Consumer Legislation in the EC Countries

A Comparative Analysis

Consumer Legislation in the EC Countries

Editor: Professor N. Reich
Prepared for the EC Commission Consumer Protection Service

These books present the first comprehensive analysis of consumer law in the nine EC countries. Their main emphasis is on the presentation and evaluation of legislative activity and reform movement which have resulted in many new — however divergent — solutions. In this connection, 'case law' is considered inasmuch as it is relevant to consumer protection. Its importance differs widely in the nine countries. The administrative implementation, in whatever form, is extensively covered; the main emphasis has been placed on centralised institutions — institutions on a membership basis or institutions safeguarding the consumer's interests — are of great importance to the development and enforcement of consumer law and have therefore been mentioned throughout. The study makes many suggestions for law improvement and approximation on an EC basis.

The comparative report and the national reports follow basically the same scheme. The first chapter gives an introduction to the organisation of consumer interests and the position of consumer law. The next chapter is devoted to the consumer's interest in reasonable prices for goods and services. The following chapters consider marketing practices under aspects of consumer information, advertising and sales promotion. In later chapters, the authors consider legal solutions for the safeguard and promotion of the consumer's interest in safety and quality. Considerable attention is then paid to regulations of consumer credit, and unfair contract clauses. The last chapter of each book evaluates the means of law enforcement in the interest of the individual consumer.

Consumer Legislation in the EC Countries: A Comparative Analysis
Verbraucherschutzrecht in den EG-Staaten: Eine Vergleichende Analyse
Le Droit de la Consommation dans les Pays-Membres de la CEE: Une Analyse Comparative —*Reich & Micklitz*

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A study prepared for the EC Commission

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Preface

The present study, which was prepared on behalf of the EC Commission Consumer Protection Service, is the first attempt at a comprehensive analysis of consumer law in the nine EC countries. The main emphasis was put on the presentation and evaluation of legislative activity and reform movements which have resulted in many new solutions. In this connection, 'case law' was considered only inasmuch as it is relevant to consumer protection. The administrative implementation of the law was evaluated only in so far as there are centralised institutions. Of great importance to the development and enforcement of consumer law are the various consumer institutions — institutions on a membership basis or institutions safeguarding the consumer's interests — which have therefore been mentioned throughout.

In line with its design, the presentation does not include the housing market, the capital market, or the law governing public enterprises and facilities. That is not to say that there are no problems of consumer protection in those areas. Rather, it has become evident that different legal traditions and economic and social conditions in the EC countries make a comparison practically impossible. Furthermore, it was not possible to deal with the 'gemeine Recht' (droit commun, common law) on which modern consumer protection legislation is based. Finally, the authors refrained from including the numerous EC directives regarding specific problems of consumer protection, especially in the field of food law.

The study is based on national reports which were prepared by the following jurists:

— Denmark: Børge Dahl, Copenhagen
— Netherlands: Ewoud Hondius, Leiden
— Belgium and Luxemburg: Marcel Fontaine and Thierry Bourgoignie, Louvain-la-Neuve
— France: Jean Calais-Auloy, Marie-Thérèse Calais-Auloy, Jean Maury, Hélène Bricks, Henri Temple, Frank Steinmetz, Montpellier
— Great Britain and Ireland: Michael Whincup, Keele, Staffordshire
— Italy: Gustavo Ghidini, Milano
— Federal Republic of Germany: Norbert Reich, Hans-W. Micklitz, Hamburg

The national reports will be published separately.

Overall reference is made here to the documentation of legislation, court practice and literature in the national reports; individual references are not made since they would unduly have inflated this study. The reports — just as the study — reflect the state of development at the end of 1978/beginning of 1979.

Draft studies have repeatedly been discussed with members of the EC Commission and the authors of the national reports, and have been revised on the basis of their critical comments. The undersigned assume, of course, responsibility for the contents as well as for any mistakes.

Mrs. Sabine Geis translated the study into the English language. Mrs. Britta Schlage prepared the index.

The undersigned express their thanks to all those who contributed to the successful completion of the study.

Hamburg, in the autumn of 1979

Norbert Reich
Hans-W. Micklitz

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Introduction

I THE STARTING POINT FOR CONSUMER LEGISLATION IN THE ECONOMIC COMMUNITY COUNTRIES: THE NEED FOR CONSUMER PROTECTION

1 The study which we have undertaken is concerned with consumer legislation in the EC countries. We will try to describe its basic contents, its common denominators and its main differences in the nine EC countries. We will do so by describing the problems law is faced with in regulating the consumption process, in protecting the consumer and in intervening in market processes that have an impact on consumer behaviour.

Consumer legislation has not been drawn up artificially, but tries to respond to the changes that market economy has been subjected to after the Second World War. The startling development of national economies, the growing income of individuals and the internationalisation of trade, especially within the framework of the Common Market, have enabled European consumers to buy goods and make use of services which in former times had been the privilege of the rich. Cars, refrigerators, holiday tours and leisure activities became available to a large portion of the community.

On the other hand, the dark sides of increased consumption made themselves felt in all EC countries: high inflation rates, increased market power on the part of big corporations, especially multinationals, safety risks involved in the ever-increasing output of new products, manipulative marketing techniques, shoddy goods and valueless services, a high debt rate and little protection of the individual all called for legal intervention by government. Frequently, the consumer's reasonable expectations were not met any better when public utilities took the place of private enterprises. To parts of the population the development of the consumption process meant hardship and poverty; consumer problems are closely associated with social problems, especially in underdeveloped regions, working hardship on the old, the socially outcast, foreign workers and other groups of the population.

The legal superstructure in most EC countries was hardly adapted for taking up and regulating the new problems created by the increased consumption process. Regardless of its different historical origins, law in all EC countries up to the last ten years greatly relied on the classical ideas of legal liberalism; namely, freedom of contract, freedom of competition, responsibility for fault, equality of rights and duties, and as little state intervention in the free market

process as possible. Under this cover, the individual consumer, especially the poor and uneducated one, would suffer great hardship and would not enjoy legal protection. The freedom of contract meant denial of bargaining power to the consumer and unilateral imposition of contract conditions, dramatically underlined by the existence of unfair contract terms in standard form conditions. The freedom of competition could lead to price fixing, misleading and suggestive advertising, and hard-pressure salesmanship. Responsibility for fault frequently meant that the increased dangers of the modern production process had to be endured by the consumer who was unable to prove the businessman's fault. Theoretical equality of rights and duties led to the total disregard of the reality of the consumer's actual chances of having his rights upheld. It is not surprising that growing unrest about the legal superstructure was felt, which endangered the system of market economy itself.

Consumerism became the slogan in mobilizing countervailing powers against the negative effects of the increased consumption process and in remedying the defects of the legal superstructure. There is obviously no uniform direction of consumerism in the EC countries, but there is public concern for consumer problems which has led to an ever-increasing amount of legislation to protect the consumer. Programmes relating to consumer protection, institutions to channel and express the consumer's interests and direct action were put on the government's agenda. This process won Community-wide recognition when the Council of the European Communities on April 14, 1975 proclaimed five rights to which European consumers are entitled; namely, the right to the protection of health and safety, the right to the protection of economic interests, the right to compensation for damage suffered, the right to information and education, and the right to representation (right to be heard).

Rights are more easily proclaimed than translated into the practice of legislative acts. In order to implement such an ambitious programme, several requirements have to be met. Firstly, there has to be an organisation safeguarding the consumer's interests. Secondly, there must be a government policy taking up the consumer's interests. Thirdly, a new body of law has to be developed by legislation, court practice and other means which in the following we shall call *consumer law*. Finally, collective representation of the consumer's interests is required in private and public bodies responsible for the implementation of consumer policy and consumer law. We shall mention these four steps in the introductory chapter to the analysis of the situation in the EC countries. Legislation for consumer protection in the EC countries will be analysed chapter by chapter within the framework of the problems which are common to all European consumers.

II THE ORGANISATION OF THE CONSUMER'S INTERESTS

2 ### 1 Generalities

In what are known as pluralistic societies, interests have to be organised to be heard, to get political support, to be translated into law and to bring about changes in economic and social structures. Unlike the labour movement, the

consumer's interests are not yet sufficiently organised. Social scientists have developed several theories to explain this fact, but we will not go into details here.

We take it from our study that the consumer's interests are not yet adequately organised and not represented sufficiently either by cooperatives or by trade unions. Cooperatives play an important role in the Common Market from the economic point of view and since their beginnings in the early 19th century have been a sort of self-help created by the consumer. Due to changes in marketing processes, they have become enterprises in the same way as other businesses and cannot be said to have an exclusive mandate to speak for the consumer. Trade unions organise the worker's interests and employ the means of collective bargaining and strikes to improve the condition of their members. They are consumer-orientated insofar as higher incomes earned by workers will enable increased consumption. Politically, they may strive for improved consumer legislation, for instance in the field of advertising and safety; we could cite many examples where such legislation was actively supported by trade unions and could not have been worked out without their support. On the other hand, there are still conflicting interests between trade unions and consumer organisations in all EC countries; for instance, in legislation on shop closing hours and in the implementation of laws on competition, advertising and safety. It is hoped that these conflicts can be overcome in order to better protect the *working consumer*.

3 2 Private consumer organisations

(i) Private consumer organisations are associations formed by individuals to promote their common interest as consumers. There may be different reasons why individuals join such an association. Usually, the members expect some service of their organisation and are willing to pay a membership contribution to get that service. The most attractive service has been the subscription to a magazine of comparative testing. Similiar to the United States, private consumer organisations are formed around testing activities. This is true for the following countries:

— In the **United Kingdom**, the Consumers' Association was founded in 1957. Its principal object is to improve and maintain the standard of goods sold or services rendered to the public. The Consumers' Association now has about 600 000 members and edits the *Which*? magazine and related magazines reporting on comparative testing.

— In the **Netherlands**, the Consumentenbond was founded in 1953 and had 480 000 members in 1978. It edits a journal of comparative testing, *Consumentengids*, gives legal advice to its members and is represented on several complaint boards (see Chapter 9, No. 206).

— In **Belgium**, the main consumer association is known under the name of Association des Consommateurs. It comprises almost 300 000 members and edits the *Test-Achats* journal.

(ii) In most EC countries, *housewives' organisations* are known, which may be regarded as consumer organisations, too. We will not go into details here.

(iii) There has been growing concern for *local consumer* problems which has resulted in local consumer unions. This movement is of specific importance in

large countries, but has not yet won general recognition.

— In **Great Britain**, the Consumers' Association has initiated and promoted local consumer groups. There are about 50 such groups now. In 1963 they merged into the National Federation of Consumer Groups. The National Federation actively criticises the market behaviour of enterprises, gives legal and economic advice, works as a pressure group for law reform and tries to represent consumers in different bodies.

— In **France**, different local and regional consumer groups have been set up in recent years. They joined the Union Régionale des Organisations des Consommateurs (UROC). They may receive legal standing under Art. 46 of the Loi Royer (see Chapter 3, No. 60; Chapter 9, No. 212) and hence enjoy an important legal status.

— In the **Federal Republic of Germany**, consumer organisation is still in its infancy and is not supported by the established consumer institutions (see No. 4). There have been initiatives on a local or regional basis. They enjoy legal standing in fighting misleading advertising, bad marketing practices (Chapter 3, No. 60) and unfair contract terms (Chapter 8, No. 193).

— In **other EC countries**, local consumer groups play an ever-increasing role, for instance in Denmark and to some extent in Italy. We will not go into details here.

4 3 Indirect organisation of the consumer's interests

There is another form of organisation of the consumer's interests in the EC countries; namely, not the union of individual members in an association, but the joining together of the various existing consumer organisations under a sort of *umbrella organisation*. This type of organisation will be found in the following countries:

— In the **Federal Republic of Germany**, the consumer's interests are organised indirectly in the regional Verbraucherzentralen and in the federal Arbeitsgemeinschaft der Verbraucher. Both are associations under private law. Their members are mostly associations: individual membership will be accepted only in rare cases and will certainly not be encouraged. These organisations try to represent the consumer's interests vis-à-vis government agencies, will lobby for consumer legislation and will cooperate in implementing the law. The Verbraucherzentralen enjoy the right of action against misleading advertising, harmful marketing practices (Chapter 3, No. 60) and unfair contract terms (Chapter 8, No. 193). They are almost completely government-financed and government-controlled as regards their financial behaviour. This limits their activity.

— In **France**, the main consumer organisation is the Union féderale des consommateurs (UFC). It was founded by local associations. It edits a magazine of comparative testing, *Que Choisir*?, is financed through the sale of the testing magazine and state subsidies, and enjoys legal standing under Art. 46 of the Loi Royer.

— In the **Netherlands**, there is an indirect organisation of the consumer's interests by Konsumenten Kontakt. It was founded in 1957 by the three Dutch labour unions, the cooperatives and the Consumentenbond (which left in 1971).

It is organised on a non-profit basis and does not allow individual membership. It edits a testing magazine, *Koopkracht*.

— In **Italy**, the most important consumer protection organisation is the Comitato Difesa Consumatori, the sole Italian member of the Bureau Européen des Unions des Consommateurs (BEUC), which was founded in 1973. The Unione Nazionale Consumatori, established in 1955 — some of whose members founded Confconsumatori in 1975 — has strongly reduced its activities and influence following judicial findings to the effect that it had received money from industry, the very reason for which it was expelled from the BEUC.

— In **Luxemburg**, the Union luxembourgeoise des consommateurs (ULC) was founded in 1962. It comprises trade unions, housewives' organisations and cooperatives, but will also encourage individual membership which currently totals 11 000. It edits a testing journal, *De konsument*.

— In **Denmark**, the Danish Consumer Council (Forebrugerradet) was founded in 1947. It is organised as a sort of umbrella organisation of all associations concerned with consumer affairs, including the local consumer groups, and will encourage individual membership. The Council is supported by government funds. It is regarded as *the* Danish consumer organisation. The government will hear it before any measure concerning consumers is introduced. The Council will also lobby for new legislation, submit detailed proposals and give advisory opinions on government-initiated bills. The Council is represented in all public or semi-public bodies working in the field of consumer protection and information, such as the Consumer Committee (No. 7), the Varefacta-Board (Chapter 2, No. 34), the Standardization Council (Chapter 5, No. 96), the Consumer Complaint Board (Chapter 9, No. 205), the Danish Home Economics Council (Chapter 2, No. 36) and the Antitrust Authority (Chapter 1, No. 19). It may give advice to individual consumers either directly or by referring them to other bodies. It may also initiate proceedings under the Monopolies Control Act or the Marketing Practices Act, but usually will leave that to the officially appointed agencies, such as the Consumer Ombudsman. It publishes its own monthly (*Taenk*), which deals with all aspects of consumer affairs.

5 **4 Semi-public consumer organisations**

Due to the weakness of existing consumer organisations and the difficulty of organising the consumer's interests, the government in many EC countries has found it necessary to provide for representation of the consumer's interests on a semi-public basis. The government usually employs the organisational patterns available under private law and sees to the financing of these organisations. There are councils charged with the administration of the organisation which use a sort of pluralistic approach to represent the relevant groups in a society which is responsible for promoting the consumer's interests, such as consumer organisations, state agencies, trade unions and associations of industry and trade. Their set-up varies widely. We would like to mention the following institutions:

— In **Great Britain**, the National Consumer Council (its predecessor was founded in 1963, abolished in 1971, and refounded in 1975) is an independent company limited by guaranty. Its principal task is to promote action to further and safeguard the consumer's interests. It is an advisory body assisting the

government; it undertakes studies and does research and uses its influence to promote general economic and social policy in the interest of the consumer. The National Consumer Council regards it as its specific task to promote the interests of the poor consumer who cannot organise in associations. The members of the Council are appointed by the Secretary of State for Trade (formerly Prices and Consumer Protection) and are made up of consumer representatives.

— In **France**, the Institut national de consommation promotes the consumer's interests on a national basis. It was founded in 1967 by state decree and is government-financed. Its council consists of 12 consumer representatives, 6 government delegates and 6 members from the associations of traders and industry. The Institut takes care of comparative testing and publishes a monthly magazine, *50 millions consommateurs*, has established ample technical services and provides advice and information to consumers, and undertakes research projects.

— In **Belgium**, the Centre de recherche et information des organisations des consommateurs (CRIOC) was founded in 1975. It is publicly financed and serves as an information pool to consumer organisations. It prepares technical, economic, social and legal expertise for consumer organisations, but not for individual subscribers.

— In **Denmark**, the Danish Home Economics Council has been set up as a semi-public test institute dealing with consumer information, especially information based on comparative tests. It also cooperates in establishing standards and in drafting the VDN Facta (see Chapter 2, No. 34; Chapter 5, No. 96). It is governed by a council whose members represent different private organisations (mostly housewives' organisations) and a smaller number of public authorities.

— In **Ireland**, the government founded the Institute of Industrial Research and Standards which is engaged in comparative testing.

— In the **Federal Republic of Germany**, three semi-public consumer institutions were founded by the government and are government-financed: the institution best known is Stiftung Warentest, a foundation under private law, which is engaged in comparative testing and edits the magazine *Test* (see Chapter 2, No. 36). The Verbraucherschutzverein was founded to bring collective action to bear in fighting misleading advertising, unfair salesmanship and unfair contract terms (Chapter 3, No. 60; Chapter 4, No. 74; Chapter 8, No. 193). In 1978, a Verbraucherinstitut was established as a foundation under private law to develop educational programmes.

— In the **Netherlands**, a semi-public research institute for consumer affairs is expected to be established in 1979.

III CONSUMER POLICY AS A GOVERNMENT CONCERN

6 In most EC countries consumer policy has gained importance and has become the government's concern. In this study we will not consider policies directed at the consumer's economic welfare or policies of education and training, except insofar as these are matters having an impact on law.

Consumer policy may be organised within the framework of the government in three different forms: political institutions being primarily and directly

responsible for monitoring consumer policy, consultancy institutions and agencies supervising and enforcing consumer laws.

1 Political responsibilities

In most EC countries that formulate consumer policy the responsibility for implementing that policy rests with the Minister of Economic Affairs. Quite frequently, there will be a conflict of interests in this Ministry itself, for the interests of producers and trade will also have to be taken into account. Therefore, consumer organisations or institutions frequently demand that there be a special Minister or Secretary of State for Consumer Affairs. This approach had been used in the **United Kingdom** where from 1972 to 1979 there had been a Secretary of State for Prices and Consumer Protection who had certain powers conferred upon him by law. In 1979 this arrangement was changed. There is now a Secretary of State for Trade, and under him a Minister for Consumer Affairs. In **France**, there was a special Secretary of State for Consumer Affairs from 1976 to 1978, an office abolished in 1978. Other countries do not have political organs specifically concerned with consumer affairs.

It is also quite common in the EC countries that consumer problems are treated by different ministers, as for instance Ministers of Justice, Agriculture and Health. Consumer problems relate to so many fields of policy and social life that it seems to be impossible to have consumer affairs exclusively covered by one minister. In some countries, the different fields of consumer protection are coordinated by interdepartmental committees, as for example in the Netherlands and in the Federal Republic of Germany.

7 2 Consultative organs

Consultative organs to promote consumer affairs and win the government's attention have been quite a success in most EC countries. We would like to mention the following consultative organs:

— In **France**, the Comité national de la consommation was created in 1960. It submits to the government proposals for reforming the law of consumer affairs. There is an equal number of representatives of government institutions and consumer organisations.

— In the **United Kingdom**, there has been a somewhat spasmodic development of consultative organs. A Committee on Consumer Protection was first created in 1960 and published the well known Molony Report in 1962 which indicated the need for changes in British law better to protect the consumer. The Committee was abolished in 1970. In 1973, the Fair Trading Act was adopted by Parliament and in Section 3 created the Consumer Protection Advisory Committee. The Committee is more than an consultative organ, because it takes part in a specific procedure of creating law. The Office of Fair Trading, on which we will report later (No. 33), may recommend legislation on consumer trade practice. Upon endorsement by the Consumer Protection Advisory Committee and approval by the Secretary of State, these recommendations may become law following approval by Parliament. So far, four orders have been suggested and two orders have been issued, namely on consumer transactions

(restrictions on statements), Order of 1976, and on mail-order transactions, Order of 1976.

— In the **Netherlands**, there is a special Commissie voor Consumentenaangelegenheden of the Social Economic Council which has been in existence since 1964. It comprises 20 members, 4 of which are nominated by consumer organisations, 7 by industry and trade, 5 by the social economic council, 3 by trade unions and 1 by cooperatives. It is supposed to be a consultative organ. For example, it prepared a detailed opinion on standard contract terms (Chapter 8, No. 178).

— In **Belgium**, the Conseil de la consommation has been in existence since 1964. It may issue advisory opinions on all matters of consumer affairs. It comprises members from industry, trade unions, cooperatives and consumer and family organisations.

— In **Denmark**, a Consumer Committee was set up in 1969. It comprised members from public authorities, consumer organisations, industry and trade. The Committee issued four reports in which a wide range of consumer protection means were proposed. So far, it has been the official consumer policy in Denmark to implement through legislation the Consumer Committee's proposals. The Marketing Practices Act and the Consumer Ombudsman's office, the Consumer Complaints Board's Act, the Price Marking and Display Act, the Consumer Sales Bill, etc., are the outcome of the Committee's work. The Committee issued its last report and finished its work in 1977. At present, a number of bills aimed at the implementation of the Committee's proposals which so far have not been implemented are being prepared by the government.

