

EU REGULATION OF CONSUMER SALES GUARANTEES: The Present Situation and Future Perspectives

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1. Introduction

This paper deals with the issue of regulating consumer sales guarantees in the EU. It is based on a presentation delivered at the Contract Law workshop during the Ius Commune Conference in Edinburgh, June 2003. In the first part of the paper, the Green Paper on consumer guarantees and after-sales services (the Green Paper)¹ is presented, which was the primary attempt to regulate guarantees on the European market. In the second part, the present situation is briefly discussed, i.e. the solution adopted by the European Parliament and the Council in 1999/44/EC Directive of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees,² and its shortcomings. In the third part, a proposal is introduced for the regulation of guarantees presented by the Study Group on a European Civil Code.

2. The past: The Green Paper on consumer goods and associated guarantees

A guarantee (or a commercial guarantee) is an undertaking by a producer, seller or any other person in the distribution chain which is additional to the protection offered to the buyer under the law.

Until recently, a guarantee within this meaning has not been of interest to the European legislature. Moreover, only few Member States had regulations (either hard law or soft law) that dealt with this subject. The legal position of the guarantee was therefore somewhat awkward: the guarantee was blooming on the European market with almost no legislative support.

The first serious attempt to commence discussions concerning the possibility of regulating sales guarantees at the European level was the publication of the Green Paper by the European Commission in 1993. The Green Paper was not limited to commercial guarantees; it thoroughly discussed and put forward legislative proposals with respect to three aspects of consumer sales: so-called legal guarantees, commercial guarantees and after-sales services.

¹ COM(93) 509 final.

² OJ L 171, 07.07.1999, pp. 0012-0016.

As its objectives, the Green Paper pointed to three issues: an analysis of the existing situation (at both the national and the European level), identifying the problems facing consumers and businesses, and outlining possible solutions at the Community level.³

For the purpose of this paper, the most interesting part is that which deals with 'solutions'. The Green Paper identified the most important problems in the field of commercial guarantees and presented several options for regulation.

Firstly, the Green Paper underlined that the future regulation should not interfere with the optional (i.e. voluntary) nature of the commercial guarantee, and the main interest should lie in ensuring through, as the Green Paper called them, 'simple ground-rules' adequate information for the consumer and the necessary market transparency. At the same time, the Green Paper emphasized the importance of encouraging healthy competition based on good commercial practices.⁴ Furthermore, the Green Paper strongly advocated the creation of a legal scheme for the commercial guarantee that would be applicable throughout the whole Community. The Green Paper supported a reduction of the rules to the necessary minimum and the further development of the scheme via standardization or codes of practice.

The Green Paper based the proposed legal scheme on three elements. The first consisted of mandatory rules concerning the legal status of guarantees and certain elements that should be present in the guarantee document. The second contained supplementary rules concerning a concrete guarantee scheme, which would be applicable in the event of gaps in the commercial documents. The final element was the establishment of two principles with regard to advertisements: (1) an advertisement relating to the guarantee should be part of the guarantee, and (2) the advertiser should bear direct liability towards the individual consumer.

The Green Paper identified a number of issues connected with the guarantee as being relevant for the regulation. The list included: the legal nature of the guarantee and its relationship with the legal guarantee (an interesting fact is that the Green Paper advocated a commercial guarantee which offers the consumer additional benefits over and above the legal guarantee); the defects covered and the duration of the guarantee; those persons who are liable under the guarantee (here the Green Paper went as far as to propose the joint and several liability of all vendors belonging to a selective distribution network set up by the same manufacturer); the beneficiaries of the guarantee; the conditions for implementing the guarantee; requirements relating to form; transparency (by which the Green Paper meant that consumers should be free to consult the guarantee conditions prior to the purchase) and advertising.

