this issue. Perhaps the most important reason is the modest level of product liability litigation in the Community during the past ten years.¹⁸² But there are also substantive explanations. First, different persons are potentially liable for damages. As a consequence of the narrower scope of the officially proposed warranty directive, consumers would have a claim for breach of warranty only against their immediate sellers. Product liability claims, on the other hand, are directed primarily against the manufacturer of defective products.¹⁸³ Second, the proposed warranty directive regulates only economic loss in the narrow sense of damages for loss of the bargain. The product liability directive, on the other hand, expressly excludes damages to the defective product from the scope of the directive and covers only cases of personal injury and damages to property,

181. Product Liability Directive, 1985 O.J. (L 210) 29. Article 1 provides for the producer's liability for defective products. Article 4 requires only that the injured person prove the damage, defect, and causal connection, without referring to the producer's fault.

182. Whereas the pace of American products liability litigation during the first quarter century has been described as "fast and furious," see James A. Henderson & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1528 (1992), the pace of European products liability litigation following the 1985 products liability directive was anemic. The Commission's "10th anniversary report," for example, summarizes the developments in all Member States on one page stating that neither the number of tort actions nor insurance premiums increased and that things will change only very slowly. See First Report concerning the application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products, COM(95)617 final at 2.

183. 1985 O.J. (L 210), art. 1. Exceptions exist because liability is extended to the importer, *id.* art. 3(2), and, as far as producer and importer of a defective product into the Community cannot be identified, to the supplier of a defective product, *id.* art. 3(3).

not including the defective product.¹⁸⁴ The liability system created by the two directives therefore avoids any significant overlap and requires a consumer to bring an action against either the seller or the producer, or both, depending on the type of damage that she has suffered.

Questions concerning the relationship of the two forms of liability may nevertheless arise, in particular concerning the potential (direct or indirect) liability of producers based on their public statements.¹⁸⁵ One can ask, for example, whether liability for the breach of warranty that results from the producer's presentation of its products automatically means that the producer is potentially liable in tort because the products are defective. A first analysis suggests that in this case the notion of a defective product in tort actions and the concept of breach of warranty in contract actions are largely similar, if not identical.¹⁸⁶ This conclusion is based largely on the Product Liability Directive's definition of a defective product in connection with strict liability in tort. Article 6 provides that a product is defective if it does not provide the safety that a person is entitled to expect. The directive lists among the factors

184. *Id.* art. 9. In both cases, the issue of liability for consequential damages is left to Member State laws.

185. If a seller is found liable for warranty-related claims as a consequence of the producer's public statements, for example, a plaintiff consumer might attempt to use the findings of the first court as evidence in a product liability suit against the producer. Also, a producer might be joined as a third party defendant by a seller who is sued in a breach of warranty action. The seller may in certain cases be the defendant at the same time in a product liability suit, if, for example, he manufactured and directly sold to consumers allegedly defective products.

186. This statement is limited to the specific situation in the Community and applies only to cases where liability results from the producer's public statements. It does not express a position concerning the highly controversial issue of the relationship between warranty liability and tort liability in the United States. As explained in the text, the liability standards for tort liability and warranty liability overlap under Community law because both systems use a consumer expectation test. The identical standard of liability means a fairly broad scope of liability in tort and contract. The situation is markedly different in the United States where the notion of a defect in product liability cases is to a much greater extent based on a risk/utility test. Creating a common standard by extending the risk/utility standard into the field of warranty liability to replace the currently prevailing consumer expectation standard, as suggested by the drafters of the proposed *Restatement (Third) of Torts: Products Liability* (Tentative Draft No. 2, Mar. 13, 1995), would significantly narrow the scope of warranty liability. For a discussion of the U.S. issues, see Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L.Q. 469 (1997).

Yet, whatever liability standard applies, there is a strong argument that at least in a case where liability is based on the producer's public statements, liability in tort resulting from defective products and liability in contract resulting from breach of warranty should be the same. This is contrary to the result reached by the court in *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995). If, for example, the producer's public statements induce consumers to use a product in a specific way, even though the product is not safe for such use, the product does not meet legitimate consumer expectations and is unsafe.

to determine whether a product was safe the presentation of the product and the use of the product which could be reasonably expected.¹⁸⁷

The product liability directive therefore specifically relies on the justified user expectations (or objective consumer expectations) to determine a product's defectiveness. This test refers to objectively justified expectations and does not include the injured persons's subjective expectations. There is nevertheless a strong argument that reasonable expectations of the public, including consumers, must be given greater weight than the producer's considerations of the product's safety.¹⁸⁸ The product liability directive apparently rejected a risk/utility test to determine whether a product was defective, at least as a principal method.¹⁸⁹

The important point is that under the product liability directive the manufacturer's public statements supposedly play an important role for the definition of the defectiveness of a product, provided they create reasonable expectations concerning the functioning of the product. Along the same lines, the proposed warranty directive requires the producer's statements about the quality of a product to help determine the scope of a warranty.¹⁹⁰ In both areas the reasonable consumer expectations therefore play a decisive role to determine liability.