— **Luxemburg** in 1965 established the Conseil de la consommation. It should be noted that only consumer representatives are members. The Conseil has wide powers of initiative.

— In **Ireland**, the National Consumer Advisory Council was founded in 1972. It has 15 members, two of whom are from trade unions, two from consumer organisations.

— In the **Federal Republic of Germany**, there is a Verbraucherbeirat attached to the Minister of Economics. The Verbraucherbeirat is set up by ministerial decree, but does not provide for direct representation of consumer organisations. Its members are chosen by the Minister. Among them are representatives of the Arbeitsgemeinschaft der Verbraucher and of trade unions. The Verbraucherbeirat also includes independent researchers. The Verbraucherbeirat issues recommendations and will take its stand in current consumer affairs. In the German Länder, there exist Verbraucherbeiräte attached to the Minister of Economic Affairs involved, for instance, in Hamburg and in Berlin.

8 3 Specialised supervisory and enforcement agencies

One of the main aims of modern consumerism has been the creation of specialised agencies which are engaged exclusively in consumer protection. This has manifested itself in the well known idea of the Consumer Ombudsman. The *Consumer Ombudsman* is a much-discussed institution and has won direct or indirect recognition only in some EC countries:

— In **Denmark**, the Consumer Ombudsman was created in 1975 together

with the promulgation of the Marketing Practices Act (see Chapter 2, No. 33; Chapter 3, No. 59). The Consumer Ombudsman must be a person having had legal training. His main tasks are the supervision of the market and negotiation with trade and industry to promote the consumer's interests. He has some law-enforcing powers himself concerning the implementation of the Marketing Practices Act (Chapter 3, No. 59). He will encourage complaints by consumers. He cooperates with the government, with consumer organisations and with the Consumer Complaints Board (Chapter 9, No. 205).

Furthermore, the Consumer Committee proposed in its fourth report that local consumer protection offices should be established. These local offices should advise individual consumers, assist them in complaint matters, take care of general consumer information on a local basis, absorb, examine and report on local consumer problems, and the like. This proposal is now under consideration in the Ministry of Commerce.

— In the **United Kingdom**, the Director General of Fair Trading and the Office of Fair Trading were created in 1973. The British legislator did not accept the ombudsman solution directly, since the Office of Fair Trading will also have to handle restrictive trade practices and not only consumer affairs (see Chapter 1, No. 19). On the other hand, it has broad supervisory powers concerning trade practices (Chapter 4, No. 74) and it is understood that they will be actively used in the interest of the consumer. The Director General of Fair Trading will negotiate and monitor codes of conduct established by trade associations (see Chapter 3, No. 59; Chapter 8, No. 192). The Director takes care of the licensing system established by the Consumer Credit Act (Chapter 7, No. 172). He takes part in the making of consumer protection laws and issues reports on fields of action in consumer affairs.

— In **Ireland**, the Consumer Information Act of 1978 (see Chapter 2, No. 33) installed a Director of Consumer Affairs. Pursuant to Art. 9 of the Act he has broad powers of supervision, law enforcement and promotion of codes of practice, mostly relating to information and advertising.

— In **France**, the Direction générale de la concurrence et des prix implementing the Act of 1945 on Prices (see Chapter 1, No. 16) has since 1978 been changed into Direction générale de la concurrence et de la consommation. This may be regarded as a step towards a specialised agency for consumer protection, especially in the field of prices (Chapter 1, No. 16) and arbitration (Chapter 9, No. 206).

In France, a special Service de la répression des fraudes et du contrôle de la qualité has existed since 1905. Its main task is to see to the implementation of the Act of August 1, 1905, which is important in the field of advertising, safety and quality (Chapter 3, No. 42; Chapter 5, No. 88). Since most of the products and services under inspection by the 'service' relate to foods, it is attached to the Ministry of Agriculture. Since today it exercises mostly consumer protection functions, this attachment is contested at present.

In 1973, a mediator was created to handle complaints against public services, but only members of Parliament and not individual consumers or consumer organisations may use his services.

— **Italy** has gained experience with the Defensore Civico in some areas which may also take up consumer problems (Liguria, Tuscany, Lazio). His functions

relate mostly to public administration, for instance in the field of unfair contract terms (Chapter 8, No. 192).

— In **Belgium**, a bill of 1978 called Mark Olivier wants to introduce an ombudsman.

— **Other EC countries** do not have specialised agencies solely concerned with consumer protection. Law enforcement follows the general principles of administrative and/or penal law and will be subject to analysis in the following chapters.

IV THE EVOLUTION OF CONSUMER LAW

9 1 General trends

It is still a question in the EC countries whether a special consumer law has been developed or is in the process of evolution. No country has as comprehensive a code of consumer protection as Japan or Mexico. There are acts of different scope which will be studied later, but usually these acts start from the existing state of the law and try to change it in order to achieve better consumer protection. The laws may be drafted in a very broad or a narrow sense. They may even be codifications of some greater field of consumer concern, such as advertising, marketing, consumer credit, unfair contract terms or product safety. We will go into details later.

We should note that with regard to existing legislation there is a strong reform movement in most EC countries sponsored to some extent by EC draft directives (for instance product liability, see Chapter 5, No. 119; advertising, Chapter 3, No. 63; door-to-door sales, Chapter 4, No. 68) or emanating from the relevant forces of consumer policy. We will not list these activities here because they have to be studied together with the relevant subject matter.

10 2 Methods of consumer protection

Consumer law in all EC countries is a conglomerate of different spheres of the legal superstructure. There are civil-law provisions, administrative-law provisions and criminal-law provisions in consumer law which are used to varying degrees by the legislator depending on the policy he is pursuing. It may be said that modern consumer legislation *usually combines civil, penal and administrative protective measures*; for instance, the British Consumer Credit Act of 1974 (see Chapter 7, No. 154), the Danish Marketing Practices Act of 1974 (see Chapter 3, No. 42), and the French Loi sur la protection et l'information des consommateurs de produits et de services of 1978 (see Chapter 5, No. 98). Regarding some subject matters, legislation may be said to be restricted exclusively to civil-law methods, as for example the German Act on Standard Form Contracts of 1977 (Chapter 8, No. 178). But this question is very controversial in legal literature and law reform movement. In our study we will refer to civil- and administrative-law methods.

The question of how far *criminal law* should be used is highly controversial among the EC countries. Legislation in some countries seems to be opposed to

methods of criminal law; for instance, the Federal Republic of Germany, Belgium, the Netherlands and to some extent Denmark. In this conjunction criminal law will serve only as a means to fight very obvious and clear contraventions of the law. Other countries have a much more positive attitude towards criminal law; for instance, France and Great Britain. We will see that this difference plays an important role in the law of advertising and marketing practices (Chapter 3, No. 42; Chapter 4, No. 74).

Our study is devoted mostly to legislation but will not disregard changes in consumer law which are based on means other than civil, administrative or criminal law. We would like to refer to a *negotiation approach* used by certain governments to put forward the consumer's interests, for instance in the law of advertising, unfair contract terms and consumer redress (Chapter 3, No. 59; Chapter 8, No. 192; Chapter 9, No. 206). Means of *self-control* developed by trade and industry may to some extent serve the consumer's interests, especially if they allow consumer representation. We will therefore mention them in our studies of advertising, safety and unfair contract terms (Chapter 3, No. 62; Chapter 5, No. 96; Chapter 8, No. 196).

11 **3 The denotation of the consumer in legislation**

If new legislation in the EC countries is directed at consumer protection, we might expect a clear definition of the persons to be protected. If we go into the details of legislation we will not find a clear concept of the consumer and will note that even the law of one country uses different approaches. We would like to list *four different approaches* which can be referred to in almost any country that has modern consumer legislation:

— One approach defines the protective aims of the law by *objective criteria*. Certain types of consumer credit, for instance credits not exceeding a certain amount, will be regulated by law (see Chapter 7, No. 156). Correspondence courses or travel contracts in general will attract the legislator's attention irrespective of who joins such an activity (see Chapter 6, No. 148).

— Another approach defines the consumer in a negative way by *excluding professional activities* or transactions in commerce from the scope of the law. Such an approach may be used in the law of unfair contract terms (see Chapter 8, No. 184), but also in other fields of consumer policy.

— Another approach tries to define the *consumer* as a subject of certain protective measures. There may be uncertainty whether to use the term consumer in a narrow or in a broad sense. A narrow definition will include only private persons using goods and services for private ends. A broad definition may include liberal professions or legal entities. The narrow concept of consumer will be of importance in the field of door-to-door sales (Chapter 4, No. 69). In the law of product liability, it is still a debatable question whether to use a broad or a narrow definition of consumer (see Chapter 5, No. 104).

— The law may also make reference to *collective consumer interests*. This concept will be employed if the law provides for collective action to fight misleading advertising (Chapter 3, No. 60) or unfair contract terms (Chapter 8, No. 193).

We will not go into details here about the different notions of consumer, but will refer to them when we inquire about the scope of certain legislation.

V CONSUMER REPRESENTATION

12 A very new concept of consumer protection manifests itself in the fact that people call for consumer representation. It is quite obvious that the concept derives from labour law: collective bargaining and labour representation have been successful means of protecting and improving the worker's social, economic and legal situation. Referring to labour law, we may easily note the basic requirements of representation: there must be organisations sufficiently representing the interests of their members or some other collective interests that cannot be negated by social policy or law.

As we have seen in our survey of consumer organisations in the EC, there is still only a small representative element in the existing bodies that formulate and further consumer interests. This is the main reason why consumer representation is still in its infancy. It may become more important if the ideas of the EC programme of consumer protection of 1975 are put into action. Under that programme the consumer is granted a right of representation and a right to be heard.

In most EC countries, consumers are represented in those institutions that serve as consultative bodies to formulate the consumer's interests vis-à-vis the government (No. 7). We have already mentioned the bodies existing within the framework of the government. The sphere of consumer representation may be extended to organisations formed by trade and industry and bodies hearing consumer complaints and using the instruments of arbitration and conciliation to settle claims (Chapter 9, No. 206). Consumer representation is beginning to win recognition in controlling advertising and marketing practices, in defining safety standards and developing quality labels, in fighting abuses in contract terms or even setting up standardised forms acceptable to both businessmen and consumers, and in investigating prices. The legal basis of consumer representation in the different fields of consumer action and its actual importance in the legal process varies from country to country and can only be studied in detail later in the relevant chapters.

In our view, the movement of consumer representation should be encouraged and should cover more areas than it does today. Of course, the framework of consumer organisation and its representativeness has to be improved, especially in those countries in which consumer organisations on a membership basis are unknown. If such is the case, consumer representation will play an important role in most fields of consumer protection which we have analysed in our study and may take some of the traditional roles of law.

CHAPTER 1

Prices

I GENERALITIES

13 It is quite obvious that the consumer's principal desire consists in procuring the goods or services he needs in a good quality and at a reasonable price. In Chapter 6 we will discuss the quality aspects of the law, especially in connection with exemption clauses. We will have to develop first the main directions of consumer policy and consumer law in the nine EC countries regarding the price factor. Special problems of the 'price' of consumer credit will be analysed in Chapter 7.

1 Different approaches

Action on the price factor in the markets for consumer goods or services cannot be seen as an isolated problem of consumer policy but strikes at the roots of economic and social policy itself. The price factor is but one element of the economy. The level of employment, employees' real incomes, the profit made by industry and trade, the balance of trade, and the workability of competition are fundamental elements of the economic system of a country. Frequently, the government will have to reconcile conflicting interests; for instance, inflation and full employment, the consumer's interest in low prices and the employee's interest in high wages.

EC countries are unanimous in agreeing that governments should try to act on the price factor in the economy. The starting point for this is not so much the need for consumer protection, but the fight against inflation. Obviously, in curbing inflation the government also provides for consumer protection: the lower the inflation rate, the better the consumer's protection against high prices or price rises. On the other hand, even a successful fight against inflation does not guarantee that the consumer will get a certain product or a certain service which is important to him at a reasonable price. This means that other instruments have to be developed by consumer policy to act on the price factor in the interest of the consumer.

As regards the fight against inflation, three types of action can be distinguished in the EC:

— Some countries prefer *direct intervention* in the price factor. This system is employed in Italy, Belgium and the Netherlands.

— Other countries prefer *indirect action* on the price factor, especially by promoting competition and by refraining from direct intervention. This system

is to be found in the Federal Republic of Germany.

— Most countries try to combine *direct intervention* and *indirect action*, as for instance Denmark, the United Kingdom, Ireland, France and Luxemburg. Direct intervention in the price factor and indirect action through antitrust law are combined to varying degrees. This interrelationship may change from time to time in pursuance of economic policy.

In our study, we shall distinguish between direct and indirect action on the price factor and analyse the relevant state acts according to that distinction. We will neither study intervention by the EC (e.g. agricultural products) nor the impact of the competition and non-discrimination rules of the Treaty of Rome on national law.

14 2 Other means of action on the price factor in the interest of the consumer

As we mentioned in the beginning of our study, most EC countries have found it necessary to develop within the frame of their consumer policy other, more subtle instruments of action on the price factor. We can distinguish between two different approaches which we will study in detail later:

(i) The consumer should be enabled to get a *general idea* of the *prices* asked for a certain commodity or a specific service on the market. Knowing the actual price and being able to compare the different offers he may, as a 'reasonable man', use his budget and income according to his means. The policy employed here is closely connected with the trends in consumer information we will study in Chapter 2. The government employs two means of informing the consumer about prices:

— Acts on *price marking* and price display inform the consumer about the actual price (including value added tax, VAT) of a certain commodity in a grocery store, department store, etc.

— In the case of prepacked goods, mere price marking will not help the consumer to get an idea of the market situation. This is especially true for packings having different weights. The consumer wants to know the price of the specific merchandise based on a reference unit weight of 100 or 1000 grams (*unit pricing*).

(ii) It is also important to protect the consumer against specific *price clauses in contracts*, notably standard form contracts. In a simple transaction such intervention will not be necessary since the consumer knows the price and accepts it as part of the contract. If the price is grossly excessive, government intervention may be necessary, especially if the poor consumer is concerned. If a long-term contract is concerned, the consumer will have to be protected against unreasonable price increases, against indexing and other devices which make it possible for the trader to ask a higher price than had been agreed upon at the conclusion of the contract.

II DIRECT INTERVENTION

15 1 Countries employing price control as a regular means of economic policy

As we mentioned above, Belgium, Italy and the Netherlands employ direct

price controls as a principal means of fighting inflation and protecting the consumer against excessive price increases. We would like to mention the following acts:

— In **Belgium**, the Regulation of January 22, 1945 contains the framework legislation on governmental control over on prices. On the basis of that Regulation, the Belgian government may issue executive orders controlling prices of all goods and services exclusive of real property. A new Regulation of December 22, 1971 was adopted to provide for more effective control of price increases. There are other Acts (of December 23, 1969; July 30, 1971; and March 30, 1976) providing for specific action on the price factor. There are special regulations on certain commodities, such as drugs under the Act of July 9, 1975 and insurance under the Act of July 9, 1975.

Belgian law has developed five means of control over price:

(i) The trader is not allowed to ask a price that is higher than the normal price (normalité des prix). The market price is fixed as a general guideline for any businessman. Judicial control of prices exceeding the normal price is only employed in case of excessive profit margins. According to Belgian experience, this provision is not suited to protect the consumer.

(ii) The government may order price ceilings. The prices asked for on the market shall not exceed the ceilings fixed by the government. In former times, those ceilings existed only for some groups of commodities. Since 1971 it has also been possible to fix ceilings with respect to specific enterprises. In Belgium, these ceilings are now in existence relative to agricultural products, cosmetics, calculators, tyres, several foodstuffs and beverages.

(iii) Belgian law has developed an interesting procedure relating to price increases. This procedure was first laid down in an Order of December 20, 1950 and was modified by Rules of 1971 and 1975. Any businessman who wants to increase his prices must give notice of his intention to the Commission for the Regulation of Prices. For a period of three months, he may not use the increased prices. If the Commission considers the rise to be inappropriate, the Minister of Economics may delay the rise for another two months. In exceptional cases, he may reject the price rise altogether. New products and new services are exempted from this procedure, but the Commission must be informed about the prices of a new product or service. If new drugs are put on the market, the prices must be approved by the government pursuant to the Act of 1975.

Consumers have criticised this procedure, for, anticipating delays pursuant to the above-mentioned Act, businessmen may ask for artificial price increases. The control mechanism is not very efficient and the legal basis underlying the grounds of delay and refusal is not clear.

(iv) The Belgian government has also employed concerted action (what they call stability pacts) to control prices. If prices are fixed by concerted action and approved by the government, they are not submitted to the procedure for price increases. So far, this programme, which is only employed for certain commodities, such as bread and electrical household appliances, has been of little practical consequence.

(v) The government also tries to control index clauses in contracts which we will study later.

Belgian law provides for detailed sanctions in order to effectuate and imple-

ment legal regulations. Consumer organisations may not take part in criminal proceedings. The law does not provide for civil sanctions in the interest of the consumer, for instance for an action of price reduction. Consumer organisations may not ask for an injunction against contraventions of the law.

— In **Italy**, the legal basis of governmental intervention is Decree No. 347 of October 19, 1944. Pursuant to such Decree, the Interministerial Committee for Prices was created, which is a government agency enjoying broad powers of action (since 1967 this Committee has been submitted to the political control of the Interministerial Committee for Economic Programming). The Committee's powers of intervention were fixed by several acts issued during the years 1946 – 1948. Thus, the Committee may order price freezes, price ceilings and price investigations. It controls the price of all goods at every stage of exchange, including import and export, as well as the price of services. The Committee is supported by the Central Commission for Prices and by subcommissions. There are also Provincial Committees for Prices, which control prices on a local level. Italian writers criticise the bureaucratic composition of the different Committees as well as the actual effectiveness of their work.

— In the **Netherlands**, the Act on Prices (Prijzenwet) of 1961 provides for a broad interventional framework for governmental action on prices. All commodities and services are covered by the Act with the exception of real property and public utilities.

Art. 2 of the Act empowers the Minister of Economic Affairs, usually in cooperation with other competent ministers, to impose maximum prices regarding certain groups of commodities or services. This power shall be exercised only if the general socio-economic interest requires such a measure. Law regards price control as an ultimate remedy in case of inflation and other economic problems. In practice, quite contrary to legislative intention, general price measures have been in force since 1972, followed by specific measures for certain trades.

Using his powers under the Act, the Minister may forbid the supply of goods or services at prices higher than those established by him. He may also forbid the raising of prices for a period of no longer than one month from the day the intention to raise the price was announced to the Minister of Economic Affairs. All measures shall last for no more than one year. The contract that does not take account of a certain price measure is null and void. There is *no* action for reduction of the price.

Dutch legal scholars criticise the Act under several aspects: its implementation is poor, the government's regulatory powers are extremely broad and undefined, the practice of general price measures is in contradiction with the lawmaker's original intention, and the consumer is not offered any action for reduction, but has to accept the annulment of the contract that contravenes the law.

16 2 Mixed systems

As we have already mentioned, most EC countries employ different means of direct and indirect intervention to fight inflation. We would like to mention the following legislation:

— In **France**, Regulations Nos. 1483 and 1484 of June 30, 1945 provide for

the legal framework of price control. Art. 60 of Regulation 1483 covers all products and services, including public goods and services, but does not apply to real property transactions. Under French law, specific rules of price control regarding transportation, banks and wine products are known.

The powers under the Act are vested in the Minister of Economics and Finance and are sometimes shared with other ministers. A National Committee for Prices has been created in France which acts as a consultative body. The investigating powers are exercised by the Direction générale de la concurrence et de la consommation (see Introduction, No. 8).

Under French law, there are different ways of taking action on prices:

(i) The Minister may issue standstill orders and by such means freeze the prices of certain goods.

(ii) The Minister may impose price ceilings and limitations on profit margins. Prices lower than those indicated by the ceilings or scales of prices will be allowed, but not higher prices.

(iii) Businessmen must apply for authorisation of price increases. If new products are put on the market, the government will not interfere.

(iv) Since 1963, the government has employed stability pacts which are concluded between business organisations and the government.

Over the past 12 months, the French government has pursued an active policy of liberalisation of prices (see Order 78/67 p of May 31, 1978). In the summer of 1978, the prices for bread were liberalised, which caused significant price increases. The policy of liberalisation has been continued in France. Most prices for industrial products (including agricultural industries) have been freed. Retail prices have been subject to governmental action by Order 78/116p of December 20, 1978. The new element of the Order is Art. 2, allowing agreements for the development of competition and for the information and protection of consumers to be negotiated by enterprises or business organisations with the Direction Générale. These agreements (engagements de modération) will be submitted to the Ministry for Economics. They will take effect only after approval by the Minister. If the agreement has been negotiated by a representative business organisation it is applicable to all enterprises of a specific branch of commerce. Concerning services, former regulations still remain in force, but the above-mentioned Order makes it possible for prices for services to be made subject to approval by the Minister for Economics.