The vision of the Green Paper went even further, however. It proposed the establishment of a so-called European guarantee. Such a guarantee would mean the application of standard guarantee conditions in all the Member States for the same type of goods of the same brand and the real possibility of implementing the guarantee in all the Member States, no matter where the goods were purchased.⁵

The Green Paper presented a very elaborate proposal for future regulation. Some issues raised by it were innovative and far-reaching. The most remarkable were perhaps the notion that the guarantee should confer additional benefits over and above the rights arising

³ Green Paper, p. 6.

⁴ Green Paper, p. 95.

⁵ Green Paper, p. 99.

from the mandatory regime, the joint and several liability of vendors belonging to a selective distribution network established by the same manufacturer, advertisement as a part of the guarantee and the Euro-guarantee. The Green Paper strongly underlined the need to deal with the problem of proper consumer information. As it is stated in the Green Paper: ‘As a rule the consumer is unaware of the existence of the legal guarantee and knows only the commercial guarantee. Thus, when there is no commercial guarantee or when it cannot be invoked, the consumer believes he has no rights. Moreover, in many cases the consumer believes that his rights are limited to the content of the commercial guarantee.’⁶

3. The present situation: The Directive on certain aspects of the sale of consumer goods and associated guarantees

The Directive did not follow the directions proposed by the Green Paper. The final version of the Directive concentrated on conformity regulation. It accepted a greatly reduced guarantee regulation, limited to the definition of a guarantee (Article 1(e)) and one article (Article 6) concerning transparency requirements. The Directive completely omitted after-sales services.

The preparatory works on the Directive did take some of the Green Paper’s ideas into consideration. The initial proposal⁷ for the Directive indicated, for example, that the guarantee should place the beneficiary in a more advantageous position than that resulting from the rules governing the sale of consumer goods set out in the applicable national provisions. However, as the work on the Directive progressed, these elements were discounted. The Economic and Social Committee, in its opinion for the proposal for the Directive,⁸ expressed the belief that harmonization in the field of guarantees is neither advisable, nor necessary, and referred to soft laws as the proper tool to regulate guarantees. This opinion sculptured the future of guarantee legislation.

As already mentioned, the rules on the guarantee adopted in the Directive are very modest. Nevertheless, the regulation received a moderately good appraisal.⁹ Of course, there is no point in denying that the very fact of devoting attention to the problem of guarantees is positive. At the same time, two issues require underlining. First, the Directive departed from the legislative assumption of the Green Paper, especially by refusing to recognize the need for non-mandatory rules concerning the content of the guarantee. Second, the very succinct set of rules did not manage to address all of the problems that are important for the guarantee or to escape inconsistencies in the text. The following analysis of the Directive’s rules aims to identify these shortcomings.

⁶ Green Paper, p. 13.

⁷ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, OJ C 307, 16.10.1996.

⁸ Opinion of the Economic and Social Committee on the proposal for a European Parliament and Council Directive on the sale of consumer goods and guarantees OJ C 66/5, 27.11.1996.

⁹ D. Staudenmayer, The Directive on the Sale of Consumer Goods and Associated Guarantees: A Milestone in the European Consumer and Private Law, *European Review of Private Law* 4, 2000, p. 559; C. Twigg-Flesner, The E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, *Consumer Law Journal*, 1999, p. 187.

According to the definition (Article 1(e)), the guarantee may be provided to the consumer by a seller or producer. Article 6(1) refers to the person offering the guarantee as the offeror, without distinguishing between guarantees given by the producer and the seller. Although the Directive only refers to the seller and the producer, its applicability is in fact much wider. The Directive (Article 1(c)) defines the seller as any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession. The definition of the producer (Article 1(d)), on the other hand, is very broad. It refers to the product liability directive¹⁰ and includes the manufacturer of consumer goods, the importer of the consumer goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods. For the guarantee scheme, this means that certain categories of intermediaries are perceived as eventual guarantors. However, the entire structure lacks consistency, as it does not cover the whole range of persons engaged in the distribution chain. It may not have a huge impact on the functioning of the guarantee scheme as such, but it may have its drawbacks if one thinks of the possibility of regulating the guarantee from the commercial distribution chain's perspective, as proposed by the Green Paper.