That the Community has during the past ten years not been able to define more precisely the scope of the notion of a "defective product" is significant and a reason for concern. Two explanations for the lack of any significant

187. 1985 O.J. (L 210) art 6(1)(a)-(b). Article 6(1)(c) also mentions the time when the product was put into circulation.

188. This has been a controversial issue in the past. Unfortunately, the debate was limited to statements in the legal literature. The Court of Justice has not yet interpreted provisions of the product liability directive. Commentators have disagreed, for example, whether the general public's expectations or the average user's expectations determine whether a product was safe.

189. The producer's expectations are relevant primarily to determine whether the product's use was reasonable and not to determine whether the product was defective. The Article 6 factors are not exhaustive, however, so that a court also might include risk versus utility considerations in its determination of whether a product was defective.

Some commentators in Europe have criticized the directive's notion of a defect and argued that the Community failed to use the experience in the United States to define a workable test of a product's defectiveness. They expressed concern in particular that the consumer expectations test is so open-ended and unstructured that the development of a harmonized, Community-wide test to determine a product's safety is unlikely. See, e.g., Hermann Hollmann, *Die EG-Produkthaftungsrichtlinie (I)*, 38 DER BETRIEB 2389, 2392 (1985). Others appear to assume that the producer's views are equally important to determine whether a product is defective. See, e.g., PRODUCT LIABILITY EUROPEAN LAWS AND PRACTICE 52-55 (Christopher J.S. Hodges ed., 1993).

190. Warranty Green Paper, COM(93)509 final at 86 (concluding that the definitions of a product's defectiveness and the scope of warranty are very similar).

development toward greater harmonization in this area are possible: Either the issue of a product's defectiveness has not at all been important or national courts have not been concerned about reaching Community-wide standards and the vague consumer expectation test gave sufficient flexibility to apply standards of their domestic laws. Given the products liability directive's very limited effects in terms of harmonizing the notion of a "defective product," one wonders how much harmonizing effect the proposed warranty directive will have.

iii) Warranty Claims and Privity

The Commission initially had suggested to allow consumer claims for breach of warranty directly against the producer, regardless of a privity element.¹⁹¹ The Commission made several arguments in favor of the producer's warranty-based liability. It reasoned, for example, that it would be counterintuitive to make the producer liable if a defective product caused personal injury or damages to property, but could not be liable for the simple nonfunctioning of the product.¹⁹²

The Commission's Internal Draft also suggested extending warranty liability to the producer who was responsible for the product's nonconformity with the contract. The producer could be held liable if the products did not conform to producer's public statements, including statements in advertising, or if they were not fit for the ordinary use and they did not conform with the qualities the consumer could reasonably expect.¹⁹³ In other words, the producer would have been liable for the consumer's direct economic loss resulting from the breach of express warranties and implied warranties of

191. See Internal Draft, *supra* note 162, art. 4. The Draft's suggestion to extend warranty claims is limited, however, to claims of direct purchasers. Since the proposed directive covers only cases of direct economic loss, it does not benefit third parties. By definition, only purchasers can suffer loss of the bargain damages.

192. *Id.* at 87 (referring to the Product Liability Directive, 1985 O.J. (L 210) 29). Arguments raised during preparation of the directive appear remarkably similar to those raised in the debate about strengthening consumer protection elements in the UCC. *See, e.g.*, Miller, *supra* note 116, at 1583-84.

The Warranty Green Paper's language, emphasizing modern marketing conditions and the consumers' reliance on the producer's implied guarantee that products are suitable for use, COM(95)520 final at 86-87, is reminiscent of cases like *Henningesen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960), where courts for the first time abolished the privity requirement for actions based on breach of implied warranties.