The law provides mostly for penal sanctions if price orders are offended. Under French law, the handling of civil sanctions is subtler than under Belgian law, for the courts will allow an action for reduction of prices. By the Loi Royer of 1973 (see Chapter 3, No. 42) individual consumers or consumer organisations may take part in criminal proceedings concerning contraventions of price orders. Violations of the agreements negotiated with the Ministry are not subject to penalties. The Minister will only suspend their application and return to a stricter regulation of prices.

In the **United Kingdom**, price control was exercised indirectly by the Price Commission, and directly by the Secretary of State for Prices and Consumer Protection (No. 6) from 1973 to 1979. The Price Commission consisted of 15 members. Their chairman was a spokesman of a merchant bank, and other members included representatives from industry, the civil service, trade

unions, one representative of the National Consumer Council and one housewife. It was designed as an investigatory body. It had to be informed about price increases. Price increases could take effect only after 28 days notice. If the Commission wanted to investigate the reasonableness of a price increase, the price was frozen for a period of four months. The Commission also had investigatory powers of its own concerning price levels, profit margins, etc. Upon the Commissions recommendation, the Secretary of State could order price freezes. The Commission also had examination powers relative to specific sectors or monopolies.

The Commission was, however, abolished in 1979, together with the statutory requirement to notify price increases in advance and the legal power to freeze prices. Under the new law, the Director General (No. 8) is authorised to investigate areas of limited competition indicated by excessive price increases. If he is satisfied that competition is limited, he may then refer the case for action by the Monopolies and Mergers Commission.

— In **Ireland**, the legal basis of price control is the Prices Acts of 1958 as amended in 1972. An Order of 1972 on Prices and Charges (notification of increases) allows price increases only after a delay of one month. The National Price Commission, bringing together representatives of industry, trade, the trade unions and the Irish Housewives' Association, may make recommendations as to price control and price levels in certain sectors of the economy. Some sort of price control is also achieved by the Annual Wage Contract negotiated among the government, industry and trade unions.

— In **Denmark**, the Act on Prices and Profits of 1974 may be described as follows: the purpose of the Act is to contribute to economic stabilisation through supervision of prices and profits (Art. 1). The Monopolies Control Authority (No. 19) may prescribe that any increase in prices shall be notified to the Authority (Art. 3). The Authority may also lay down rules which make it unlawful to increase prices or exceed specified prices or rules on the calculation of prices (Art. 6). The basis of such price directions will in general be cost prices (Art. 7). The Authority shall, however, take into account (a) the rate of efficiency, so that efficiently operated enterprises are enabled to cover necessary direct costs and are allowed a reasonable amount to help cover indirect costs and net profits, and (b) capacity exploitation, so that an unusually low degree of capacity exploitation cannot justify price increases (Art. 7). The Authority shall, by using the regulatory power provided for in Art. 6, put an end to unreasonable prices, i.e. prices exceeding what would be stipulated under Art. 7 (Art. 8).

— **Luxemburg** employs similar means of price control as Belgium, but also relies on antitrust law (No. 19). By the Order of November 8, 1944, the Price Office (Office des prix) was created. A new framework act of June 30, 1961 gives broad regulative powers regarding all goods and services to the Office. A special regulation on price rises was issued on January 1, 1971. This regulation was substantially modified on January 21, 1973. The following means of price intervention exist in Luxemburg today:

(i) The Office may fix prices for all goods and services (with the exception of specific services of doctors, lawyers, etc.). Regulations exist with respect to foods, drugs, home appliances, camping and installation of heating systems.

(ii) In the law of Luxemburg, as in Belgian law, the principle of normalité des prix is known.

(iii) The procedure of price rises requires 60 days' notification to the Office. Wholesalers are subject to the procedure, too. New goods and services are exempted, with the exception of new drugs pursuant to the Act of August 4, 1973. The Office has direct administrative powers to allow or reject the price rise. If it does not give its explicit approval in two months, tacit approval will be presumed by law.

The Office is advised by a consultative Commission des prix whose members come from consumer organisations, industry and trade.

Violations of the law and price regulations are subject to penal sanctions. Prosecution may be initiated by the Office and by local authorities.

17 3 Governmental intervention as an exception

In the **Federal Republic of Germany**, there has been no direct governmental control over prices in general. German law only provides for governmental intervention in the prices of transport, insurance and some types of energy.

An Act of 1948, as amended in 1952, provides for the legal framework of governmental control of all prices. The constitutionality of the Act has been challenged, but in 1958 the Federal Constitutional Court held that the Act may still be employed for governmental measures to fight inflation and to guarantee stability of prices. The German government does not use the powers vested in it by the Act.

The Act of 1967 on Stability and Economic Growth (Gesetz über Stabilität und Wachstum) defines the basic tasks of the government's economic policy. The government has to see to the stability of prices, a high employment rate, economic growth and a balance of the terms of trade. The Act does not give the government any powers of direct intervention. Art. 3 of the Act establishes what is known as concerted action (Konzertierte Aktion), which is a body of representatives of the government, industry and the trade unions (including one consumer representative) discussing voluntary guidelines on wages and prices. These guidelines do not have any legal importance. In recent years, concerted action has ceased to work because the trade unions no longer took part in the meetings.

III INDIRECT ACTION THROUGH ANTITRUST LAW

18 1 Antitrust law as a principal means of action on prices

As we mentioned before, in the **Federal Republic of Germany** general governmental intervention in the price factor is not known. Government agencies rely almost completely upon antitrust law as a basic instrument of economic policy and consumer action. Usually, antitrust law will only indirectly influence the price factor by guaranteeing a system of effective competition. It is a debatable question under German law to what extent workable competition can be ensured in a system of market economy in which there are high concentration

ratios and in which monopolies and oligopolies exist in many markets of relevance to the consumer (for instance cars, detergents, margarine).

The basis of German antitrust law is the Act Prohibiting Restraints of Competition of 1957, as amended in 1973; a bill amending the Act is currently under discussion in Parliament. The Act provides for the following means of effectuating competition in the field of prices:

(i) The Act strictly forbids competing enterprises to fix prices by agreement or concerted action. The Act will not allow restraints of competition on the grounds of reasonableness or public policy unless the Minister of Economics explicitly authorises such an agreement or unless the Act allows such agreement after prior registration with the Cartel Office. The Act of 1973 forbids also coordinated action in restraint of trade (abgestimmte Verhaltensweisen). The scope of the German Act resembles very much Art. 85 of the Treaty of Rome. Court practice has outlawed what are known as price information systems and joint selling organisations trying to maintain a uniform and high price level on the market. There is a grave loophole in the law: under the Act competing enterprises are not forbidden to act in a parallel way unless they have explicitly agreed to do so. Parallelism of price increases will be found in many markets important to the consumer, especially car sales.

(ii) Under the Act, resale price maintenance has been forbidden since 1974. The only exception is books which may be sold at a uniform price level in bookstores. The same is true for tobacco products pursuant to tax regulations.

(iii) The law on recommended prices has been regulated by the Amendment of 1973. A recommended price must be clearly indicated as such. Recommended prices are not allowed if they are apt to deceive the consumer as to the true market price. Recommended prices may be forbidden if they keep the price level artifically high. There has been discussion in the Federal Republic as to whether or not to maintain recommended prices. The government does not apparently intend to prohibit recommended prices in general. They may have to be registered if the bill of 1978 becomes law.

(iv) If a monopoly or any enterprise holding a market-dominating position (überragende Marktstellung) abuses its market power, the German Cartel Office (Bundeskartellamt) may intervene and prohibit such abuse. The Kartellamt has taken action in recent years against increases in gasoline prices and excessive price levels regarding certain medical products, especially tranquillizers (Valium). Since the Act does not define explicitly what it means by abuse, there has been much discussion among legal writers and courts as to the interpretation of that section of the Act. There have been several decisions by the Federal High Court to the effect that price controls may be exercised against monopolies, but that they should also remain the last resort. The courts will accept abuse of market power only if the challenged enterprise asks much higher prices than its competitors in similar markets. Price control through direct intervention by the Bundeskartellamt has not proved to be very effective.

In German antitrust law, sanctions of a penal, administrative and civil nature are known. The law is very strict as regards price fixing and resale price maintenance: any such contract is void, may result in a heavy fine and may be forbidden by administrative action. Abuses of recommended prices or market power only give rise to administrative action. There is no collective action by

consumer organisations nor any individual remedy to which the consumer may resort, but it may be introduced by way of reform.

19 **2 Mixed systems**

As we noted above, several countries in the EC employ both direct and indirect action on prices. Indirect action is exercised through antitrust law, which will contain provisions similar to those contained in the law of the Federal Republic of Germany, but not as strict as regards their scope. We would like to mention the following legislation:

— In **France**, Art. 419 of the Penal Code of 1810 and Arts. 34 – 40, 50 pp of Regulation 1483 of July 30, 1945 provide for the legal basis of fighting restraints of trade, especially actions on prices.

(i) Art. 419 of the Penal Code forbids 'artificial price changes' (altérations artificielles des prix) and applies to all movables and services. It distinguishes between manipulations taking place outside the market or occurring in a specific market. Price fixing agreements are regarded as sanctionable under Art. 419 of the Penal Code.

(ii) Arts. 50 pp of Regulation 1483 forbid all contracts in restraint of trade, especially contracts agreeing on a minimum price to be demanded for a specific commodity. The law allows exceptions if the contract or agreement has positive effects on the market, for instance if it promotes technical progress. The law also forbids activities on the part of firms holding a dominant position and using their market power in contradiction to the normal functioning of the market.

(iii) Arts. 37 – 40 prohibit resale price maintenance. The law allows exceptions by governmental decree. Such exceptions are only granted to specific firms for certain products. So far, resale price maintenance has been allowed only to launch new products in the market. The law also allows governmental action on recommended prices. Usually, recommended prices are legal, but may be forbidden by governmental order. This happened in the case of car tyres, sporting outfit and similar products.

Under the French law of restrictive trade practices only penal sanctions are known. Consumer organisations may take part in criminal proceedings against the enterprise which is charged with price fixing. Since 1977, a Commission for Competition has been in existence in France. It may only issue recommendations, but not take direct action against restraints of trade.

— In the **United Kingdom**, the Fair Trading Act of 1973 has brought about a certain consolidation of British antitrust law and has vested the powers of investigation and action against restrictive trade practices in the Director General of Fair Trading. The Director has to ensure the registration of agreements in restraint of trade, may initiate investigations and may, with the approval of the Secretary of State for Trade (formerly Prices and Consumer Protection), bring proceedings before the Restrictive Trade Practices Court. He has no powers as such over monopolies and mergers, which are controlled by a special Monopolies and Mergers Commission, but he can initiate inquiries into certain alleged monopoly situations.

The Restrictive Trade Practices Act of 1956, as amended in 1977, and the Resale Prices Act of 1964, as amended in 1976, contain the British law on

agreements in restraint of trade. The basic principles of these Acts are:

(i) Restrictive trade practices must be registered. Pursuant to the Act, restrictive trade practices are, for instance, price fixing agreements and information agreements on prices of goods or services. The Act does not cover conscious parallelism or concerted action.

(ii) The registration procedure should enable the Restrictive Trade Practices Court to ascertain whether the agreement is contrary to the public interest. There is a presumption that such an agreement will be against the public interest unless one of the eight 'gateways' can be used. There has been much litigation concerning the gateways left by the Act. It is now established practice in the UK that agreements on maximum prices are always against the public interest even if they help to rescue a certain industry. On the other hand, agreements on minimum prices may not be deemed contrary to the public interest. Agreements to maintain publishers' retail prices have been said to be in accordance with the public interest. If an agreement is not registered, it is not enforceable. It is not a criminal offence not to register such an agreement. Many unregistered agreements have been discovered in the UK.

(iii) Resale price maintenance has been unenforceable against third parties since the Act of 1964. There are some exceptions to that principle which are construed narrowly in British law.

(iv) Recommended prices are permitted under British law, but may be declared void if they are used to maintain resale prices or to create confusion among consumers. British lawyers and economists are discussing the question of whether recommended prices should be restricted further or forbidden altogether.

(v) Monopolies are regulated under Sections 6 – 10 of the Fair Trading Act. Monopolies are *not* per se regarded as harmful. If they work against the public interest, they may be subject to investigation and legal action by the Director General of Fair Trading and the Secretary of State for Trade. In case of abuse, the Secretary can make an order against the monopoly if such order has been approved by Parliament. A breach of the order is not regarded as a criminal offence.

— In **Ireland**, the Restrictive Practices Act of 1972 contains the legal principles of restraints of trade. Agreements in restraint of trade are subject to control by the Restrictive Practices Commission. They are submitted to a public interest test. Upon the Commission's recommendation, the Minister for Industry may issue an order prohibiting certain restrictive practices. The order must be approved by Parliament. A breach of the order is regarded as a criminal offence.

— In **Denmark**, the purpose of the Danish Monopolies and Restrictive Practices Act of 1955 is to use public control in preventing unreasonable prices and business conditions and in securing the best possible conditions for freedom of trade. The Act contains rules on notification to and registration with the Monopolies Control Authority, which in case of restraint of competition resulting, for instance, in unreasonable prices shall terminate such conduct by negotiations or — if negotiations fail — by order. Fixed resale prices cannot be enforced unless approved by the Monopolies Control Authority. The use of recommended resale prices is allowed. Pursuant to the Act on Prices and Profits

of 1974 (Art. 10), recommended resale prices and changes therein shall be notified to the Monopolies Control Authority.

— In **Luxemburg**, price fixing and concerted action on the price is forbidden by the Act of January 17, 1970 concerning Restrictive Trade Practices (Loi concernant les pratiques commerciales restrictives). They may be allowed if the public interest demands it. Positions of economic power may not be abused. Resale price maintenance is forbidden by the Regulation of December 9, 1965. But exceptions are made in the case of books (Order of December 9, 1965) and tobacco (September 16, 1975).

20 3 Countries where antitrust legislation has little or no importance

The more the government takes direct action against prices, the less will be the importance of antitrust law. The government will even favour certain restraints of trade in order to make its direct action on prices effective. We would like to mention the following legislation which employs such restrictive approach to antitrust law:

— **Belgium** does not have a specific antitrust law. A bill is being debated in Parliament. The Act of May 27, 1960 prohibits abuses of economic power to the detriment of the public interest. This Act is very seldom applied. Price fixing, resale price maintenance and other restraints of trade are not subject to regulation. Belgian law tries to limit these agreements to the contracting parties and will not allow enforcement against third parties. Any competitor or retailer not bound by the agreement may sell below the fixed price. This is not regarded as an unfair trade practice. On the other hand, the law will not prohibit boycotts or discrimination against third parties.

— The **Netherlands** are somewhat more concerned about restrictive trade practices. The Act of June 26, 1956, Wet Economische Mededinging, established a regulatory system under Dutch law. Restrictive agreements must be registered. Non-registration is a criminal offence. The register is not public. The Minister of Economic Affairs may declare the agreement non-binding. He may also void specific clauses in the agreement; for instance, concerning resale price maintenance. Positions of economic power may be controlled by the Minister in cases of abuse. The Dutch Act offers *no* consumer protection against restraints of trade. In 1977 a reform bill (Lubbers reform bill) was submitted to Parliament. It will forbid price-fixing agreements. There is room for many exemptions by governmental order.

— In **Italy**, there is no specific act against restrictive trade practices. On the other hand, there are systems of collective bargaining in determining prices of milk products, which were established under the Act of July 8, 1975.

IV PRICE INFORMATION

21 1 Price marking

The principle of marking the price of goods, especially foodstuffs, in stores and other outlets is quite generally accepted in the legislation of all EC

countries. There is no doubt that the prices should mention value added tax (VAT). Price displays concerning services, on the other hand, are not regulated in a uniform way in the EC countries. We would like to mention the following legislation:

— In **France**, an Order of September 16, 1971 requires price marking and price display regarding most goods and services. The indications have to be clear and obvious. Specific regulations apply to car repairs (circulaire of January 14, 1972) and home repairs (Order of December 6, 1968). It is a principle of French law that any supplier of services should submit an estimate so that the consumer will know the costs.

— In **Belgium**, there have been acts about price marking since 1923, which were replaced by the Act on Commercial Practices of 1971 (see Chapter 3, No. 42). Art. 2 of the Act of 1971 provides for price marking of most consumer goods and services. The marking must be obvious and clear. VAT must be mentioned. There may be specific orders exempting certain goods, such as luxury goods, from the scope of the Act.

— In the **Federal Republic of Germany**, the Price Marking Order of May 10, 1973 provides for price indications of goods and most services. In contrast to former regulations, the Act also applies to services, but does not make it a statutory obligation to submit an estimate.

— In the **United Kingdom**, Section 16 of the Price Commission Act of 1976 gave broad regulatory powers to the Secretary of State for Prices and Consumer Protection. Pursuant to the Act, a Price Marking (Food) Order was issued in 1978. There are special orders for petrol, hotel accommodation among other matters. All price marks under such orders must be clear, easily legible and show whether value added tax is included. Provisions on price marking may also be included in codes of conduct monitored by the Director General of Fair Trading (see Chapter 3, No. 59).

— In the **Netherlands**, there exists only a Decree of 1963 on price marking in shop windows. An amendment of the Prijzenwet will enable the Queen-in-Council to lay down rules of price marking for all goods and services. Voluntary systems of price marking have been adopted in the Netherlands and so far have functioned quite well.

— In **Italy**, there is no law on price marking in general. Nevertheless, Decree No. 138 of January 11, 1923 demands price marking of foodstuffs. A further Decree of January 19, 1939 (No. 194) extended the price marking obligation to clearance sales. Moreover, pursuant to Act No. 426 of June 11, 1971, the price of goods for large and general consumption displayed either in shop windows, at the entrance of a shop or on shelves must be marked. Services are not included in said regulation with the exception of advertising for tourism where prices must be indicated pursuant to Decree No. 2049 of October 29, 1955.

— In **Denmark**, the law is now codified in the Price Marking and Display Act of 1977. Art. 1 lays down the principle that all goods offered for sale should be clearly marked with prices including VAT. Under Art. 4, services are subject to price marking if the Monopoly Control Authority has issued specific regulations.

— In **Luxemburg**, price marking is laid down in a Regulation of January 6, 1972. Price marking of goods has to be in writing, and has to be clear and

obvious. Services have to be indicated on a unit basis, for instance dry cleaning, laundry. There are special regulations regarding some goods and services, such as meat, jewellery and hotel accommodation.

22 **2 Unit pricing**

While the system of price marking, at least for goods, is quite generally accepted or at least practiced in all EC countries, the system of unit pricing is still in process of evolution and recognition by law. If there are regulations on unit pricing at all, the legislator usually exempts standardised packings from the regulation. The legislators seem to be agreed that the consumer does not need the help of unit pricing if he buys goods in standardised packings. There is no proof so far that standardisation of packings will meet the requirements of consumer protection better than unit pricing.

The following countries have established systems of unit pricing:

— In **France**, the Regulations of September 16, 1971 and September 20, 1973 provide for unit pricing, especially regarding prepacked or frozen meat, fish, fruit, vegetables and rice.

— In **Belgium**, an Order of July 10, 1972 enables regulations on unit pricing of prepacked goods. The order covers detergents, cosmetics and all sorts of foodstuffs. So far, the order has only been applied to some foodstuffs, such as meat and rice.

— In the **Federal Republic of Germany**, an amendment to the Eichgesetz of 1976 provides for the introduction of unit pricing. The Act contains many exemptions, especially concerning standardised packings. It is practiced only to some extent in the case of prepacked meat and poultry.

— In **Denmark**, Art. 7 §2 of the Price Marking and Display Act of 1977 empowers the Monopolies Control Authority to establish a system of unit pricing regarding commodity groups which are important in everyday consumption and which may be presumed to be of particular importance to the consumer as price guidance.

— In the **United Kingdom**, the Price Marking (Food) Order of 1978 demands that in supermarkets unit prices be indicated in the case of meat, cheese and some poultry.

— In the **Netherlands**, the Bill to amend the Prijzenwet will allow unit pricing.

— In **Luxemburg**, unit pricing is required by government order for meat, poultry, fruit and vegetables.

— To our knowledge, a system of unit pricing is not known in the legislation of other EC countries.

V THE CONTROL OF CONTRACT CLAUSES ABOUT PRICE INCREASES

23 Under the doctrine of freedom of contract, the price of a commodity or the supply of a service is in theory freely negotiated between the parties. In reality, the price agreed upon will either be the market price or the price determined by government intervention. Contract law simply follows the patterns of

direct or indirect intervention by the government and economy and only plays a role in determining the validity of the contract. We mentioned that problem in Sections II and III of this chapter.

Contract law may become important as a means of indirect price control and consumer protection when long-term transactions involving the supply of goods or services are concerned. The businessman or trader will usually try to provide for a unilateral increase in the agreed price if the value of the money has depreciated by inflation or if his own costs have increased due to economic or political circumstances.