The Directive is not very precise with respect to the beneficiary of the guarantee, either. The buyer of the consumer goods becomes the beneficiary of the guarantee, if the latter is offered. The questions that may arise here are whether the guarantee is only valid for the first buyer or whether it is possible to transfer the guarantee to the subsequent owners of the goods. This problem has a particularly important meaning for durable goods accompanied by a long-term guarantee.

The definition (Article 1(e)) indicates that the guarantee is an undertaking given without extra charge. This means that the rules on the guarantee only apply if the guarantee is provided for 'free'.¹¹ Therefore, the rules of the Directive do not apply to so-called extended guarantees or insurance policies that are steadily gaining recognition and popularity on the market.

However, charges that may be imposed on the buyer in connection with the guarantee are not limited to the payment for obtaining the guarantee. In addition, there may be a charge for invoking or performing the guarantee if the guarantor is determined to escape the 'offering charge'. The Directive does not indicate whether the extra charge extends to the costs of invoking and performing the guarantee by the consumer.

The more general question of whether the legislative framework should only cover free guarantees or whether the guarantor should be allowed to sell the guarantee is not easy to answer. If the rules are set for 'no extra charge' guarantees only, it creates a situation where the guarantor may easily escape their applicability simply by charging a symbolic fee. Moreover, guarantees against payment are left unregulated. On the other hand, if the guarantor is allowed to charge for the guarantee, the guarantee should offer the consumer additional privileges over and above conformity. Otherwise, the consumer will be paying for protection which he is nevertheless entitled to under the law.

From the consumer's point of view, the remedies available when the product fails are

¹⁰ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; OJ L 210, 07.08.1985, pp. 0029-0033.

¹¹ Which is never true, because the price of the product always contains the price of the guarantee.

the most interesting and valuable part of the guarantee. Actually, for the consumer the guarantee is worth as much as the remedies it offers.

According to the Directive (Article 1(e)), if the goods do not meet the specifications laid down in the guarantee document or relevant advertising the guarantor may offer to reimburse the price paid, or to replace, repair or handle the goods in any other way. The Directive does not provide an explanation as to the exact meaning of the remedies. Two such remedies (repair and replacement) also apply in the case of non-conformity of the goods. The Directive offers a definition of repair. It states (Article 1(f)) that repair, in the event of non-conformity, is to mean bringing consumer goods into conformity with the contract of sale. There is no indication as to whether the same meaning is to be given to repair within the guarantee scheme.

The list of the remedies is open-ended. 'Handling the goods in any other way' suggests that the guarantor may offer any other remedy or indeed a combination of different remedies. In addition, the Directive does not provide any kind of hierarchy between the remedies available, as in the case of conformity. This means that the guarantor makes all the specifications concerning remedies. Article 6(2) requires the guarantee to set out the contents of the guarantee, which most probably includes the remedies available. However, if the guarantor does not comply with this requirement, the only solution which the Directive offers is that the validity of the guarantee is not affected and the consumer may still rely thereon (Article 6(5)). The Directive does not provide any indication as to the possible default remedies.

The Directive refers to advertising on two occasions: in the definition of the guarantee (Article 1(e)) and in Article 6(1). The Directive declares that the content of the guarantee is formed not only by the guarantee statement but also by the advertising. In other words, advertising constitutes an integral part of the guarantee. However, the first time when the Directive refers to advertising (Article 1(e)) it uses the word 'relevant', the second time (Article 6) 'associated'. Moreover, Article 1 refers to specifications concerning the guaranteed goods, while Article 6 concerns the binding nature of the guarantee. It is unclear, however, whether the scope of those two words is the same and the different wording is only the result of legislative inefficiency.