193. Internal Draft, *supra* note 162, art. 4(1) (referring to Article 2(2)(b) (conformity with producer's public statements), Article 2(2)(c) (fitness for ordinary use), Article 2(2)(e) (conformity with legitimate consumer expectations)).

merchantability.¹⁹⁴

The producer's direct liability for breach of warranty would not have introduced a completely new liability concept in Europe. In Member States like France, Belgium, and Luxembourg, courts have extended a warranty-like liability to manufacturers.¹⁹⁵ Warranty-based actions and tort-based actions largely have collapsed into one notion of liability.¹⁹⁶ Finland recently introduced producer's warranty liability by statute.¹⁹⁷ In the United Kingdom, moreover, the DTI Consultation Paper considered the same methods to make the producer liable for breach of warranties, even in the absence of a contractual link between the producer and consumer.¹⁹⁸

The producer liability concept of the Internal Draft, however, is not included in the officially published Commission proposal for a directive. Presumably, it was too radical for many Member States. It certainly was also opposed by industry.¹⁹⁹ What remains in the Commission's official proposal are provisions in Article 2(2)(d) and Article 3(5) which can be viewed as a much more modest version of the Commission's original direct liability concept.²⁰⁰

The producer's (indirect) liability for breach of warranty under the official proposal has two elements. First, Article 3(2) provides that the producer's public statements are treated like express warranties.²⁰¹ Second, Article 3(5) envisages the seller's right to recover in an action against the producer, if the seller's liability for breach of warranty is the result of an act by the producer. This provision will cover Article 3(2) situations where the producer's public

194. This liability would have extended the producer's liability under the product liability directive (which covers only personal injury and property damages) to the consumer's direct economic loss, i.e. ordinary loss of the bargain damages. Importantly, the proposed warranty directive is limited to damages in the form of direct economic loss. See *supra* note 181 and accompanying text, concerning the relationship between product liability and breach of warranty claims.

195. See, e.g., Warranty Green Paper COM(93) 509 final at 87; Internal Draft, *supra* note 162, at 15. For France, which provided the model followed by the other two countries, see Muriel de Courrègues, *France*, in *EUROPEAN PRODUCT LIABILITY* 101 (Patrick Kelly & Rebecca Altree eds. 1992).

196. These countries' entire no-fault product liability laws are essentially based on the notion that the producer is irrebuttably responsible for defects of the product.

197. Internal Draft, *supra* note 162, at 15.

198. See Warranty Green Paper, COM(93)509, final at 86-87 (including references to other national laws); DTI Consultation Paper, *supra* note 176, at 8-10.

199. See COM(95)520 final at 12.

200. The Commission has moreover indicated that the concept of producer liability might resurface in the future. See 1996 O.J. (C 309) 7, recital 11.

201. See *supra* note 180 and accompanying text.

statements created consumer expectations that resulted in a breach of warranty. Article 3(5) goes further, however, because liability resulting from "any act of commission or omission by the producer" enables the seller to seek remedies against the producer. This broad language apparently includes situations where the producer is responsible for a production defect or design defect which was the basis for a successful warranty claim against the seller.²⁰²

The effectiveness of Article 2(5) and Article 3(5) as instruments to create the producer's indirect warranty liability, however, will be limited. Article 3(5) is one of the few nonmandatory provisions in the draft directive. Producers with the necessary economic power vis-à-vis their distributors and sellers will most likely be able to exclude their liability, depending on the lawfulness of such exclusion in their national laws. This means that the directive's goal of creating more equal competitive conditions will also be limited.

IV. CONCLUSIONS

The above discussion demonstrates that the Community has pursued a limited agenda in the area of consumer protection. The measures adopted by the Community did not introduce standards of protection that went beyond existing Member State consumer protection laws. The same conclusion will most likely apply once the currently pending directive concerning warranties in consumer contracts has been adopted. This assessment should not come as a surprise. Nor should it be disappointing, despite occasional complaints by consumer rights advocates. It is appropriate for the Community to focus on the integration of markets and harmonization of Member State laws. A Community consumer policy that is independent of Member State laws is likely to fail, because consumer protection must be based on Member State laws.

Differences between Member State contract laws also make far reaching reforms more difficult. In particular the second part demonstrated some of the problems that arise when the Community engages in consumer protection

202. The producer as defendant in an action brought by the seller presumably could raise Article 3(2) defenses, even if the seller had failed to raise them when he was sued by a consumer for breach of warranty. If the producer is able to demonstrate, for example, that the consumer's purchasing decision was not influenced by the producer's public statements, he should be able to avoid liability vis-à-vis the seller.

measures that are related to Member State contract laws. This experience only confirms the conclusion of the Community's limited role in terms of strengthened consumer rights. Member States will continue to be the principal place of consumer protection activities.