In contract law, basically two different means are applied to adapt prices to changing circumstances. One device is called the *index clause*: the price of a certain commodity or service will change automatically in line with inflation. Other clauses provide for a *unilateral right to raise the price* without changing the contents of the contract and without enabling the consumer to oppose such increase.

Index clauses are a problem of general economic policy and forbidden under the legislation of many EC countries; for instance, under the Belgian Act of March 30, 1976, a French Regulation of December 30, 1958, and the German Act on Currency of 1948. We will not go into details here.

Much more common and dangerous to the consumer are clauses of the second type. National legislation varies widely. We would like to mention the following:

— The above-mentioned **Belgian** Act provides for a very detailed regulation of price increases in contract clauses. Price increases are only admitted as a result of increases of well specified and approved costs. Price increases may only be asked for 80% of the purchase price while the other 20% may not be subject to any increase. Clauses that are contrary to law are regarded as void, with the contract remaining in force.

— The new Act of the **Federal Republic of Germany** on Standard Form Contracts (Chapter 8, No. 178) has included a provision in Art. 11 §1 to the effect that price increases are not allowed if delivery of the goods is to take place four months after the formation of the contract. This provision of the Act has certainly little practical effect since it does not apply to all cases in which no specific price or date of delivery has been fixed. On the other hand, the Act allows clauses adapting the price to changing circumstances.

— In **France**, the Act No. 23 of January 10, 1978 (Chapter 8, No. 191) allows governmental intervention in price clauses which are considered to be 'abusives'.

— In the **Netherlands**, the Bill on Consumer Sales (Chapter 6, No. 136) will allow such clauses, but gives the consumer a right to withdraw from the contract. The contract may not stipulate otherwise unless delivery takes place three months after conclusion of the contract.

— With regard to **Denmark**, it should be noted that Article 36 of the Contracts Act (Chapter 8, No. 178) as well as the Marketing Practices Act (Chapter 3, No. 42) may be used as a weapon against such clauses. A price increase may, if unreasonable, be set aside (Article 36 of the Contracts Act). And the use of a clause providing for an unlimited unilateral right to raise the price will most certainly be prohibited (Marketing Practices Act). The impact of clauses dealt with is, of course, greatest on contracts binding the consumer for a longer

period of time, such as may be the case in many service contracts. A way to limit the impact of such clauses is to give the consumer the right to withdraw from such a contract after a certain period of time subject to a certain notice. Pursuant to the Danish Act of 1978 on Certain Consumer Contracts, the consumer is not bound for more than one year. The Act is mandatory.

VI CRITICAL EVALUATION

24 It is an observation of our study that the EC countries take very different steps and use very different means to control inflation and safeguard the consumer's interests in the stability of prices. The policy chosen by a country is subject to its discretion and the political complexion of its government. We cannot decide here which system works best in the interest of the consumer, but it should be noted that mixed systems enjoy the greatest popularity, and that existing law strives for consumer protection to a very limited extent only.

Approximation and reform should be attempted in the field of consumer information and control of contract clauses on price increases:

— *Price marking acts* should be applied to *services* if that has not yet been effectuated by the national legislator.

— Due to the incorporeal nature of services, the appropriate way of price marking should be reconsidered. In any case, the consumer should be entitled to an *estimate* so that he knows how much a certain service, especially car repairs, will cost.

— It is very doubtful whether the system of *unit pricing* of certain goods as applied in some EC countries provides help and guidance to the consumer. Since many prepacked goods are exempted from unit pricing, the practical effect is very small. It might be better to extend price marking to uniform weights and not only to the article sold. This practice is already followed by many businessmen and traders and could be subject either to a legal rule or to a code of conduct.

— No system of *unit pricing of services* has been developed yet. This seems to be most desirable in the interest of the consumer. It is of no help to the consumer if he knows the price of one hour's work; rather, he should be able to compare typical services. If services can be standardised, this might be the beginning of a system of unit pricing (see Chapter 6, No. 124).

— The problem of *contract clauses* on price increases calls for greater legislative attention. It is unrealistic to forbid such clauses, but the consumer should be aware of his obligations in future. He has to be informed about the comparative basis upon which the price of a certain commodity or service is to be increased. He should not be subject to a businessman's or a trader's unilateral action. He should enjoy a right of withdrawal from the contract if he considers the price increase to be unreasonable.

CHAPTER 2

Consumer Information

I GENERAL REMARKS

25 The improvement of consumer information on all aspects of the process of consumption is one of the basic and uncontested aims of consumer policy all over the world (USA, Canada, Sweden, Japan) and especially in the EC countries. The necessity of fostering consumer information has been expressly stressed in several documents of the EC Commission, especially in Art. 34 of the First Programme of Consumer Policy of 1975 and in further documents. The promotion of consumer information is regarded as a primary goal of all EC governments that have instituted some sort of consumer policy. It may even form part of educational policy, as for instance in Denmark (Folkeskole Act 1975/1977, Arts. 32–35).

In this comparative study, we will evaluate only the role law, especially *modern consumer legislation*, plays in the sphere of consumer information. A great deal of consumer information does not come under the law at all, for instance through education in Kindergarten and school (with the exception of Denmark), through private efforts. Other kinds of information, such as advertising, are indirectly subject to legislation and will have to be studied separately (Chapter 3). There is information which is monitored by consumer organisations — part of whose main activity consists in such monitoring — and reaches law only where it is contested as being detrimental to the interest of some businessmen. We will study that aspect under Section IV of this chapter. State agencies may spread information in various ways; for instance, by reporting about their activities in the media, by handing out pamphlets, and by recommending market behaviour. It is a question of statutory regulation and of the by-laws of these organisations how far they are entitled to engage in such activity. We will mention these issues in passing.

From the point of view of our study, two types of information have become relevant to law. The first might be called legislation and state activity on labelling (see Section II), the second initiative encourages collective information systems established by business, consumer representatives and state agencies (see Section III).

In our comparative survey, we shall study first legislation on labelling (excluding price indications, see Chapter 1, No. 21). We shall then turn to collective information systems and finally make some remarks on the legal basis and limits of information given by consumer organisations, such as comparative testing.

II LEGISLATION ON LABELLING AND SIMILAR SUBJECTS

26 1 The existence of framework legislation

There has been in the past and will be in future considerable national legislation on labelling. By labelling, we mean a legal system aimed at providing objective product or service information either attached to the product itself or accompanying the service by means of a written statement. The duty to put a label on a commodity or to provide a written statement in conjunction with a service offered usually lies with the producer, the tradesman or the offerer of the service (insurance company, travel agency, etc.).

It is quite generally accepted in the EC countries that, due to the variety of products and services, the technical construction or chemical composition of goods, the different performance of them and the consistent flow of new items, the legislator can work out *framework legislation* only, which has to be put into detailed rules by administrative regulation. We should note that there are *two different types of framework legislation*:

(i) Some countries have a system in which the authorisation to issue regulative orders concerning consumer information is stipulated in specific market acts. We would like to mention the following examples:

— The **Belgian** Act on Commercial Practices of July 14, 1971 (Loi sur les pratiques de commerce) in Art. 12 provides for a regulative power of the King 'in order to assure the fairness (loyauté) of commercial practice'. These orders may refer to composition, denomination of origin and quality, labels, marks, signs, and in general to information. As may be gathered from the wording of the Act, it is not so much directed at consumer information, but at assuring good market conduct. The Belgian draft reform of 1977, modifying the Act of 1971 in the interest of the consumer, aims at extending the King's regulative powers specifically to the effect that the consumer is provided with information.

— Art. 10 of the **Danish** Act on Marketing Practices of June 14, 1974 (Lov om markedsføring) gives a similar power to the Danish Minister of Commerce. Prior to issuing any regulation, he has to consult the relevant business and consumer organisations. The scope of labelling regulations relates firstly to the aspect of quantity, to certificates of origin, and secondly, as provided for in Section 2, Subsection 2 of Art. 10, to the contents and composition of goods, their durability and directions for their use as well as other properties. Art. 3 of the Marketing Practices Act should also be mentioned as under a general clause it requires business to provide the consumer with the information he needs. The Consumer Ombudsman supervises the fulfilment of this obligation.

— In the **United Kingdom**, the Trade Descriptions Act of 1968, as amended in 1972, empowers the Department of Trade to require that certain types of goods be marked or accompanied by information or instructions to the consumer. On a more informal basis, the Director General of Fair Trading, under Section 124 of the Fair Trading Act of 1973, is under a duty to encourage trade associations to prepare for and disseminate to their members codes of practice to guide, safeguard and promote and interests of the consumers in the UK. These codes should provide for information necessary to consumers.

— The **Irish** Consumer Information Act of 1978 adopts regulations similar

to those we have found in British law. The Minister of Industry, Commerce and Energy is enabled under Section 10 to make marking orders requiring traders to give prescribed information or instructions relating to goods on or with such goods. The Director of Consumer Affairs may encourage and promote the adoption of codes of standards including consumer information.

— The **French** Loi sur les fraudes et falsifications en matière de produits et de services of August 1, 1905 contains regulative powers to the competent minister concerning labelling and 'étiquetage' of products and services coming under its scope of application. Under the Act No. 78/23 of January 10, 1978, Loi sur la protection et l'information des consommateurs de produits et de services, these powers have been extended to the regulation of information to the consumer, especially on the safety of products (see Chapter 5, No. 98) and to the institution of certificates of quality (No. 33).

In all these countries, however, specific regulative powers concerning labelling are included in their special food and drug acts (Chapter 5, No. 83 ff).

(ii) Other EC countries, such as the Federal Republic of Germany, the Netherlands, Luxemburg and Italy do not have such broad regulative powers on the part of administrative agencies, but restrict them by law to specially defined products.

— The **German** Act on Foodstuffs and Consumer Goods of August 15, 1974 (Lebensmittel- und Bedarfsgegenständegesetz) (see Chapter 5, No. 83 ff) gives broad regulative powers to the government in the field of foods, tobacco, cosmetics and other consumer goods, such as detergents, etc. It does not, however, allow regulations governing consumer information about goods other than those specifically enumerated by the Act. Hence, there are other acts, for instance governing drugs (Arzneimittelgesetz of August 24, 1976). There is no administrative power to regulate consumer information on technical and household appliances. Here, only the principles of product liability are applied (Chapter 5, No. 102 ff).

— In the **Netherlands**, the basic act in this conjunction is the Consumer Goods Act (Warenwet) of December 28, 1935. Art. 14 gives the King or Queen-in-Council regulative powers relating to the description of goods. Art. 14a concerns the form of description. The Act covers not only foodstuffs and beverages but also other goods that are used in the preparation of foodstuffs. By order of the Queen-in-Council, the scope of application of the Act may be extended to other consumer goods. This has happened in the case of cosmetics, toys, etc. The draft reform of 1977 will introduce a new Art. 14d into the Act. It will widen the possibilities of promoting consumer information on goods, e.g. on the nature, composition, design, quality, properties, durability and instructions for use.

— In **Italy**, there is special legislation giving regulative powers to administrative agencies under the Food Act of 1962 and other special legislation.

— In **Luxemburg**, a Regulation of November 19, 1974 about foodstuffs is applied.

In the final analysis, the various types of framework legislation do not differ from each other that much. It is a question of technical importance how the framework legislation is shaped to enable the establishment of consumer information systems, especially under the impact of EC Directives on specific

consumer information in the field of foods, textiles, cosmetics, drugs and other consumer goods.

Concluding these general remarks, we should note that only *two European countries* have such framework legislation in the field of services, namely Denmark and France. As will be shown later, the so-called labelling of services by providing a prospectus, etc., usually derives from specific legislative intervention or from the principles of the law of standard contract terms.

27 2 Weights, measures, packaging

Due to the development of the Common Market, especially with respect to trade in agricultural products and foodstuffs, there has been considerable reform legislation in the area of weights, measures and description of contents and origin of prepacked goods in all EC countries. It is the aim of such legislation or regulations to establish uniform indications of weight, length, quality and description, to standardise wrappings, tin cans and bottles for prepacked goods, and to assure the truthfulness of the descriptions of contents. The acts apply mostly to foodstuffs, but also to cosmetics, detergents and other products that are sold by weight or other quantity unit in prepacked form. Sometimes it is also the legislator's aim to prevent the marketing of so-called slack-fill packings (Mogelpackungen).

We cannot go into the details of such legislation, but will mention the basic acts and regulations:

— Regarding **France**, we would like to mention a Decree of October 12, 1972, concerning prepacked foods.

— Regarding **Belgium**, Sections 5 – 11 of the Act of 1971 are the basis of legislative regulation; they are followed by specific administrative orders.

— Regarding **Denmark**, we have to mention Arts. 7 and 8 of the Price Marking and Display Act of 1978.

— The relevant **British** acts were promulgated in 1963 and 1976, the latter gradually introducing metric units, thus replacing the old imperial units. The Trade Descriptions Act of 1968/72 (Chapter 3, No. 42) is also applicable to prepacked goods.

— Regarding **Ireland**, the Weights and Measures Acts of 1878/1936 apply. The 1970 Merchandise Marks Act enables the Minister of Industry and Commerce to make orders as to the quantity, description and packing of goods. Important rules were introduced by the Merchandise Marks (Prepacked Goods) Orders of 1973.

— Regarding **Italy**, the Act of April 30, 1962 on Foodstuffs and Beverages contains also regulations on weights, measures and descriptions of prepacked foodstuffs.

— The **Dutch** Eykwet of 1937/1939 contains the basic regulations governing measures. Specific regulations based on the Warenwet concern prepacked goods.

— In the **Federal Republic of Germany**, the Eichgesetz of January 20, 1976 amended the old Act of 1969. It contains the basic rules on information which has to be given to the consumer concerning weights, measures, etc. It also prohibits slack-fill packings. Besides this general Act, there are regulations

governing prepacked goods (December 20, 1976) and food (Lebensmittelkennzeichnungsverordnung) of January 25, 1972.

— In **Luxemburg**, a Regulation of November 12, 1975 demands certain indications on prepacked goods.

It must be acknowledged that owing to the European Commission's activity the approximation of legislation in most EC countries has greatly advanced and takes into account the consumer's interests. One specific problem remaining is that of describing prepacked goods in the different languages within the EC. When goods are exported or imported, the labels must be in the language of the country where the product is sold. This may produce artificial barriers to trade which so far have not yet been overcome by the creation of general symbols which could be used in all EC countries.

28 **3 Regulations on labelling of components and additives of products**

There has been considerable regulation regarding disclosure of the contents, components, additives, etc., of specific products, especially foods insofar as they are allowed (Chapter 5, No. 83). Most regulations of this kind have been sponsored by the EC and have been translated into national law by the above-mentioned framework legislation. The main points of that activity so far have related to specific foods, textiles and cosmetics, leaving out all those products which are not enumerated in the relevant regulations, such as bread, sausages and detergents. We will not go into a detailed analysis of these regulations and their loopholes.

29 **4 Regulations on information about quality and safety**

Much more interesting from the consumer's point of view are regulations concerning consumer information about safety, quality, product performance, durability, etc., of a certain commodity. Obviously, this regulation has to be seen in connection with product standards and quality as studied below (see Chapters 5, No. 98; Chapter 6, No. 123).

So far, the legislator seems to be very hesitant to impose duties of information on safety, quality, etc., on the producer or trader. On a European basis, there are only some very detailed regulations concerning the classification of eggs, fruit and vegetables, the indication of durability of milk products, etc. On the other hand, there are various initiatives trying to create voluntary or even government-monitored systems of safety and quality labels as well as information on product performance. We will study that aspect in Section III of this chapter.

30 **5 Services**

Legislation and regulations on labelling in the past have almost exclusively been concentrated on goods, especially on drugs, foodstuffs, cosmetics and textiles. It seems to be much more difficult to develop by law information systems relating to services (outside the regulation of advertising which will be studied in Chapter 3). A service, such as an insurance contract, the repair of a

car or household appliance or participation in a correspondence course, is something immaterial which cannot be accompanied directly by a label. Hence, law may intervene by demanding that a prospectus be written about the service offered or that the contract terms be disclosed in such a way as to provide the consumer with sufficient information. These approaches have been taken by law only in very specific areas. Most far-reaching regarding this aspect are the acts of Denmark and France. We will not study such obligations in contracts concerning the construction of houses or the purchase of investment fund units. Intervention has concentrated on the following areas:

(i) There is legislation concerning consumer information in insurance contracts, especially on the substance of the insurance policy (commencement and termination of insurance, premiums to be paid, coverage, consequences of default).

(ii) There is specific legislation on correspondence courses and on consumer credit transactions which will be studied in Chapters 6 and 7, Nos. 148, 157 and 163.

(iii) There is little or no legislation on the information of the consumer in many other contracts which are of importance, as for instance travel contracts, home removal, car repairs and fixing of household appliances. However, voluntary information systems or the principles of standard contract terms may entitle the consumer to some basic information.

31 6 Truthfulness of disclosure

In completion of this section, it should be mentioned that any label or prospectus has to comply with the standard of truthfulness as it has been developed in the law of advertising (Chapter 3, No. 41). Usually, the standard of truthfulness does not require a producer, trader or offerer of services to furnish specific information to the consumer. In certain circumstances, however, he may act fraudulently by withholding on the label certain basic information to the consumer. This principle of legislation has been developed especially regarding labels of origin, but does not really attempt to provide consumer protection but protection of those rightfully using labels of origin. We will not go into details here, since this is a question of unfair competition law or trade description law.

III COLLECTIVE INFORMATION SYSTEMS

32 1 State participation and consumer representation in working out collective information systems

As we have seen, it is a generally adopted principle of legislation in all EC countries that a businessman, within the scope of the truthfulness doctrine, gives the consumer the information he thinks necessary for the promotion of his business. Within the limits of restrictive trade practices law, businessmen may join to form collective information systems and thereby try to promote their own objectives of information to the consumer; for instance, on product performance and quality, reliability of a certain service, origin of products. Such

information may be given by means of distinctive labels and signs on the product.

In modern consumer policy, a trend can be observed in most EC countries towards the development of these systems by state authorities and agencies into mechanisms providing to the consumer reliable, objective and usable information on various aspects. Such informal procedure has the great advantage of enjoying the support of businessmen, since they will voluntarily join such systems, thereby trying to promote their marketing activities. These information systems are more flexible in adjusting to changes in markets and products. They may also be much more helpful to the consumer than the above-mentioned legislation on labelling, since they can use symbols for the consumer to grasp relevant information in a uniform, simple and quick way.

Collective information systems may be even more sophisticated and may take account of the consumer's interest even better if consumer organisations are represented in the relevant bodies competent to monitor the system. Consumer representation may serve as a means to harmonise and compromise the marketing interests of business and the consumer's need for information (see No. 12).

33 **2 Information systems monitored by state agencies**

If we are informed correctly, only the following countries have a legal basis of state participation in the development of collective information systems.

— In **Great Britain**, Section 124 enables the Director General of Fair Trading (see No. 8) to promote codes of conduct and practice with the relevant trade and producers' associations. This power, which is more an indirect one since the Director General cannot force traders into adopting such a code, has been used in putting through 12 codes of practice in various branches. It must be noticed, however, that the basic aim of these codes is not so much to give the consumer certain information but to improve his legal position vis-à-vis the tradesman, for instance concerning guarantees, after-sales service, damages and claim settlement. As far as that goes, the code could be said to be part of his contractual rights. These elements will be studied later (Chapter 6, No. 146).

— The **Danish** Consumer Ombudsman, established by the Market Practices Act of 1974 (see No. 8), has been vested with wide powers in the field of marketing practices. He is not so much a law enforcement officer but, through an informal procedure, has to try to establish guidelines which may increase the amount of information given to the consumer.

— The **Irish** Director of Consumer Affairs (see No. 8) under Section 9 of the Consumer Information Act may encourage and promote the establishment and adoption of codes of standards in conduct and information.

— In **France**, there has been concern for state-monitored information systems since the creation of the Institut national de consommation (Introduction, No. 5). The reform legislation of 1978 has promoted information systems in the field of certification marks, quality labels (No. 35), product standards (Chapter 5, No. 98), consumer credit (Chapter 7, No. 163) and unfair contract terms (Chapter 8, No. 191). However, the practice of negotiating codes of conduct is not known in France as it is in the United Kingdom, Denmark and Ireland.

Legislation in all other European countries does not include express or implied powers of that kind. Political agencies responsible for consumer policy may nevertheless try to persuade business to adopt voluntary codes of information. That has been the case in the **Federal Republic of Germany**, the **Netherlands** and **Belgium**.

34 3 Consumer representation

No EC legislation provides for consumer representation in establishing collective information systems. There are, however, voluntary information systems which in their by-laws guarantee consumer representation, namely in France and Denmark and to some extent also in the Federal Republic of Germany.

— Regarding **France**, we would like to mention the AFEI (Association française pour l'étiquetage d'information) which derives from a concerted action between businessmen and consumer representatives (Institut national de la consommation). The AFEI is entitled to grant quality labels describing product performance to those producers who subscribe to its by-laws and conform to its standards.

— Regarding **Denmark**, we would like to mention the system of the so-called VDN-Varefacta which is established by the joint efforts of industry and consumer councils. The system of Varefacta giving information about product performance, quality, etc., has been developed for certain foods, toys, household appliances and for sporting outfit.