Article 6(2) deals with the transparency requirements. It refers to three different categories of information: information concerning the consumer's legal rights, the content of the guarantee and the process of claiming under the guarantee. First, it requires the guarantee to state that the consumer has legal rights under the applicable national legislation and to make clear that those rights are not affected by the guarantee. Without doubt, this information is very useful to the consumer, assuming that he is aware of what conformity actually means. It is worth reiterating that the Green Paper claimed that one of the biggest problems facing the consumer is the lack of knowledge concerning legal rights and mistaking it with guarantee.¹² Next, the guarantee is to set out in plain, intelligible language¹³ the content of the guarantee. The Directive does not specify, however, what precisely constitutes the content. Finally, the Directive requires a list of the essential particulars for making claims under the guarantee. The Directive specifically refers to the following: the duration of the guarantee, its territorial

¹² Green Paper, p. 13.

¹³ Interestingly, the plain, intelligible language requirement does not refer to the first part of Article 6(2), which concerns legal rights.

scope and the name and address of the guarantor. The Directive does not indicate what the territorial scope of the guarantee actually means. Is it the territory where the guarantee is binding or the territory where the guarantee may be invoked? A second problem relates to the requirement of identifying the guarantor. In many cases the consumer is required to contact a person other than the guarantor in order to invoke the guarantee, and the Directive omits to recognize this.¹⁴

Article 6(3) states that, at the request of the consumer, the guarantee is to be made available in writing or in another durable medium available and accessible to him. Again, the Directive assumes positive knowledge on the part of the consumer concerning his rights.

The Directive leaves the choice of the language (or languages) for presenting the guarantee to the Member States (Article 6(4)).

A statement (Article 6(5)) to the effect that infringements of transparency requirements (paragraphs 2, 3, 4) do not affect the validity of the guarantee and the consumer may still rely on the guarantee and require it to be honoured concludes the rules on guarantees. This is the only remedy offered to the consumer by the Directive. In extreme cases this may mean that the consumer may rely on a guarantee that does not specify its content (the defects, its duration and the remedies available), does not state how it should be invoked and does not even exist in writing.

The regulation adopted by the Directive is not sufficient to create the legal skeleton for the proper functioning of the guarantee on the European market. The European legislature tried to shift the burden of creating it to the Member States and consumer organizations. If the guarantee is meant to function in the European dimension, that may not be the best idea. Moreover, the Directive does not explain the reasons for such a limited scope of the regulation and the rejection of the notion of non-mandatory rules.

The Directive, of course, does offer some advantages. First, as already stated, the very fact that it mentions the guarantee is positive. Another undeniably useful element is the fact that the Directive recognizes the explicitly binding nature of the guarantee (Art. 6(1)) regardless of who offers the guarantee.

4. The future?

The Dutch Team belonging to the Study Group on a European Civil Code¹⁵ is finalizing its work on the Principles of European Sales Law. The Group already decided in a very early stage of the process that the Principles should include a part dealing with sales guarantees. Although the work on the Principles is almost complete, the presented version of the black-letter rules is not final.

The main idea behind the draft is the creation of a complete and comprehensive set of rules to regulate the functioning of the guarantee in consumer sales. The Directive served as a

¹⁴ The Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, OJ C 104/30, 10.03.1998, also required the name and address of the person to be contacted to be listed in the guarantee.

¹⁵ For the history, aims and methods of the Study Group on a European Civil Code, see the paper by V. Heutger, Steps towards a European Sales Law, also presented at the Edinburgh workshop and published in this issue of the EJCL, <<http://www.ejcl.org/75/art75-4.html>>.

first point of references for the draft. The drafters very often also referred to the proposals in the Green Paper, although the draft does not go as far as the latter. Flexibility, completeness and its non-mandatory character, combined with the assurance of proper consumer information are the most important features of the scheme.

The draft requires the observance of certain transparency requirements (elaborated on the basis of the Directive) and provides rules concerning the content of the product guarantee. Practically all the rules relating to the content of the product guarantee are default rules, which has two consequences. The prospective guarantor is forced either to create his own guarantee conditions and to communicate them to the buyer or to accept the non-mandatory rules provided by the regulation. The guarantor has a great deal of flexibility in creating conditions for his own guarantee as long as he observes the transparency requirements. The draft underlines the importance of adequate consumer information through actions like providing the consumer with the guarantee document, informing the consumer about advantages relating to the product guarantee as compared to conformity, or only allowing limitations on the guarantor's liability if the guarantee clearly states this.