— In the **Federal Republic of Germany**, safety and quality labels are granted by different organisations of business and trade, such as DIN, RAL, etc. Consumer representation is still in its infancy. It does not occur in the system of RAL labelling, but has begun within the system of industrial standards (Chapter 5, No. 96).

35 4 Collective and certification marks, quality and safety labels

An interesting new development in the sphere of consumer information and also marketing is taking place which manifests itself in the grant of so-called collective marks or, in Great Britain and Ireland, certification marks. They are partly governed by the legislation on *trade marks* which does not usually serve the consumer's interests and henceforth is not studied here. To some extent they have been set up by specific governmental action and will be protected against confusion under trade mark law. Trade mark legislation becomes relevant to consumer information in so far as it provides for or protects a system of safety or quality labels in line with collective or certification marks.

The legislative situation as to certification and collective marks in the EC countries is as follows:

— In the **United Kingdom**, most product standards are devised by the British Standards Institution. Some of them are adopted for legal purposes, e.g. in regulations made under the Consumer Protection and Safety Acts (Chapter 5, No. 98). Any business fulfilling the conditions of the mark is entitled to its use. There will be regular quality controls. The user who fails to meet the standards

will lose his right to use the mark. Best known are the 'Woolmark' and the 'Kitemark' of the British Standards Institution (Chapter 5, No. 96).

— In **Ireland**, a similar certification mark exists under the Trade Marks Act of 1963.

— In **France**, a system of collective marks is used under the Trade Mark Legislation of 1964. There have been special decrees concerning labels issued by standards organisations, such as AFNOR (Chapter 5, No. 96). The Act of January 10, 1978 created *certificats de qualification* which resemble rather the British certification marks than the continental collective marks. Such a label will be awarded only if the requirements of the Laboratoire nationale d'essais have been met.

— In the **Federal Republic of Germany**, the Trade Marks Act of 1968 allows collective but not certification marks. They may be used for distinctive labels on safety and quality, such as the DIN mark awarded by the German Standards Committee (Chapter 5, No. 96). There are other quality labels in the form of collective marks, such as RAL, 'Weinsiegel'. The use of the mark is regulated by the by-laws of the proprietor of the mark and controlled by private law. With the exception of DIN, no businessman has any legal right to use the collective mark unless he meets the standards of such mark.

In 1979, the Technical Labour Material Act (Chapter 5, No. 97) has been amended in order to provide for the safety label 'GS — geprüfte Sicherheit'. The label is awarded by the government after examination. The manufacturer or importer is free in deciding whether he wants to submit his products to the testing procedure. An abuse of the label will be fined.

— In the **Benelux** countries (Belgium, the Netherlands, Luxemburg), trade mark law was unified in 1962 when the Benelux-mark was created. Under that law, collective marks are known which may be used for distinctive labels by the national standards institutions (see Chapter 5, No. 96), such as BENOR in Belgium. In the Netherlands, the Dutch Association of Housewives has registered a 'consumer hallmark' with the Benelux Trade Mark Office in The Hague.

— In **Italy**, the Royal Decree of June 21, 1942 provided for collective marks.

— In **Denmark**, collective marks are known under the Trade Mark legislation of 1959.

IV COMPARATIVE TESTING, CONSUMER CRITICISM

36 1 Comparative testing

Most EC countries have developed a system of comparative testing of products and services. We can distinguish between systems run by consumer organisations and systems run by state agencies in which consumers are represented.

— In **England** (*Which?*, published since 1957 by the Consumers' Association), **Belgium** (*Test-Achats*, Association des consommateurs), **Luxemburg** (*De Konsument*-Union luxembourgoise de consommateurs), and the **Netherlands** (*Consumentengids* published by the Consomentenbond, *Koopkracht* published by Konsumenten Kontact), such comparative testing is performed exclusively by consumer organisations.

In **France**, there is a private testing institution (*Que Choisir?*, published by Union féderale des consommateurs), and a publicly sponsored testing institute (Institut national de la consommation, which edits *50 millions de consommateurs*).

In the **Federal Republic of Germany** (Stiftung Warentest, which publishes *test*) and in **Denmark** (Danish Home Economics Council, which is a semi-public test institute), testing institutions are government sponsored, yet partly independent of state influence.

37 2 Liability of testing institutions

It is quite commonly accepted in the legislation of all EC countries that a testing institute which is independent of business and works on an objective and scientific basis may publish its results in a comparative form. It enjoys *freedom of the press and information* as a basic constitutional right recognised in all EC countries. It is not subject to the strict regulations of comparative advertising among businessmen (Chapter 3, No. 51). However, the question of civil liability of a testing institution may arise if, in consequence of negative test results, a producer is criticised or, all the more, if consumers are discouraged from buying a certain product. The testing institution's activity may involve a high risk in terms of civil liability.

There are no special acts governing civil liability of comparative testing institutions. One notable exception is Art. 2 §4 of the **Danish** Act of 1974 which forbids not only producers and tradesmen but also consumer associations and their testing institutions spreading misleading information. That is why under Danish law tests must be true in order not to give rise to liability. Non-compliance will be a criminal offence under Art. 19. Civil liability is governed by the law of torts. There have been no cases so far.

In the countries with *codified law*, the general clauses of liability in tort apply also to testing institutions, as for example Art. 1382 of the French, Belgian and Luxemburg Civil Codes, Art. 1401 of the Dutch Civil Code, Art. 823 of the German Civil Code, and Art. 2043 of the Italian Civil Code. The rules developed by the courts on civil liability of testing institutions seem to be quite similar in the legislation of codified law. **French** doctrine demands that there be fault (faute) on the part of the consumer institution, which in one case has resulted in 310 000 Francs worth of damages payable to the criticised producer. However, the courts will be reluctant to assume fault on the part of a testing institution if the standards of due care and objectiveness have been met. There have been similar court decisions in **Belgium** (Affair Mazobel) in which the court pointed out that, because of its objectiveness, the testing institution was not liable. If the test is conducted carelessly, for instance if just two cans of a relatively cheap product are bought, a civil action for negligence may be brought against the testing institution. In the **Netherlands**, the courts demand that a testing institution should be independent of producers or tradesmen. The results of testing must be justifiable. In its well known decision of December 9, 1975, the **German** Bundesgerichtshof expressly stated that testing institutions, such as Stiftung Warentest, enjoy wide discretion if they are neutral, objective and well founded in their value judgements.

In **British** and **Irish** laws, the principles of defamation apply. A claim for damages for libel would not succeed under British law if the above-mentioned criteria of testing have been met.

In summary, we may say that legislation in all EC countries does not prevent comparative testing through excessive obligations of due care and risk of civil liability. Testing institutions enjoy ample freedom of activity which they seem to be using actively.

There is still uncertainty in European jurisdiction whether or not a *droit de réponse* exists on the part of a businessman whose products have been criticised in a comparative test. French, Belgian and Danish laws seem to accept such right in certain circumstances not to be explained here, while German law will not usually allow this since the results of a testing activity are not regarded as facts but as value judgements. In other EC countries the problem does not seem to exist.

38 3 Criticism and boycott by consumer organisations

Consumers and their organisations may also wish to inform the public about unfair marketing practices of businessmen, bad product performance, unreliability in supplying services. They may even go so far as to ask other consumers not to buy a certain product or not to accept a certain service. That is called a boycott.

Consumer criticism is voiced quite frequently in all EC countries, while consumer boycotts are still very rare. There is no legal basis for such criticism, but the freedom of the press and opinion doctrine is envoked here to guarantee consumer organisations certain rights to 'negative information about businessmen'. They may incur civil liability in a similar way as testing institutions. There seems to be a trend towards restricting consumer criticism and boycott if directed against specific businessmen (in the Federal Republic of Germany and in France).

39 V CRITICAL EVALUATION OF APPLICABLE LAW

Our comparative analysis shows the areas of consumer law where the improvement of information plays an important role, but has not yet won general recognition. We should like to point out the following gaps in information obligations.

(i) Hardly any legislator within the EC has answered the fundamental question of any information system: *Is it useful, is it usable and is it used.* Much of the information which today has to be disseminated on the market by law may be useful, but in many cases is not usable and even less used. This is especially true for the very detailed information about the composition of products, especially foods, cosmetics, detergents, etc., as well as for complicated technical statements about household appliances, chemical formulas for drugs, etc. If the information is not usable, it will be used in practice even less. The use of information is also made impossible because it does not take into account the specific needs or problems of certain groups of consumers, such as the 'poor' consumer or the foreign consumer.

Political or legislative action in the future should try to develop new forms of information and labelling which meet the basic demands of usefulness, usability and actual use. *Quality labels, signs, distinctive marks*, etc., should be the future form of consumer information, not information in words as it is available to us at present.

(ii) It seems to be impossible to find a solution by law to the problems involved in comparing and evaluating the information bits the consumer is entitled to today. Law leaves him alone in analysing all the information he may get on the market. This means that *comparative testing* should be even more encouraged and that new systems of *classification* of products and services should be developed.

(iii) *Collective information* systems are enjoying great popularity at present. They should not be seen only under marketing aspects but also under aspects of promoting the consumer's interests. This implies an option for state-monitored information systems. Consumer representation in the relevant bodies which set up collective information systems, such as quality labels, should be required by law.

(iv) Despite the considerable work done by the EC Commission to promote and harmonise consumer information, legislation in the various EC countries still varies a great deal. It seems to us that only in those areas where there have been explicit EC Directives (certain foods, cosmetics, textiles, etc.) will the consumer in the EC find similar information in all EC countries. In other fields, the consumer will still find completely different information systems in the EC countries, which does not help to establish a Common Market.

(v) As we have pointed out, *information on services* is still in its infancy and has to be developed further, especially concerning those services the consumer wants to avail himself of in all EC countries, for instance travel contracts, car repairs, etc.

CHAPTER 3

Advertising

I GENERAL REMARKS

40 In the preceding Chapter we described the efforts of law, governmental agencies and consumer organisations to provide the consumer with the information needed for a rational purchase decision. In reality, we all know that the most important information to the consumer comes from the producer, tradesman or entrepreneur. Such information, which in the following we will call advertising, will primarily serve the marketing interests of businessmen and not the information interests of the consumer. There is of necessity a conflict of interests between advertising and consumer information. Advertising may but need not be informative.

Advertising may conflict not only with the consumer's interests, but also with other interests. The situation seems to be much the same in all EC countries. Firstly, there may be public interests, such as health, safety, environment, which may be in opposition to certain forms of advertising. Advertising by large companies increases their market power and hence puts in danger the system of market economy itself. Excessive, fraudulent or unfair advertising may do harm to competitors and hence demand regulation for the sake of workable competition.

In our comparative analysis, we have found that there is regulation of advertising in the legislation of all EC countries which has one common denominator: we will call it the truthfulness doctrine (Section II). The interests of consumer information and the demands of public policy are taken into account in a very different way in the legislation of the EC countries (Sections III and IV). We will have difficulty in finding common denominators here. Another problem is raised by very different enforcement systems in the legislation of the EC countries (Section V).

Comparing advertising law in the EC countries, we should point out common denominators and divergent policies. It is impossible to analyse the working of the legal system in detail, as it depends very much upon the appreciation of each case, upon the economic, political and legal traditions and upon the specific philosophies of business and consumers.

II THE PRINCIPLE OF TRUTHFULNESS AS A STARTING POINT FOR ADVERTISING LAW

41 1 Generalities

In modern advertising legislation in the EC countries, the principle of truthfulness seems to be quite commonly accepted. In countries on the Continent having laws of unfair competition or base adjudication on the general clauses of the law of torts, this principle stems directly from the idea of 'concurrence déloyale'. Its original intention was to protect competitors against untrue or misleading claims and statements by which one competitor — the advertiser — tried to win market shares to the detriment of the other. Not until later, and not in all countries, was the idea of protecting the public and the consumer's interests incorporated into the law of unfair competition or, in an even more modern development, put explicitly into a more general regulation of market conduct, as for instance in the case of the Danish Act of 1974. Researchers and practicians are still discussing whether the principle of truthfulness as developed out of the idea of concurrence déloyale is always useful to the consumer. There may be conflicts of interest between consumers and businessmen. This can be seen especially in the legal handling of comparative advertising (No. 51): true comparative advertising serves the consumer as a means of information, but will be detrimental to the competitor who does not like his product being criticised by his rival.

The principle of truthfulness originates not only from the idea of concurrence déloyale but also from criminal law, since untrue, misleading and fraudulent claims which are made recklessly or negligently by competitors in business and trade are contrary to the public interest and to public morals. The government through its criminal prosecution agencies may take steps to protect the public, and indirectly the consumer, against untrue statements in trade and commerce. This is the starting point for legislation in the UK and Ireland, and also in France.

42 2 The different legal bases of the truthfulness doctrine

While the principle of truthfulness in advertising is generally accepted in the legislation of the EC countries, its incorporation into the system of law is quite different in each country and depends on its origin as mentioned above. For the purpose of comparative analysis, it seems to be impossible to separate substantive law from the ways and means by which it is controlled. Therefore, we must distinguish between three main streams of realisation of the principle of truthfulness in EC legislation:

(i) A system of *criminal law* exists in France and in the United Kingdom.

— In **France**, the system of criminal law is traditionally based on Art. 405 of the Penal Code and was taken up by Art. 1 of the Act of August 1, 1905 on Fraudulent Practices (Loi sur la répression des fraudes). The Act was amended in 1963 and extended to consumer protection by the Loi Royer of December 27, 1973 (Loi d'orientation de commerce et d'artisanat). Today, Art. 405 of the Penal Code, Art. 1 of the Act of 1905 and Art. 44 of the Act of 1973 are applicable to the fight against false and misleading advertising.

— In the **United Kingdom**, the legal basis of advertising is the Trade Descriptions Act of 1968 as amended in 1972.

(ii) A *civil law* system stemming from the idea of unfair competition is in force in the Federal Republic of Germany, Luxemburg, Belgium and with certain qualifications in the Netherlands and Italy.

— The basis of the **German** law is the Act Prohibiting Unfair Competition of 1909 (Gesetz gegen den unlauteren Wettbewerb), which was amended in 1965 and 1969; a reform bill is under discussion, but the principles of the Act have remained the same and are interpreted by very detailed court practice.

— The basic law in **Belgium** is the above-mentioned Act (No. 26) on Commercial Practices of July 14, 1971 which has a wide field of application and covers practically all commercial activities.

— In **Luxemburg**, Art. 2 of the Act of December 23, 1974 (Règlement Grandducal concernant la concurrence déloyale) is applicable.

— In the **Netherlands**, there is no specific act concerning advertising or market conduct, even though a draft reform is under discussion (regelen omtrent de privatrechterlijke bescherming tegen misleidende reclaame). The basis is Art. 1401 of the Civil Code (Burgerlijk Wetboek).

— In **Italy**, there is no specific regulation on advertising. The courts apply the unfairness doctrine of Art. 2598 §3 of the Civil Code of 1942 (Codice Civile).

As we mentioned before, all civil legislation or case law originated from the idea of concurrence déloyale and only gradually took into account the consumer's interests. Our analysis shows that nowadays the consumer's interests have come to play a greater role in law than in the past, but are still not the primary aim of the law.

(iii) A system relying mostly on *administrative law* was inaugurated in **Denmark** by the Act of 1974 and the institution of the Consumer Ombudsman, and in **Ireland** by the Consumer Information Act of 1978 (No. 26).

— In **Denmark**, one of the Consumer Ombudsman's (No. 59) main tasks is immediately to put an end through negotiation to any misleading advertising either in an informal way or, if this is impossible which occurs very rarely, to ask for a court order or, in urgent cases, to issue an injunction himself.

— In **Ireland**, the Act of 1978, Sec. 8 §3 enables the Director of Consumer Affairs to ask for an order by the High Court prohibiting the publication of a misleading advertisement. It is not yet known to what extent an informal procedure will be applied.

(iv) We must insist, however, that no country relies exclusively on one of the above-mentioned systems of controlling untrue or misleading advertising. The truthfulness doctrine may be found in other documents relating to specific subject matters and may relate to administrative, civil and penal law, respectively.

— In **France**, the idea of concurrence déloyale is still applied by jurisprudence to Art. 1382 concerning 'publicité fautive'. Competitors may bring an action against misleading advertising if it does harm to them. The consumer is protected indirectly if such an action is successful. Consumer organisations, however, have no legal standing under the concurrence déloyale doctrine and will not therefore use their powers under the Loi Royer (No. 60).

— In **Great Britain**, there is civil legislation on specific types of advertisements inducing sex discrimination (Act of 1975), race discrimination (Act of 1976), etc. There are some provisions of an administrative nature in the Fair

Trading Act of 1973 which we will study later. There is no concept of 'unfair competition law'.

— In the **Federal Republic of Germany**, criminal proceedings may be taken against a businessman having fraudulently engaged in grossly misleading advertising. A Reform Bill of 1978 tries to lessen the standard in order to effectuate criminal prosecution. These powers under criminal law have hardly ever been used in conjunction with misleading or untrue advertising. Special legislation on foodstuffs, cosmetics and drugs provides for criminal sanctions (fines) in the case of misleading claims. Violation of these laws may also give rise to civil actions. In practice, criminal prosecution hardly ever takes place.

— In **Belgium**, the Act on Commercial Practices of 1971, despite its intention to depenalize the law, still recognises criminal sanctions applicable to certain types of misleading advertising. They concern especially false indications of price, quality, denomination and composition of products made in bad faith (mauvaise foi). To some types of advertising, the penal code may still be applicable. There are also some administrative regulations, though these are not of great importance.

In **Denmark**, misleading advertising is prohibited under Article 2 of the Marketing Practices Act. An enterprise issuing such advertisement commits an offence (cf. Art. 19 of the Act). Furthermore, misleading advertising may give rise to civil law remedies: the competitor losing customers may have a right of damages in tort, and the consumer buying goods relying on the advertised message may have a right under the Sale of Goods Act, because a commodity not as good as promised in the advertisement is deemed to be defective.

— In **Italy**, criminal sanctions against misleading advertising are provided for in several special acts in the field of foodstuffs and agricultural products, Art. 13 of the Act of April 30, 1962 No. 283 on Foodstuffs and Beverages, as well as Arts. 515 and 517 of the Criminal Code. Outside the field of misleading advertising, criminal regulation of the advertising phenomenon is also provided for in the Decree of May 30, 1953, No. 572 on Baby and Diet Food.

— In **Ireland**, Sec. 8 §1 of the Consumer Information Act of 1978 forbids certain types of misleading advertisements under penalty of fines or/and imprisonment pursuant to Section 17.

43 3 Controlled statements

When forbidding untrue, false or misleading advertising, the law must first of all define what is meant by advertising. We may note some common denominators. Legislation in all EC countries agrees that advertising is deemed to exist if the person makes the statement in the course of business. This will usually be the case if a public enterprise or utility makes claims, even though law is not unanimous in that point. However, information given by consumer organisations is not regarded as advertising. This is also true for Danish law, Art. 2 §4 of the Marketing Practices Act, which forbids consumer organisations to make misleading claims, but does not regard them as advertising. Political, religious and social propaganda does not come under the scope of application of the Act, either.

Legislation in all European countries is unanimous in that advertising must

have some factual content to be sanctionable by criminal or civil law. Messages without any factual content, puffs, hyperbolical claims and forms of suggestive advertising without any information at all, are not usually covered by the truthfulness doctrine. They may be regarded as being 'contra bonos mores' under the principle of unfair competition (Federal Republic of Germany, Belgium, Luxemburg, Denmark), but law is still uncertain about that point (cf. No. 47).

Relevant European legislation describes advertising activities in different ways, which means different steps of controlling them.

— In the **Federal Republic of Germany**, Art. 3 of the Act Prohibiting Unfair Competition prohibits misleading claims (irreführende Angaben), whether made in public or in private (Reform Act of 1965), whether made in writing, in pictorial form or verbally, containing whatever information designed to promote business activity. Although the Act enumerates certain types of information and claims, it does make it clear that they are not meant to be exclusive.

— In **France**, court interpretation of Art. 1 of the Act of 1905 and of Art. 44 of the Loi Royer demands that the advertising message (publicité) should be addressed to the public and should be done in the course of business. Messages to private persons are not controlled unless they are sent to several potential customers. The message may concern three types of claims: misleading statements about goods or services, misleading statements about contract conditions including prices and misleading statements about the person of the advertiser and his business. This enumeration is criticised by French lawyers as being too narrow, but is read so as to include practically all advertising.

— In **Belgium**, Art. 19 of the Act of 1971 concerns all information (toutes informations) which is diffused in order to directly or indirectly promote the sale of a product or service to the public regardless of the place or means of communication. Art. 20 defines the contents of the advertising message which seems to be wide enough to cover the most current advertisements. However, advertisements for services are not taken up by Art. 20. Truthfulness in advertising services is developed in Belgian law through the application of Art. 54, which forbids acts against good morals and commerce doing harm to traders or professional interests. The Belgian draft reform of 1977 tries to widen the scope of application. It will include all commercial messages. It has not to be decided any more whether they are 'information' within the meaning of the law.