The rules are quite detailed and deal with many issues that are connected with the use of the product guarantee, such as a product guarantee for part of the product only, or prolonging the duration of the guarantee. The choice of this particular drafting technique may be explained by the very nature of the subject at stake. First, it is a consumer issue; second, as already stated, the subject has not previously been regulated in a complex way, neither at the European nor (with some exceptions) at the national level.

The draft differs from the Directive in many respects. The most apparent difference is perhaps the new name: a product guarantee. It distinguishes the sales guarantee from other kinds of guarantees. Also, it indicates that, as a default rule, the guarantee follows the product. Next, the draft extends the definition of the guarantor to all persons engaged in a commercial chain. Third, the regulation covers free guarantees as well as guarantees provided against payment. Also, it indicates that, as a default rule, the guarantee is invoked and performed free of charge.

The draft (Article 502) recognizes the binding nature of the product guarantee and extends it to the subsequent owners of the goods. It does not allow making the binding nature of the product guarantee conditional upon fulfilment of any formal requirements (such as registration or notification) by the guarantee holder.

Article 503 obligates the guarantor to provide a product guarantee document to the consumer. In comparison with Article 6(2) of the Directive the draft provides new elements with regard to the content of the guarantee document. First, the product guarantee document is to point to the advantages of the product guarantee for the buyer in comparison with the conformity rules. Second, it is to indicate the name and address of the person to whom the notification of the good's failure is to be made, together with the procedure for notification. The draft states that if the guarantor infringes on requirements concerning the presentation of the product guarantee document the buyer is entitled to ask the guarantor to provide a product guarantee document that meets all the requirements.

One of the most important characteristics of the draft is that it provides the default coverage of the product guarantee (Article 504). It specifies the default duration (five years or the estimated life span of the product, whichever is shorter), the default specifications that the goods are to meet, the available remedies and the costs involved in invoking and performing the guarantee. In the draft, the product guarantee covers certain elements of the conformity test (Article 301(1)(b), (c), (e) of the draft). This means that the goods are to:

- (b) be fit for the purposes for which goods of the same type would ordinarily be used;
- (c) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;
- (e) have the qualities and performance which the buyer can reasonably expect, taking into account any public statements on the specific characteristics of the goods made by a person in an earlier link in the business chain, the producer or his representative.

As to the remedies, the guarantee holder may choose between replacement, repair and reimbursement of the price paid if the product guarantee document does not specify otherwise.

The draft regulates the issue of guarantees relating to a specific part or parts of the goods (Article 505) and the prolongation of the product guarantee (Article 508). It places the burden of proof on the guarantor (Article 507) and, at the same time, allows the limitation or even the exclusion of the guarantor's liability in the case of misuse or mistreatment and a failure to maintain the goods in accordance with instructions adequately explained in the product guarantee document (Article 506).

5. Conclusions: Is that all?

'Consumers are not only less well-informed than suppliers, but they are in a weak position to exercise any formal legal rights they might have.'¹⁶ These words were once directed at legislators in Central and Eastern Europe, but they may also serve as a guideline for the EU. The creation of a successful consumer guarantee market cannot only be limited to a set of rules, no matter how well elaborated. The law itself does not provide a solution to all possible problems. The objective may only be attained by combining legal instruments with educational and informational consumer programmes and the creation of an efficient, expeditious and inexpensive enforcement system. At the same time, however, the legal structure of the guarantee is to provide adequate support for its proper functioning. A set of flexible default rules, such as the rules prepared by the Dutch Team, may be a solution to this problem.

The set of rules proposed by the Dutch Team (subject to changes that might be made during the final reading of the draft) are:

PRODUCT GUARANTEES IN CONSUMER SALES

Article 501: Definition of a product guarantee

(1) A product guarantee means any undertaking of the type mentioned in paragraph 2 given to a consumer

- (a) by a producer or a person in later links of the business chain, or
- (b) by the seller in addition to the seller's obligations under the provisions of this Chapter and Article 6.101 of the PECL.