— The law of **Luxemburg** resembles to a great extent Belgian law, but is somewhat narrower in application. Art. 2a of the Act of 1974 concerns false indications about the nature, origin, method of production, quality or destination of goods. Art. 2b concerns wrong indications about conditions of sale (indications fallacieuses quant aux conditions de vente).

— The **British** system is somewhat narrower in application. The law neatly distinguishes between advertising for goods and advertising for services. Section 2 of the Trade Descriptions Act of 1968 says that the trade description is an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or part of goods. That section lists the object or contents of the claim and therefore does not apply to claims not specifically provided for by the Act, especially claims with ambiguous contents, claims relating to the value of the merchandise, claims not relating to specific product performance, claims relating to the identity of the supplier and to the avail-

ability of goods. Advertising for services is mentioned in Section 14 of the Act, which makes it an offence for anyone in the course of business knowingly or recklessly to make a false statement about any of the following: the provision in the course of any trade or business of any service, accommodation or facility; the nature of any service, accommodation or facility provided in the course of any trade or business; the time at which, manner in which or persons by whom any service, accommodation or facility is so provided; the examination, approval or evaluation by any person of any service, accommodation or facility so provided; or the location or amenities of any accommodation so provided. It is a debatable question in English law whether the claim of a trader who promises to render services although he knows that he might fail will be prohibited by law. British judges argue that this is a matter of contract law and therefore not a criminal offence under the Trade Descriptions Act. A reform has been proposed to close this loophole in the law by making it an offence to advertise services which one has no intention or prospect of providing.

— The **Irish** Consumer Information Act of 1978 reproduces the main provisions of the UK Trade Descriptions Act. It added, however, a helpful general clause (Section 8): an advertisement in relation to the supply or provision in the course or for the purposes of a trade, business or profession of goods, services or facilities (shall not be published) if it is likely to mislead, and thereby cause loss, damage or injury to members of the public to a material degree.

— The **Danish** Act of 1974 forbids false, misleading or unreasonably incomplete indications or statements likely to affect the demand for or supply of goods, real or personal property, and the demand for and performance of work or services. The wording is wide enough to cover all types of advertising in the market.

Those countries that do not have special provisions on misleading advertising, such as **Italy** and the **Netherlands**, do not need a specific definition of advertising since they will prohibit as unfair business conduct any untrue statement made by a businessman. The Italian law of unfair competition will only cover specific facts (fatti specifici) and is even more lenient towards hyperbolical claims than the acts in other EC countries.

44 4 Tests of truth in advertising

Another central problem of the standard of truthfulness as adopted by the law of advertising consists in how to know exactly what type of claim the courts will regard as misleading, untrue, false, etc. It is obvious that the practical working of the law can be observed only through careful analysis of case law, which has been done in the national reports. From the consumer point of view, statements in advertising concerning quality aspects of a product or a certain service are most important. The consumer wants to know whether by law he may rely on the claims that are made through advertising concerning product performance, service reliability, etc. We may note that this problem has not always been solved satisfactorily by legislation in EC countries.

For reasons of comparative analysis, we may distinguish between *subjective* and *objective* tests that are used to determine truth in advertising.

(i) In the court practice of the **Federal Republic of Germany** the subjective

test prevails: a statement or a message will be misleading if a certain part of the public (about 10% of the receivers of the message which will be determined by liberal appreciation of the courts) is apt to be deceived. The standard seems to be very strict because it catches ambiguous statements and hints in commerce. On the other hand, the producer or tradesman will not necessarily be liable under the truthfulness doctrine if he makes false, untrue or incomplete statements which in the opinion of the courts will not mislead the public. Such court practice excludes boasts, hints to product performance, value of a certain service, etc., from the application of the truthfulness doctrine. We should like to note that stricter practice is under development in food law. Art. 17 of the new German Food Act of 1974 applies a much stricter truthfulness doctrine than is known from the principles of unfair competition. Since the Act is very new, we are not yet informed about its actual working.

— An approach similar to that under German law is taken by Art. 20 §1 of the **Belgian** Act of 1971. Here advertising is forbidden if it contains indications likely to mislead the public as regards the identity, nature, composition, origin, quantity or characteristics of a product. Art. 20 §3 forbids advertising creating confusion with respect to another competitor or his products. As we already mentioned, this paragraph relates to advertising only of a product, not of a service. False indications of services come under the good morals clause of Art. 54, but are not as strictly controlled as claims for products.

(ii) Legislation in most other European countries seems to use a *combination of subjective and objective tests*:

— Such a combination is expressly stated in Art. 44 of the Loi Royer in **France**, where the legislator forbids statements or indications that are false or may induce an error. French writers discussed whether the standard of misleading advertising may be taken from the idea of the 'bon père de famille' or from the standard of the average consumer. Recent decisions in France show that the average consumer standard is applied. This standard tallies better with the realities of modern advertising and consumer behaviour. With the aid of that standard, French law is able to cope with misleading advertising, specifically advertising directed against old people, foreigners, etc.

— The **Danish** Act of 1974 takes a similar attitude as French law. It forbids both false and misleading claims. By taking up cases and working out guidelines, the Danish Consumer Ombudsman tries to define more precisely what claims are regarded as false or misleading. It also covers unreasonably incomplete statements and indications.

— **United Kingdom** law under Section 3 of the above-mentioned Trade Descriptions Act declares that the trade description is false if 'false to a material degree'. Small inaccuracies will not be forbidden. It is a question of degree what description of products will be regarded as false. Misleading but not actually untruthful advertising may also come under Section 3.

— In **Ireland**, the Act of 1978 covers misleading advertisements. It defines misleading as that which is likely to deceive. There is no need to prove deception. The general provision is supplemented by more detailed ones of the Act.

(iii) As far as we know, the least strict standards in advertising law are applied under Italian, Luxemburg and Dutch laws.

— In **Italian** law, misleading advertising will be controlled by applying the

unfairness doctrine of Art. 2598 §3 of the Civil Code. The standard of deception is adapted to the reasonable consumer and does not make allowance for the little educated consumer, the poor consumer, etc. Italian writers therefore demand a tightening of the truthfulness doctrine.

— The law of **Luxemburg** covers advertisements only if they are false *and* misleading.

— **Dutch** law applies only the concurrence déloyale doctrine, which is unable to effectively protect the consumer against misleading advertising.

45 5 Negligence

It is a debatable question in advertising law whether a misleading or false claim can only be forbidden if the advertiser or some other person has acted negligently. This first of all depends on whether civil or criminal sanctions are applied. In civil-law systems, as in Germany, Belgium or Luxemburg, negligence is not necessary for a successful action for injunction. But, if damages are asked for, negligence must be proved.

In countries with criminal law systems some sort of negligence or mens rea is generally required. The standards vary; it must be noted that under the impact of consumer movements they have become stricter in modern legislation.

— In **France**, legal writers debated the question of negligence under the Loi Royer. The majority of writers and courts seems to agree that some sort of negligence is required to violate Art. 44 of the Loi Royer. Two decisions of the Cour de cassation of 1977 stated that the advertiser has to verify his claims. Bad faith is not necessary to give rise to liability. The advertiser must be careful about what he claims and cannot escape responsibility by closing his eyes to what is said in his name. French writers now speak of 'publicité trompeuse', and no more of 'publicité mensongère'. If the advertiser did not make the claim himself but through an advertising agency, Art. 44 §2 states that he cannot hide behind the agency. He is regarded as having advertised himself and therefore may be criminally liable. However, not the company but its officers will be 'punished'.

— In **Denmark**, negligence is not required for an injunction but only for penalty. Penalties on legal persons are possible pursuant to Art. 19 §6.

— In the **United Kingdom**, we have to take into account the differentiation in law concerning the description of goods or services: concerning goods, mens rea is not necessary. The advertiser may, however, escape liability by a statement or other means which are as bold, precise and compelling as the original statement. On the other hand, advertising for services is prosecuted only if the trader makes false statements either knowingly or recklessly. Liability of third parties is regulated in Art. 24 of the Trade Descriptions Act. The advertiser will not be liable if he shows that the false description was somebody else's fault. An important decision by the House of Lords states that a big company may escape liability if it has taken all reasonable precautions itself and can then prove that a particular employee was at fault. In any case, the advertiser must make all necessary enquiries himself. If he fails to do so, he becomes liable.

Jurisdiction under criminal law in other countries demands negligence on the part of the persons responsible for advertising and will not allow penalties on legal persons (**Netherlands, Italy**).

The subject of the doctrine of truthfulness that has been discussed most is the burden of proof. The law in EC legislation differs a great deal.

(i) Legal systems applying civil sanctions make it clear that the plaintiff challenging the advertisement by an action for injunction will have to prove that it is misleading or false. This doctrine is the basis of **German** law. However, this rule is not applied strictly. In certain cases the courts will impose a duty of giving indications on the truthfulness of advertising. These cases relate to claims concerning the superiority of performance, trade, etc., of the advertiser, specific price bargains (see Section IV) as well as advertising concerning health promotion, etc. Reform proposals are under discussion in the Federal Republic of Germany as to whether these exceptions should be embodied in a general legal principle which switches the onus of proof. A draft reform by the CDU/CSU of 1978 tries to generalise this duty of disclosure on the part of the advertiser. The Federal Parliament has not yet taken any decision on that issue.

— **Belgian** law follows similar principles as German law. A draft reform, not yet under discussion in Parliament, would put the burden of proof as to the truthfulness of advertising on the tradesman's shoulders if the case were taken up by the Minister of Economics who is competent to forbid misleading advertising. Civil actions will be handled as before.

— In the **United Kingdom**, it seems to be the rule that the onus of proof lies with the inspectors controlling trade descriptions and not with the advertiser. Concerning price descriptions (Section IV), the House of Lords has clearly stated that the burden of proof for false description lies with the prosecuting agency and its inspectors and not with the tradesman. If applied on a general basis, this rule obviously limits considerably the scope of application of the law, especially with respect to false advertisements concerning product performance, etc.

— The **Dutch** draft reform of 1976 wants to impose the burden of proof on the trader insofar as he has acted negligently.

(ii) There is modern legislation which takes a different approach to that question. Usually, it will not reverse the onus of proof directly, but will entitle the public agency controlling advertising to demand that the advertiser should disclose his claims. If, for instance, a certain foodstuff is claimed to reduce weight, the advertiser may be requested by the public inspector to disclose the facts about such claim. If he cannot comply with that request, the advertisement will be regarded as false and hence will be forbidden by law.

— The above-mentioned approach is taken by the **French** Act of 1973. The inspectors of competition and consumer protection as well as the 'service pour la répression des fraudes et falsifications' controlling advertising are authorised to ask the advertiser for facts, justifying his claims or statements. If he cannot produce such facts, he will be prosecuted and eventually punished. In practice, this amounts to a reversal of the onus of proof.

— A similar provision is found in Art. 17 of the **Danish** Act of 1974 pursuant to which the Consumer Ombudsman may ask for all information that may be necessary in the performance of his duties. A genuine reversal of the burden of proof will work in injunction cases but not in criminal cases.

— The **Irish** Act of 1978, Section 20, imposes the burden of proof for a trade description on the businessman.

From legislative experience we may note that the reversal of the burden of proof usually demands the existence of a public agency which controls advertising and the existence of an objective test of truthfulness (No. 44).

(iii) In the legislation of other European countries, such as **Italy** and **Luxemburg**, similar rules are unknown. To our knowledge, there is no reform movement in this area. Legislation in these countries will have to be changed if Art. 6 of the EC draft directive on misleading and unfair advertising comes into force.

III DUTIES OF INFORMATION AND OBJECTIVENESS IN ADVERTISING

47 1 General remarks

It is quite commonly accepted in the European consumer movement that even true, not misleading advertising will not suffice to satisfy modern standards of consumer protection. It is felt that advertising should provide the consumer with *minimum information* on the product, service or business of the advertiser so as to enable the consumer to make a rational purchase decision. On the other hand, it is felt that claims in advertising should be in line with the common standards of public policy and should be decent as well as fair, as laid down in the rules of the International Chamber of Commerce. Advertising, for instance, should help to promote health, should not induce people to use articles that may be harmful to them, should protect young people and minorities, should not discriminate against women or any other part of the population, should be directed towards peace and understanding, and should help to preserve national resources.

There are thus reform activities in most EC countries aiming at the introduction of certain standards of informative and objective advertising. The truthfulness doctrine as described above, even if construed in a very modern way, is not sufficient, because it has only a negative aspect and does not impose on the advertiser a direct obligation to disclose and to be objective. The approaches taken in that conjunction by the respective national legislation vary a great deal and are difficult to compare.

— The courts in the **Federal Republic of Germany** apply the general principle of unfair competition law — viz. that acts in commerce which are directed against good morals are forbidden — to certain cases of grossly uninformative or unobjective advertising. This practice, which nowadays partially takes into account the consumer's interests, will forbid claims abusing pity, claims taking advantage of prejudices, fears, etc., on the part of the consumer, and claims including uncertain results on product performance in the case of drugs and food. These cases remain exceptions and will not really restrict the advertiser's freedom of making whatever claims he wants as long as they are not misleading.

— **Belgian** law contains a similar general clause in Art. 54 of the Act of 1971, but is not so much directed at consumer protection as protection of good morals in commerce and trade. Henceforth, we do not find cases concerning the

consumer's interests. The Belgian draft reform of 1977 tries to authorise the King to forbid advertising that refers to physical or psychological conditions of the consumer.

— The **Danish** Act of 1974 alludes to these problems in Art. 1 and Art. 2 §1 of the Act of 1974. Art. 1 states the general principle that business activities (including advertising) shall be carried on in accordance with proper marketing practices. Art. 2 prohibits unreasonably incomplete indications or statements as well as statements which due to their form or because they are concerned with irrelevant circumstances are improper — provided such statements are likely to affect the demand for or the supply of goods, real or personal property, and the supply of services. Danish law authorises the Consumer Ombudsman to work out details in consultation with businessmen and consumer organisations. These guidelines may then determine proper marketing practices as mentioned in Art. 1. The Danish Act is not so much directed at fighting abuses of advertising that occurred in the past, but at promoting better business practices in the future.

— In **Great Britain**, the Trade Descriptions Act allows regulations concerning the meaning of certain expressions used in advertising. We must also refer to the Fair Trading Act of 1973. The Act does not contain a general clause of the same broad wording as in the Federal Republic of Germany, Belgium or Denmark, but only authorises the Director General of Fair Trading to work out codes of practice, Section 124, or to ask for enforceable undertakings, Section 34. We will go into details later (No. 59).

— In **Ireland**, the Act of 1978 enables the Director of Consumer Affairs to ask for more information in advertising. The Minister of Commerce, Industry and Energy may issue advertising and definition orders.

— In the **Netherlands**, a draft reform is being discussed amending the Warenwet (Chapter 5, No. 84). It will enable the Queen-in-Council to issue orders about information to be supplied on the market (Chapter 2, No. 26) and will also have an impact on advertising.

Legislation in the other EC countries does not include such broad standards but only specific regulations which we will mention here.

48 2 Specific regulations

Besides regulations on claims about prices (No. 49) and consumer credit (Chapter 7, No. 173), there are specific regulations on duties of information and objectiveness in advertising concerning certain products and services. We will not go into details, but just mention trends in law:

(i) There are strict regulations in the legislation of most EC countries concerning advertising for *drugs* (cf. Chapter 5, No. 91 ff). Besides the truthfulness doctrine, the legislator tries to prevent public advertisements of drugs for specific diseases, as VD, and the like. In order to secure decency and information in advertising, legislation in some countries provides for administrative control of advertisements for drugs. This system has been applied in **Italy** under an Act of May 5, 1941, in **Belgium** under an Act of March 25, 1964, in **Luxemburg** under the Act of August 4, 1975, in **France** under the Code de la Santé publique, Art. L 551, R 5045 ff, in **England** under the Medicines Act of 1968, in **Ireland** under the Medical Preparations (Advertisements and Sale) Regulation

of 1958, and in **Denmark** under the Medicine Act of 1975. The **German** legislator embodied a specific regulation on advertising for drugs in the Heilmittelwerbegesetz of 1965, modified by the new Drugs Act of 1976. Art. 3a, as amended, contains provisions concerning minimum information standards that have to be met in advertisements.

(ii) The regulation on advertising for *foodstuffs* (see Chapter 5, No. 83 ff) is less strict than that for drugs, but tries to lay down as a common principle that foodstuffs, cosmetics, etc., should not be claimed to be medically helpful and effective unless specifically authorised. This principle is to be found in the **British** Act of 1955, in the **German** Food Act of 1974, in the **French** Act of 1972 on Food and of 1977 on Cosmetics, in the **Italian** Act of April 30, 1962 on Foodstuffs and Alcoholic Beverages, in the **Danish** Medicines Act, in the **Belgian** Act of January 21, 1977, and in the **Dutch** draft to amend the Warenwet.

(iii) Many regulations concern information and objectiveness in advertising of *correspondence courses* (Chapter 6, No. 148). The legislator wants to assure that the student of a correspondence course is provided with information in public claims, advertisements, pamphlets, etc., about the studies he will pursue. This principle of law is expressly stated in the **French** Act of July 12, 1971, and the **German** Act of 1976. A similar bill is under preparation for **Luxemburg**. Adoption of similar acts in the legislation of the other EC countries is under discussion or may be promoted on the initiative of the EC Commission.

IV PRICE ADVERTISING

49 Next to the quality of a product or service he wants to purchase, the consumer is most interested in knowing its price. Information systems about prices, for instance labelling of prices, unit pricing, price comparisons, are one of the basic issues of consumer policy and have been referred to in Chapter 1, Nos. 21 – 22. Here, we are concerned only with legislation on advertising for prices.

The idea of 'truth in price claims' is accepted unanimously in the legislation of all EC countries. This doctrine, for instance, will require the advertiser to indicate in his advertisements prices plus value added tax (VAT) if he uses the price factor in his claims.

Based on our analysis of advertising law, we can distinguish between two different approaches to the truth in price claims doctrine: a more negative direction and a more positive direction. Advocates of the *negative* direction of the truth in price claims doctrine try to forbid false and misleading price claims. Commercial practices applied here vary both in extent and in length of time. As specific issues of consumer policy, we would mention bargain offers, price cutting, discounts, claims that the price is lower than the recommended or generally accepted market price, special-offer prices, etc. A more *positive* approach of the doctrine is directed at giving the consumer all information necessary in the advertisement itself.

(i) The *negative* aspect of the truth in price claims doctrine is accepted in the legislation of all EC countries as part of the general truthfulness doctrine. We should like to note, however, that there are many differences in detail which we cannot study here. We should also like to mention that the legislative approach

is quite different: it may be simply part of the truthfulness doctrine or it may be subject to specific regulations. We will only mention specific regulations here:

— In **Great Britain**, Section 11 of the Trade Descriptions Act forbids three types of false indications of prices: false indication to the effect that the price is below a recommended price, false indication to the effect that the commodity is offered at a price lower than the actual price, false indication to the effect that the seller's current price is less than the previous price. There are considerable problems in British law regarding the enforcement of these provisions since the courts place the onus of proof on the inspectors. They have to do a considerable amount of research in order to prove that the current price is less than the previous price. There seem to be many loopholes in the present regulation, which has led to the publication in 1975 of documents by the Office of Fair Trading recommending a more detailed regulation on false indications of prices. The rules have recently been both extended and simplified by the Price Marking (Bargain Offer) Order, 1979.

— In **Belgium**, there are specific regulations under Arts. 2 – 4 of the Act of 1971 trying to control price comparisons and price reductions. Prices if indicated must be unequivocal.

— In **France**, there are two Orders of September 2, 1977 and June 30, 1978 regulating truthfulness of price claims and price reductions.

— In **Denmark**, the new legislation is found in the Price Marking and Display Act of 1977. Art. 5 states that the price used in advertisements must include value added tax and that a recommended price must be indicated as such.

— In the **Federal Republic of Germany**, there is a general regulation on misleading claims which also applies to prices, price reductions, bargain offers, etc. There is a specific act which prohibits the offering in advertisements of discounts of more than 3%. This act also includes bargain offers and price cutting, but not price comparisons, offers at a lower price, etc. This act is much criticised by consumer organisations since it will prevent effective price competition. Art. 1 of the Price Marking Regulation of 1973 demands truth in price claims including VAT. There are also specific regulations in antitrust law (Chapter 1, No. 18) to the effect that recommended prices must be clearly indicated as such.

— In **Luxemburg**, the Act of 1974 forbids false price indications and price reductions as well as other forms of misleading price claims (Art. 2).

— In **Ireland**, the Act of 1978 forbids false or misleading indications of prices for goods or services and of recommended prices (Section 7).

(ii) *Positive* information duties regarding advertising of prices are still quite rare in the legislation of the EC countries. Law generally provides that if the advertiser indicates prices this must be done in a specific way. On the other hand, he is not obliged to use the price factor in his advertisements at all. He is only under the legal obligation to indicate his prices at the point of sale, which has been mentioned in Chapter 1, No. 21, and the duty applies only to the retailer.

V SPECIFIC INTERDICTIONS AND RESTRICTIONS ON ADVERTISING

50 In all EC countries, there are rules regulating and restricting certain forms of

advertising from a public policy point of view. Only in recent years have the consumer's interests been taken into account in determining what is meant by the public interest. In the past, restrictions on advertising by specific professions and trades, such as doctors, pharmacists and lawyers, have served not the consumer's interests but the interests of those specific professions.

We should like to mention the following spheres of specific interdictions on advertising.

51 1 Comparative advertising

Comparative advertising is prohibited or at least limited by criminal or civil law in most EC countries. Under the classical doctrine of concurrence déloyale and 'denigration', this is true for **France, Belgium** (Art. 20 §2 of the Act of 1971), **Luxemburg, Italy** (Art. 2598 §2 of the Civil Code), and the **Federal Republic of Germany**. There seems to be a relaxation of standards if comparative advertising is not misleading, serves as an objective basis of information and does not specifically denounce a certain trader.

Dutch jurisprudence seems to have a more positive attitude towards comparative advertising. **British** and **Irish** laws only prohibit comparative advertising if it is defamatory. The **Danish** Act of 1974, taking into account the consumer's interests in a larger measure, allows comparative advertising if it conforms to the standards of truthfulness and fairness as developed above. The **Belgian** draft will explicitly allow comparative advertising.

From the consumer's point of view, the classical prohibition of comparative advertising is certainly not in the interest of the consumer. On the other hand, total freedom of comparative advertising may be misleading to the consumer or may provide him with information he cannot use. The issue of comparative advertising will be debated anew in conjunction with the EC draft directive on misleading and unfair advertising. In contrast to the law in most EC countries, the draft is quite positive about comparative advertising if it is not misleading. Whether or not comparative advertising will actually increase competition and information remains to be seen.

52 2 Health

Advertising harmful to health has been a specific concern of consumer protection legislation for the past 15 years, even though trends in the EC countries are quite different.

(i) Above all, we have to mention here advertising for *cigarette smoking*. In **Italy**, a provision covering cigarette advertisements has been in existence since 1962 even though it is not clear whether such legislation derives from the consumer's or the state producer's interests. Other EC countries have tried specific restrictions on advertising for cigarette smoking, e.g. the **Federal Republic of Germany** by the Food Act of 1974 (no advertising on the radio or on television), and **France** by the Act of July 9, 1976 (no advertising on the radio, on TV or in public 'affiches'). In **Belgium**, the producer has to indicate the dangerousness of smoking under an Act of 1975 and a new system of regulation has been developed by an Act of 1977. In **Denmark**, voluntary systems regulating advertising

for tobacco have been in existence for many years. Originally, the Ministry of Health negotiated with the relevant trade organisations using the threat of legislation as a strong incentive. Now such negotiations are handled by the Consumer Ombudsman. In **England**, a voluntary system was worked out in 1977 according to which cigarette packets and advertisements have to carry a message that smoking may be harmful to the consumer's health. We should also like to mention that several initiatives on the regulation of advertising for cigarettes have been taken at the instigation of cigarette producers or have been sponsored by government agencies.

(ii) There is a similar, yet not clearly defined concern about advertising for *alcoholic beverages*. The question is still whether or not advertising for alcoholic beverages incites the consumption of alcohol. There is public discussion but no legal prescriptions. A remarkable exception is the **French** system of classification of alcoholic beverages and restrictions on advertising for certain groups of beverages, namely high-percentage alcohols. There seem to be many loopholes in the regulation. Circumventions are deplored by consumer organisations.

Other countries try to work out voluntary systems; in **Denmark** under the sponsorship of the Consumer Ombudsman and in the **Federal Republic of Germany** on the initiative of the producers of high-proof alcohols. In **Denmark**, the situation concerning alcohol and that concerning tobacco are the same.

There are also regulations on the protection of young people against the dangers of the consumption of alcohol. We will not go into details since this is a problem of social policy in general and not specifically of consumer policy.

53 3 Advertising on the radio and on television

The member countries of the EC have developed very different systems of regulation in order to control advertising on the radio and on television. It is hard to find common denominators since they depend very much on the public policy pursued by the specific country and its system of radio and television broadcasting. The problems in this conjunction are not so much discussed from a consumer-policy point of view but from the point of view of other sectors of public policy, such as media policy, financing of radio and TV and competition with newspapers. We will only mention the following regulations without going into details:

— In **Belgium**, under an Act of 1960, radio and television are prohibited from carrying advertising.

— In the **United Kingdom**, there are two broadcasting systems; firstly, a publicly controlled system which carries no advertising (BBC), and secondly a system that is run privately (ITV) and which may carry advertising pursuant to a special Act of 1973. That Act contains specific regulations on television advertising, providing for preliminary control by an independent advertising advisory committee and its director. Certain forms of advertising are forbidden, for instance advertising for cigarettes.

— In **France**, advertising is allowed, but regulated and controlled in advance by specific bodies (Régie Française de Publicité).

— In the **Federal Republic of Germany**, advertising on the radio and on TV is subject to the by-laws of the publicly run radio and television stations. There is

no preliminary control of advertising. It is limited to certain hours of the day. Some radio stations completely prohibit advertising, as for instance the NDR in Hamburg.

— In **Denmark**, advertising on the radio and on TV is forbidden.

— In the **Netherlands**, there are special regulations on advertising under the Broadcasting Act. A self-regulatory body (Reklaameraad) controls advertising on the radio and on TV.

— In **Luxemburg** and **Italy**, advertising on the radio and on television is explicitly promoted by law.

VI CONTROL SYSTEMS

54 1 General remarks

In the analysis of consumer legislation on advertising it has been pointed out that legal traditions in the EC countries are quite different in spite of similarities in the area of public policy. We will find even greater differences between the sanctions provided by law. One basic difference depends upon whether a country adopts a system of civil rules, criminal rules or administrative provisions. Countries with civil rules will pay attention to the development of a system of injunctions in order to stop deceiving or unfair advertising. A country having criminal law provisions will pay attention to the penalties which might be imposed on the wrong-doer, be it fines or even imprisonment. Countries with administrative control of advertising will develop means for public authorities either to stop certain advertisements or to exercise preventive control of advertising.

55 2 Combination of sanctions

As a result of the different legal approaches to advertising, we should not forget that most EC countries are trying to combine civil, criminal and administrative means of control. By way of comparative analysis, we would like to point out the following characteristics of national legislation.

56 (*a*) *Injunctions*

For several reasons it is important to develop a quick and inexpensive procedure in order to obtain an *injunction* (action en cessation, einstweilige Verfügung) against a claim contrary to law. We would like to mention the following legislation:

— In the **Federal Republic of Germany**, usually a three-stage procedure is employed in procuring an injunction: in the first stage, the advertiser whose claims are challenged will be warned by the trade or consumer association (see No. 4). He will be asked to stop the advertisement or to promise to pay a fine of a certain amount (Abmahnverfahren). If such measure is not successful, the court may be asked to grant an injunction in summary proceedings. In more complicated cases an action may be brought to court. If the advertiser does not

comply with the injunction, he will have to pay a fine of a certain amount up to DM 500 000.

— A similar procedure is provided for in Arts. 55 – 59 of the **Belgian** Act of 1971 (action en cessation). The procedure does not include the German Abmahnverfahren.

— The law of **Luxemburg** resembles the Belgian law (Arts. 11 – 13 of the Act of December 23, 1974).

— In **France**, there is the new procedure inaugurated by the Loi Royer. At the request of the public prosecutor (who gets the information he has from the department inspectors in charge of competition or from the Service de la répression des fraudes), the criminal judge may issue an injunction against the advertisement. He may also order publication of the judgement. In that way the advertisement is stopped immediately.

— In the **United Kingdom**, only private individuals injured by a claim may ask for an action against misleading advertising. The attorney general may also bring a civil action in exceptional cases of infringements of criminal law, the so-called relator action, but it is left to his discretion whether or not to bring such action. This instrument has not yet been employed against unfair advertising. The OFT could also seek an undertaking from a trader that he would not continue a deceptive trade practice.

— In the **Netherlands** and **Italy**, civil actions against advertising are brought on the basis of the general clauses on concurrence déloyale included in the civil codes but serve mostly the competitors' interests.

57 (*b*) *Damages*

It is a much debated question in consumer law whether the consumer should be entitled to claim *damages* for untrue or unfair advertising. In most cases this will be a question of the contract or the law of torts and will not be studied here. On the other hand, the damage done to the individual consumer does not amount to so much as to encourage him to bring a civil action for damages. The question is closely linked with the position of consumer organisations with respect to untrue and unfair advertising (No. 60).

We would like to mention specific legislation or reform activities in the following countries:

— In **English** law, there are two acts which apply here. The Misrepresentation Act of 1967, applicable only in England and Wales, not in Scotland, entitles the consumer to claim damages if the false representation (in advertising or elsewhere) was made negligently to him, that is without reasonable grounds for belief in its truth. The onus of proving such reasonable belief is upon the representor. If there is neither fraud nor negligence but an innocent misrepresentation, there may still be an action for rescission or for damages. As a rule, misrepresentation involves only factual statements, not silence or non-disclosure.

In Britain, the Powers of Criminal Courts Acts of 1973, Sections 35 – 38 allow orders for compensation to be made in criminal proceedings. Orders may be made to compensate for losses caused by breaches of the Trade Descriptions Act. The court will order the convicted person to pay compensation for loss or

damage resulting from the offence.

— In the **Federal Republic of Germany**, a reform bill tries to entitle the consumer induced to conclude a contract in consequence of false claims in advertising to bring an action for damages or for rescission of contract. It is not yet clear in what measure these rights should be given to the consumer. There is much opposition to the bill from traders. It is still open to question to what extent a trader will be responsible for untrue or misleading statements made not by himself but by the producer from whom he gets the product.

— **Belgian** law allows actions for damages by individual consumers, though such actions are not frequent. The draft reform tries to widen the possibility of damages to the consumer in case of contraventions of the Act of 1971. This may lead to an action for price reduction. It is also discussed in Belgium whether the consumer should be entitled to a special action for rescission of contract.

— As regards **Denmark**, the Consumer Sales Act of 1979, may be mentioned. Pursuant to the Act, a commodity sold is defective if it does not correspond to the information given on the packing in advertisements or in any other way and irrespective of whether the misleading information is given by the seller or an earlier link in the chain of supply. If the commodity sold is defective, the consumer has certain rights that cannot be contracted away.

— In **Luxemburg**, the draft concerning the consumer's legal protection (Chapter 9, No. 209) will include an interesting reform of advertising law. Pursuant to Art. 13, an advertisement concerning qualities or guarantees will become part of the contract even if the contract has not been concluded between the advertiser and the consumer. The consumer will be entitled to ask for resolution of the contract or reduction of the price.

— In **Ireland**, the Sale of Goods and Supply of Services Bill of 1978 (Chapter 6, No. 130) will contain misrepresentation rules similar to those in British law.

58 (*c*) *Penalties*

If advertising is controlled by criminal law, contraventions result in *penalties*, especially fines. In the past these sanctions have not proved to be very effective. In many cases the pay-off from contravention of the law was higher than the fine to be paid. Imprisonment was imposed very rarely.

It is a tendency in consumer law to make criminal sanctions more effective by raising the fines. As an example, we would like to mention the **French** Act of January 10, 1978 under which the fine may amount to one half of the expenses of the incriminated advertising. In **Denmark**, considerable fines are levied (double the profits earned or aimed at).

59 (*d*) *Administrative proceedings*

More modern forms of fighting untrue or unfair advertising are provided by *administrative law*. Civil or criminal sanctions, as we have seen, have little preventive effect and may be limited in their practical consequences. Control by administrative agencies may promote the consumer's interests and help to remove untrue or unfair claims completely from the market.

We would like to insist that — with the exception of certain products, such as

drugs (No. 48) — administrative control is not so much conceived as a means of law enforcement but is used for a so-called *negotiation approach*. It is considered to be the administrative agencies' task to cooperate with business, perhaps also with consumer organisations, in working out the rules to be followed in advertising and to negotiate for their practical fulfilment. Sanctions will be applied only in exceptional cases. This negotiation approach has been most successful in Denmark and in Britain; it is under preparation in other countries.

— By the above-mentioned Act of 1974, the **Danish** legislator created the institution of the Consumer Ombudsman. Art. 15 §2 of the Act reads as follows: 'The Consumer Ombudsman shall, on his own initiative or in consequence of complaints, applications made by others, use his best endeavours by negotiation to induce persons carrying on a trade or business to act in accordance with the provisions of this act and with the regulations made by the Minister of Commerce in pursuance of this act.' The Danish legislator placed great hope in the informal procedure to be followed by the Consumer Ombudsman. The Ombudsman has also legal powers: to procure an injunction or a fine against a tort-feasor he may act as a public prosecutor or plaintiff in the Copenhagen Trade Court. In exceptional cases, he may issue injunctions himself (Art. 16 of the Act of 1974). In Denmark, injunction procedures are seldom initiated. The informal, quick procedure used to put an end to improper marketing practices and misleading advertising is the letter of consent. The Consumer Ombudsman declares the advertising to be misleading and asks the advertiser to discontinue the advertisement and to refrain from advertising in a similar way in the future and to confirm that. Usually, this is done in writing, very often just to confirm a consent given by telephone. However, if the advertiser rejects the Consumer Ombudsman's request, injunction procedures may be initiated by the Consumer Ombudsman at the Market Court in Copenhagen. The Consumer Ombudsman may, however, also issue an immediate interlocutory injunction himself, cf. the Marketing Practices Act, Art. 16, Section 2, in which case the injunction has to be confirmed by the court within a short period of time. Also, it should be noted that injunction procedures may be initiated not only by the Consumer Ombudsman but by anyone taking a legal interest in the matter, for instance the Consumer Council, which will be interested in matters concerning consumers collectively.

— Adopting the Fair Trading Act, the **British** legislator tried a similar approach by establishing the Office of Fair Trading. That Office, having set up a special consumer division, may propose codes of practice and negotiate them with the relevant business organisations, Section 124 of the Fair Trading Act. Some twelve or more of these codes have now been negotiated. The Director General of Fair Trading will approve such codes only if certain standards are applied and control mechanisms are secured. The Director General may also ask for enforceable undertakings by the businessman whose advertising is challenged as being misleading or unfair, Section 34 of the Act. If the businessman does not agree, the Director General may ask for a court order. In 1977, 46 assurances were received by the Director General, 13 which he had asked for were refused and 3 court orders were issued.

— In **Ireland**, the Act of 1978, clause 9(5) defines the powers of the Director of Consumer Affairs concerning supervision, control and information. He may

request misleading advertisements to be discontinued, ask for court orders, and encourage and promote the establishment and adoption of codes of standards in relation to such practice.

Legislation in other countries does not go as far as in Denmark or Britain.

— In **Belgium**, the Minister of Economics may ask for an 'action en cessation'. This power applies only to expressly forbidden practices of advertising, but not to the general clause of Art. 54 of the Belgian Act. In practice, the Minister of Economics will issue warnings to traders concerning advertising. A draft reform will initiate a new procedure of warnings against businessmen acting unfairly, which are to be followed by penal sanctions.

— In the **Federal Republic of Germany**, the Minister of Economics uses the indirect powers conferred upon him under the Act Prohibiting Restraints of Competition of 1957, for instance in regulating advertising concerning cigarette smoking. The powers of the German Cartel Office (Bundeskartellamt) are dissimilar from those of the Consumer Ombudsman in Denmark or the Office of Fair Trading in Great Britain; it may only prohibit an advertisement characterised by abuse of market power (Chapter 1, No. 18).

60 3 Competence of consumer organisations

The emergence of consumer organisations throughout the EC countries has been a starting point for giving them powers of participation in the control of advertising. Legislation is still in its infancy and its practical impacts are hardly known. There has been only one empirical study, namely about Germany. We may well be witnessing a new development in consumer law:

— In the **Federal Republic of Germany**, an amendment of Art. 13 of the Act Prohibiting Unfair Competition of 1965 gives consumer organisations the right to apply for injunctions against misleading or unfair advertising. This competence has gradually been used by consumer organisations but is not yet working satisfactorily. The activity of consumer organisations is mostly hindered by excessive legal charges and risks. Under the reform bill an extension of the action of consumer organisations is currently being discussed. Every consumer organisation having 75 members should be allowed to go to court. The financial risks should be diminished. Consumer organisations may also ask for damages (No. 57) if the individual consumers assigned their claims to them.

— In **Belgium**, Art. 57 of the Act of 1971 gives consumer organisations which are represented in the Consumer Council (No. 7) the right to obtain an injunction. The action may concern misleading advertising excluding advertising for services and unfair trade practices. So far, at least two cases have been brought into court by consumer organisations.

— In **Luxemburg**, the Act of 1974, Art. 13, contains similar rules as Belgian law. Each individual, all professional groups and all consumer organisations represented in the price commission (Chapter 1, No. 16) have a right to bring an action for injunction concerning acts of unfair competition. It is not restricted to mere claims of misleading advertisements for products as in Belgian law.

— In **France**, Art. 46 of the Loi Royer of 1973 allows certain authorised consumer organisations (associations agrées, Chapter 9, No. 212) to become parties in criminal proceedings. The law regulates in detail what organisations

enjoy legal standing. They must be registered, their explicit statutory object must be the defence of the consumer's interests, which means that they really promote the consumer's interests. The organisation must have obtained special permission from the competent authority which, by special regulation, will only grant permission to nationwide consumer organisations having more than 10 000 members or being family unions or to regional or local organisations which are deemed fit for the purpose. In France, 9 consumer organisations plus family unions are now entitled under Art. 46 of the Loi Royer to act nationwide. The action may be brought only in cases in which collective interests of consumers are concerned either directly or indirectly. There is no doubt that these interests are concerned in all cases of misleading or unfair advertising. The law provides for a wide field of application of the 'action civile' which is practically used only in criminal proceedings (plainte avec constitution de partie civile). The action civile has the advantage that legal charges are relatively low and participation in a public prosecution is rendered possible. In a damages suit, the consumer association will only be awarded nominal damages or relatively small sums. So far, practical experience with the Loi Royer is still limited.

— In the **Netherlands**, the Dutch consumer organisation, Consumentenbond, may bring actions only in the name of its members, not in its own name. A draft reform is being discussed aiming at granting consumer organisations the right to bring collective actions.

— In **Denmark**, the Ombudsman takes care of the consumer's interests. Therefore, the legislator did not deem it necessary to provide for collective action by consumer organisations. However, anybody who has a legal interest may go to court. Therefore, the Danish Consumer Council may ask for an injunction but not for damages.

— In **British** and **Irish** legislation, actions by consumer organisations or class actions are not known. The above-mentioned common-law system of relator actions (No. 56) by the Attorney General has never been used in the specific interest of consumer organisations.

— In **Italy**, Art. 2601 forbids consumer organisations to institute actions against misleading advertising. That article is challenged on constitutional grounds by an Italian consumer organisation, Comitato Difeso Consumatori.

61 4 Corrective advertising

One type of remedy which has been under intense discussion in the legislation of the European countries has been corrective advertising. Most systems of control, whether civil or criminal, will not suffice, even if working successfully, to correct and change the consequences of a misleading advertising message that has already been circulated in the media.

Corrective advertising is a relatively new instrument of law and hence has yet to win legal approval. So far, first steps in that direction seem to have been taken by the legislators of a few countries only.

— Art. 44 §2 of the **French** Loi Royer contains a principle of corrective advertising since the courts are authorised to issue 'annonces rectificatives'. A decision by the Court of Paris of July 4, 1977 seems to extend this authorisation.

The courts may decide at their discretion whether or not to ask for corrective advertising.

— The **Belgian** draft reform of 1977 tries to introduce a new Art. 65 taking up the idea of corrective advertising.

— In **Britain**, a report of 1975 by the Director General of Fair Trading rejected the idea of corrective advertising. Limited possibilities are introduced by the Consumer Safety Act, 1978 (see Chapter 5, No. 98).

— In the **Federal Republic of Germany**, the courts may order publication of their decisions but not of the motives of their judgement. Under the law of torts, a consumer organisation may ask for some sort of counter-information or correction of an advertisement, but so far there has been no practical experience with this remedy. The reform bill being discussed in Parliament does not contain any provision on corrective advertising.

— Under the **Danish** Act of 1974, the system of corrective advertising is not known. In defamation cases, publication of the judgement is allowed. Corrective advertising is provided for in the Medicines Act of 1975.

— In the legislation of other European countries the principle of corrective advertising is unknown.

62 **5 Systems of self-control**

Systems of self-control in advertising have always played an important role in all EC countries. There are several self-regulatory bodies on a general basis, as the one sponsored by the International Chamber of Commerce, and there are institutions of self-control for specific trades and markets. Originally, self-control is part of the idea of concurrence déloyale and does not primarily intend to serve the consumer's interests. It is directed at freeing the market from dishonest and deceptive claims and trade practices. It serves as a means of preventing state intervention. Only recently have we been able to note a trend of incorporating the consumer's interests into the standards of a self-control system or even of admitting consumer representatives to the bodies managing self-control. These tendencies, however, fail to change the basis of the system of self-control which is not directed primarily at promoting consumer interests.