(2) The undertaking may be:

- (a) that the goods will meet the specifications set out in the product guarantee or in associated

¹⁶ J. Mitchell, B. Kutin and A. Macgeorg, *Guidelines for Consumer Policy in Central and Eastern Europe, Journal of Consumer Policy* 24, 2001, p. 85.

advertising;

- (b) that the goods will be replaced or repaired;
- (c) that the price will be reimbursed; or
- (d) that some other remedy will be provided.

Article 502: The binding nature of the product guarantee

- (1) A product guarantee is binding without acceptance, in accordance with Article 2.107 of the PECL, in favour of the first buyer, notwithstanding any provision to the contrary in the product guarantee document or the associated advertising.
- (2) If not specified otherwise in the product guarantee document, the product guarantee is also binding without acceptance in favour of every owner of the goods within the duration of the product guarantee.
- (3) Any requirement in the product guarantee whereby it is conditional on the fulfilment by the guarantee holder of any formal requirement, such as registration or notification of purchase, is without effect.

Article 503: Obligation of the guarantor

- (1) A person who gives a product guarantee to a consumer undertakes to provide to the consumer a product guarantee document that:
 - (a) states that the buyer has legal rights which are not affected by the product guarantee;
 - (b) lists all the essential particulars necessary for making claims under the product guarantee, notably:
 - the name and address of the guarantor;
 - the name and address of the person to whom the notification is to be made and the procedure of the notification;
 - (c) points out the advantages of the product guarantee for the buyer in comparison with the conformity rules;
 - (d) is drafted in plain, intelligible language;
 - (e) is drafted in the same language as that in which the goods were offered, unless such a document has already been provided to the buyer.
- (2) The product guarantee document must be in paper or another durable medium available and accessible to the buyer.
- (3) The validity of the product guarantee is not affected by any infringement of the requirements of paragraphs 1 and 2, and, accordingly, the guarantee holder can still rely on the product guarantee and require it to be honoured.
- (4) If the requirements of paragraphs 1 and 2 are infringed, the buyer is entitled to ask the guarantor to provide a guarantee document constructed in accordance with the requirements of paragraphs 1 and 2 [specific performance].

Article 504: Coverage of the product guarantee

If the product guarantee document does not specify otherwise:

- (a) the duration of the product guarantee is five years or the estimated life span of the goods, whichever is shorter;
- (b) the product guarantee includes the requirements set out in Article 302(1)(b), (c) and (e);
- (c) the guarantee holder may choose between replacement, repair and reimbursement of the price paid;
- (d) all costs involved in invoking and performing the product guarantee are borne by the

guarantor.

Article 505: Guarantee confined to specific parts

- (1) A product guarantee relating only to a specific part or specific parts of the goods must clearly indicate this limitation in the product guarantee document.
- (2) If the limitation is not so indicated, it is ineffective.

Article 506: Product guarantee conditions

The product guarantee may exclude or limit the guarantor's liability under the product guarantee for any failure of or damage to the goods caused by

- (a) misuse or mistreatment, or
 - (b) a failure to maintain the goods in accordance with instructions that are adequately explained in the product guarantee document,
- provided that the exclusion is clearly set out in the product guarantee document.

Article 507: Burden of proof

Where the consumer invokes a product guarantee within the period covered by the guarantee, the burden of proof that

- (a) the goods met the specifications set out in the guarantee document or in associated advertisements, and
 - (b) any failure of or damage to the goods is due to misuse, mistreatment, failure to maintain, or other cause for which the guarantor is not responsible
- lies with the guarantor notwithstanding any provision to the contrary in the product guarantee document.

Article 508: Prolongation of the product guarantee period

If any defect or failure in the goods is remedied, pursuant to the product guarantee, then the product guarantee is prolonged for a period equal to the period during which the guarantee holder was not able to use the goods due to the defect or failure.