We would like to mention the following systems of self-control in the EC countries:

— The **British** system of self-control is regulated by the Advertising Standards Authority. It is about the most comprehensive body in EC jurisdiction. The board of the ASA comprises 12 members, four of whom are devoted to commercial interests, while eight are said to be independent and may belong to consumer organisations. In 1962, ASA worked out a code of advertising. Advertising should be legal, decent, honest, truthful and responsible to the consumer. It asks businessmen and advertising agencies to conform to its standards. Besides informal powers, it may prevent the publication of an advertisement deemed to be contrary to its code. It has great moral powers in the business world. Usually, its advisory opinions are followed. Criticism has been voiced recently by the National Consumer Council which pointed out that inspite of ASA there is much misleading advertising in England and the code is not being observed. The Office of Fair Trading should be empowered to see to the observance of the code.

— In **France**, there are several codes concerning advertisements mostly based on the recommendations of the International Chamber of Commerce. The basic idea of the code is that an advertisement should be decent, loyal and true. Observance of the code is controlled by the Bureau de verification de la publicité (BVP), which consists of 20 people from the business world and three representatives of the Institut national de la consommation. The President is a high independent personality. The BVP is authorised to issue recommendations, advisory opinions directed at specific advertisements before their appearance in the media. The BVP may also ask an advertiser not to publish his claim any more. It has no direct legal power to demand sanctions, not even in the form of a boycott, but enjoys high moral authority.

— In the **Federal Republic of Germany**, the Deutsche Werberat has been in existence for nearly ten years. It is a self-control agency of German businessmen, advertising agencies and the media. Only professionals are represented on its board. There is a committee of coordination cooperating with consumer organisations. The Deutsche Werberat handles individual complaints and sponsors self-regulatory rules. It may only issue recommendations, and does not have any power to enforce compliance with its objections. Consumer organisations find fault with the very loose and wide standards applied by the Deutsche Werberat which amounts to that advertisements are hardly ever criticised.

— In the **Netherlands**, there is the Nederlandse Code voor het Reclamewezen which is influenced by the rules of the International Chamber of Commerce. Application of the rules is controlled by the Reclame Code Commissie which may only issue recommendations and is of a purely voluntary nature.

— In **Belgium**, there are different codes of advertising, more general ones based on the rules of the International Chamber of Commerce and specific ones for drugs, cosmetics and household appliances. Their institutions of self-control try to secure compliance with the codes and may ask the media not to circulate an incriminatory advertisement. Consumer representatives do not take part in the system of self-control.

— In **Italy**, there is one main self-regulatory code, the Advertising Fairness Code, introduced in 1971 on the initiative of the Italian General Confederation of Advertising. Self-control is exercised by an honorary jury, whose composition does not, however, grant an adequate and fair representation of the consumer's interests. Among its nine members, in fact, only one of them is chosen to represent the consumer's interests. The honorary jury is authorised to ask the media to drop unfair advertisements. The inadequacy of such system is largely explained by the existing connection between the Italian General Confederation of Advertising and Industry. Moreover, the publication of judgements in the media is not allowed, and in any case judgements are not binding.

— In **Denmark**, the old system of self-control has almost been abolished by the appointment of the Consumer Ombudsman under the Act of 1974.

VII EVALUATION OF ADVERTISING LAW IN THE ECONOMIC COMMUNITY COUNTRIES

63 1 The need for putting into force the EC draft directive on advertising

Our comparative analysis of the law of advertising in the EC countries has revealed common denominators, but also remarkable differences in substantive law and law enforcement. If the EC draft directive on advertising were adopted by all member countries and their laws were changed to that effect, a considerable step towards approximation and law reform would be made. We are convinced from our analysis that the EC draft directive takes up most of the recent developments in the law of advertising and will effectively promote the consumer's interests. We will not go into details since the draft directive is deemed to be well known. We will not go into details either of how far the EC countries will have to change their laws if they want to comply with the draft directive. From a general viewpoint, we should like to note the following:

— The law in **Denmark** seems to comply most with the EC draft directive and may require changes only insofar as it will have to provide for corrective advertising. Collective action by consumer organisations is already possible, even though it has no great importance due to the activities of the Consumer Ombudsman.

— The law in **France** complies with the concept of misleading advertising and the sanctions in the EC draft, but will have to develop more precise principles of forbidding unfair advertising.

— The law of the **Federal Republic of Germany, Belgium** and **Luxemburg** has many parallels with the EC draft directive and already largely conforms to the EC proposals. However, the truthfulness doctrine will have to be applied more strictly in the interest of the consumer. New types of unfair claims in advertising, which have not yet been touched by national law, will have to be developed. The possibility of consumers or consumer organisations bringing damages suits will probably be taken up if the reform bills become law.

— In the **United Kingdom**, the Trade Descriptions Act may still serve as a basis for advertising law, but will have to be amended in order to cover claims that are not 'trade descriptions' within the narrow meaning of the law. The Fair Trading Act will have to provide more effective standards and methods for coping with unfair claims. English law will have to be changed substantially if consumer organisations are given the right to bring an action for injunction or damages. Perhaps, the Director General of Fair Trading should be enabled to ask for injunctions on behalf of the consumer.

— Regarding **Ireland**, the new act complies to a great extent with the EC draft directive. The standards of misleading advertising may have to be applied more strictly, however, and the concept of dishonest statements against the interests of the consumer must be worked out by the Director. Consumer organisations should be allowed to go to court. Corrective advertising should be considered.

— The other EC countries, namely the **Netherlands** and **Italy**, will have to change their laws substantially in order to comply with the EC draft directive.

64 2 The need for new concepts

Compliance with the EC draft directive will, if enforced effectively, solve some but not all of the problems of advertising. Claims referring to health

remain a consumer problem. Legislative action must be taken against advertising being an abuse of market power. These problems are still very much under discussion in the EC countries and need more empircal research. If it is hard to find a satisfactory solution on the national level, this will almost be impossible on an EC level.

Another big problem not yet solved by the EC draft directive is the unification of the system of sanctions. In our comparative analysis we have noted great discrepancies which, due to national sovereignty, cannot be overcome by the EC draft directive. In our opinion a *combination of civil sanctions, criminal sanctions and administrative regulations* will serve best the consumer's interests. It should be pointed out that, with respect to all types of sanction, consumer representatives should be heard and should be entitled to participate. Corrective advertising should be encouraged.

CHAPTER 4

Marketing and Sales Promotion

I GENERAL PRINCIPLES

65 It is quite generally accepted in all EC countries that the producer or trader is free to use his methods of marketing and sales promotion. He may do whatever he thinks best to market his products, induce consumers to accept his services, etc. This principle stems from the very system of market economy which has been accepted to varying degrees by all EC countries and which is the basis of the EC Treaty itself.

However, some methods of marketing or sales promotion are restricted, partially regulated or even totally forbidden. The regulations will very frequently overlap with those of advertising and cannot always be separated therefrom. Very diverse interests — the public interest, the interests of competitors, and only recently the consumer's interests — have to be taken into account.

66 1 The idea of unfair competition

In the countries which have accepted the system of concurrence déloyale, the idea of protecting the fair competitor against unfair methods of his rivals has been the starting point for legislation and judicial practice. This system still exists in:

- — **France** (Art. 1382 Code Civil)
- — **Italy** (Art. 2598 Codice Civile)
- — **Netherlands** (Art. 1401 Burgerlijk Wetboek)
- — **Luxemburg** (Regulation of 1974)
- — **Federal Republic of Germany** (Art. 1 of the Act Prohibiting Unfair Competition of 1909)
- — **Belgian** Act on Commercial Practices of 1971, Art. 54
- — In **Denmark**, a similar regulation had been in force till 1974 when the new Act on Marketing Practices was promulgated
- — **Great Britain** and **Ireland** do not have general acts regulating unfair competition outside the law of torts (defamation and passing-off)

67 2 The evolution of consumer policy

The idea of concurrence déloyale has gradually been supplemented by the need for protection and promotion of the consumer's interests in the market.

We refer here especially to the regulation of certain types of high-pressure salesmanship, such as door-to-door selling, inertia selling, pyramid selling, unsolicited telephone calls, which may be used by all competitors in the market, but which may still be detrimental to the consumer and hence have to be regulated by law. The idea of unfair competition must take up the idea of consumer protection. We should like to mention the following legislation where this concept has evolved in such a way.

— In the **Federal Republic of Germany**, the above-mentioned general clause of the Act Prohibiting Unfair Competition is administered by the courts in such a way as also to protect the consumer against unfair marketing practices. We shall cite some examples later on. German writers and courts agree that the Act Prohibiting Unfair Competition has gradually been changed in an attempt to include the interests of competitors as well as the public interest and the consumer's interests. But it must be admitted that the consumer's interests play only a secondary role. Another problem is to effect the necessary compromises on the conflicting interests of producers, traders and consumers.

— In **Belgium**, Art. 54 of the Act of 1971 has been a similar starting point for legislative and judicial concern about the consumer's interests. The draft reform of 1977 tries to shift the consumer's interests explicitly to the field of application of the general clause.

— In **Denmark**, Art. 1 of the above-mentioned Act of 1974 forbids acts against good market conduct. The legislative approach goes to show that the Danish legislator wanted to take up the consumer's interests in defining the standard of good market conduct. Of course, interests of competitors also play a certain role in the definition of good market conduct. It is one of the Consumer Ombudsman's main tasks to apply in detail and in a concrete way the principles of good market conduct in negotiating guidelines with business and consumer organisations.

— **France, Italy**, the **Netherlands** and **Luxemburg** still adhere to the classical idea of concurrence déloyale and seek consumer protection in specific acts.

— A completely different approach of regulation has been taken under the **British** Fair Trading Act of 1973. The Director General of Fair Trading (No. 8) has certain powers to ensure good market conduct in order to protect the consumer. Section 13 gives him the right to make proposals for legislation with effect on consumer trade practices. He has to consult first the independent Consumer Protection Advisory Committee appointed under the Act. On the basis of these proposals, the Secretary of State is then enabled to issue orders on trade practices. This procedure has been used, for example, in regulating mail-order transactions. Another power of the Director of Fair Trading is to be found in Section 34 of the Fair Trading Act. If he deems a certain conduct to be unfair to the consumer he may, as we have already seen in advertising law, ask for a written assurance from the trade to stop such practice. If he does not get such an assurance, he may ask for a court order. A breach of the court order is regarded as contempt of court and may be prosecuted.

— In **Ireland**, the Consumer Information Act of 1978 adopted a system similar to the British by instituting the Director of Consumer Affairs.

In the following, we will mention some types of marketing practice which have attracted the legislator's attention in the interest of the consumer. From a

comparative point of view, it is impossible to enumerate and describe exactly the different trade practices which are regulated by law, especially if they relate to conflicting interests.

II DOOR-TO-DOOR SALES

68 1 Generalities

One method of marketing and sales promotion, namely door-to-door sales, has been taken into consideration under consumer protection law in most EC countries. The title employed here is somewhat misleading, since not only contracts of sale come within the scope of the law but also credit agreements and contracts for services. On the other hand, a contract may be concluded not only at the consumer's doorstep but also outside the businessman's regular premises, for instance at the place of work, in the street. Protection of the consumer against this type of marketing is necessitated by two reasons: the consumer may not be free in his decision to enter into a contract; as a result of the very method employed by the trader he is not able to compare the different offers on the market.

Three different methods of legislative regulation may be applied: an *administrative-law method*, a *civil-law method* and a *prohibition method*.

Regulation by *administrative law* may demand prior registration and control of door-to-door sales. Such regulation was applied in the past to travelling salesmen (Reisegewerbe, ventes itinérantes) and was not really designed to protect the consumer but the existing trade against unwanted competition.

A *civil-law method* usually requires that door-to-door sales and related forms be put down in writing and leave the buyer (the consumer) what is known as a cooling-off period (usually about one week) within which he may revoke his decision to enter into a contract. At a glance, this regulation seems to be in opposition to the basic principle of contract law in all EC countries, namely the binding force of contract. However, the contradiction is not a real one, since a binding contract will only come into being if the cooling-off period has passed and the consumer has not revoked his offer.

The *prohibition method* (Denmark) simply forbids door-to-door sales with but a few exceptions.

We will compare legislation here in general terms only, leaving out specific regulations on credit transactions (Chapter 7, Nos. 157 and 163), correspondence courses, investment shares, insurance contracts. We must notice, however, that sometimes the different aspects are not defined precisely by law.

69 2 Existing legislation

The following legislation on door-to-door sales exists in the EC countries:

— The **French** Act of December 22, 1972 regulates what is known as démarchage à domicile. This Act applies also to sales at the consumer's working place, but not to sales on public premises and in streets. All contracts with consumers are covered by law, be they sales contracts on a cash basis, instalment

sales or service contracts. Law is not quite clear whether the Act applies if the consumer himself has asked for a visit, for instance in a classified advertisement. The contract must be submitted in writing and must contain certain information. The consumer has a seven-day cooling-off period, beginning upon delivery of a copy of the contract. He may revoke the contract on a special form attached thereto. The consumer may not be asked for a down payment. There are certain exceptions to the application of the Act, namely insurance contracts, contracts for new cars, contracts for home-made articles. French writers criticise the exceptions for automobiles and insurances as not being reasonable. The Act contains a special clause trying to fight the abuse of feeblemindedness or ignorance in door-to-door selling (délit d'abus de faiblesse). It wants to protect the poor consumer, the foreigner, etc. There is a specific criminal sanction for that provision of the Act. So far, this has been of no practical consequence in court practice.

— In the **Netherlands**, there is a special act regulating door-to-door sales, called Colportage Wet, of September 7, 1973. The Act includes a very detailed administrative and civil-law regulation on door-to-door sales. It distinguishes between credit transactions, hire-purchase transactions and cash transactions. Credit transactions are forbidden, hire-purchase transactions must be registered, cash transactions are free unless otherwise provided by regulation (for instance, cosmetics, furniture, but not books, films). Door-to-door transactions must be laid down in writing. There is a cooling-off period of 8 days, beginning on the day the writing has been registered with the Chamber of Commerce.

— Art. 53 of the **Belgian** Act of 1971 forbids ventes intinérantes in order to protect local commerce and the consumer. The Act is applied on a small scale only. The Belgian draft reform tries to use a civil-law regulation by demanding that the contract at somebody's doorstep (en dehors de l'entreprise du vendeur) should be in writing and should give the consumer a cooling-off period of 7 days. There is also a specific act in Belgium concerning a cooling-off period in instalment sales (Chapter 7, No. 157).

— In the **Federal Republic of Germany**, the Industrial Act (Gewerbeordnung) contains provisions on travelling salesmanship. Art. 56 prohibits only certain types of door-to-door sale, for instance credit transactions, sales of drugs, firearms and similar matters. Now, pursuant to a decision of the Federal High Court, a civil sanction is attached to those provisions which settled a very controversial issue. Certain types of door-to-door sale may also be in contrast to the Act Prohibiting Unfair Competition. A cooling-off period of 7 days is only provided for in hire-purchase transactions (Chapter 7, No. 157), contracts of joining a book-of-the-month club, and similar agreements. A new bill concerning door-to-door sales is presently being discussed in Parliament. The bill provides for similar regulations as the French Act of 1972 and will only exempt small transactions and real property transactions from its field of application. There is strong opposition to the bill.

— Regarding the **United Kingdom**, we would like to mention Sections 64, 67 – 74 of the Consumer Credit Act of 1973 which give the consumer entering into what are called regulated agreements at the doorstep a cooling-off period. We will study details in Chapter 7, No. 163.

— In **Denmark**, unsolicited door-to-door sales of goods have — with certain exceptions concerning certain foodstuffs and books — been prohibited since the beginning of the century. The field of application of this ban has been extended by the Act on Certain Consumer Contracts of 1978. Pursuant to Art. 2, Section 1 of that Act, any application in person or over the telephone by an enterprise to a consumer on his private premises or in some other place to which the public is not admitted aimed at the conclusion of a contract — be it a contract for the sale of goods, the supply of services or any other matter — is prohibited without the consumer's prior request. However, pursuant to Art. 2, Section 2, the ban does not apply to applications for the sale of books, newspapers, magazines, insurances and certain foodstuffs. Any person who disregards the prohibition commits an offence. Also, a promise given by a consumer in conjunction with an application contravening Art. 2 is not binding. In the event of a contract being concluded outside permanent business premises, i.e. also in the case of an application by an enterprise to a consumer on his private premises at his explicit and prior request, the Act provides for a cooling-off period of one week. The period runs from the time of conclusion of the contract in the case of sales of goods, provided that at such time the consumer has had a possibility of examining the goods — otherwise the period will run from receipt of the goods. Upon conclusion of the contract, the enterprise shall expressly inform the consumer of his right to withdraw and in doing so shall use a text prescribed by the Minister of Justice. If the enterprise fails to do so, the contract will not be binding upon the consumer.

— In **Italy**, door-to-door sales are regulated by the Act of June 11, 1971, No. 426 on Trade which was put into force by the Decree of January 14, 1972. Said legislation, concerning especially door-to-door sales, imposes on the seller a warranty of safety and an insurance duty. The seller must register with the administrative authority. Italian law does not provide for a cooling-off period.

— In **Luxemburg**, an Act of March 5, 1970 'sur le colportage' provides for administrative registration of and permission for travelling salesmanship. Certain goods may not be sold on colportage. There is no civil sanction attached to the Act nor is there any cooling-off period. Art. 10 of the Draft on Legal Consumer Protection of 1978 (Chapter 9, No. 209) provides that such a contract is void at the request of the consumer.

— In **Ireland**, the Sale of Goods and Supply of Services Bill of 1978 (Chapter 6, No. 130) enables the Minister of Commerce to issue orders providing for a cooling-off period for contracts of sale, hire-purchase or the supply of services concluded outside regular business premises.

We would like to mention that the approximation and reform of law in the EC countries could be achieved if the EC draft directive on door-to-door sales and related forms came into force.

III Specific forms and methods of marketing forbidden by law

There has been legislation forbidding certain types of sales methods which seem to be specifically detrimental to the consumer. The following problems appear to be quite common in the EC countries.

70 1 Pyramid selling

Pyramid selling is a form of salesmanship in which the consumer is promised certain advantages if he succeeds in finding customers himself. The longer the line of involvement, the smaller the consumer's chances of gaining the benefits promised under the system. Pyramid selling in some ways simply amounts to fraud and hence is subject to penal law. Since fraud is hard to prove, the legislator has found it necessary to enact specific laws against pyramid selling:

— In **France**, there is an Act of November 5, 1953 prohibiting what is called 'boule de neige'. It is a criminal offence to initiate such a system. The consumer who participated in such a system may get his money back.

— In **Belgium**, Art. 52 of the Act on Commercial Practices of 1971 takes a similar approach to French law.

— In the **United Kingdom**, the Fair Trading Act of 1973 provides for civil regulation. The consumer may withdraw from such a system and may get his money back.

— In **Denmark**, the Consumer Ombudsman has worked out guidelines against pyramid selling. Under Danish law, these schemes will be regarded as being against good marketing practices as defined in Art. 1 of the Act of 1974.

— In the **Federal Republic of Germany**, pyramid selling is forbidden pursuant to the general clause of the Act Prohibiting Unfair Competition. A new criminal sanction is presently being discussed under the Reform Bill of 1978.

71 2 Unsolicited goods

Marketing unsolicited goods (also called inertia sales) is a method of salesmanship according to which the consumer will receive merchandise (a book, a record, a household appliance) which he has not asked for. The merchandise is usually accompanied by a letter asking the consumer to pay the money or to return the article. It is quite common that due to ignorance of law consumers will think that they are under an obligation to pay the money and keep the merchandise. Inertia sales may also occur in the form of unwanted directory entries. They should be distinguished from mail-order sales (the consumer asks a mail-order house to send him by catalogue a certain commodity) which within certain limits is legal in all EC countries.

We would like to mention the following regulations:

— In **France**, there is a Decree of February 9, 1961 prohibiting what is called 'envoi forcé'. Sending unsolicited goods will not be regarded as constituting a contract; the act is made a criminal offence. It is legal for a trader to sell goods by asking the consumer to send him a coupon.

— In **Great Britain**, there are controls in the Unsolicited Goods Act of 1971. The Act provides that in certain circumstances the receiver may treat the unsolicited goods as unconditional gifts. The recipient acquires title to the goods within six months of their receipt. There are detailed provisions on what the recipient may do in order to shorten the time. Demanding payment for unsolicted goods is made a criminal offence. Unwanted directory entries are also dealt with by the Act.

— In **Ireland**, the Sale of Goods and Supply of Services Bill of 1978 adopts

provisions similar to those of Britain on unsolicited goods, services and directory entries.

— In the **Netherlands**, the Bill on Consumer Sales of 1978 (Chapter 6, No. 136) provides that the consumer may keep the commodity without payment if the supply was not at his request.

— In **Belgium**, Art. 51 of the Act of 1971 points out that the consumer is obligated neither to return nor to pay for unsolicited goods. The draft reform will extend this regulation to include also unsolicited services.

— In **Denmark**, there is a new Act of 1978 forbidding unsolicited applications in person or by telephone. The Act does not apply to contracts for the sale of foods, newspapers, magazines, insurances and certain natural products. Pursuant to Article 4 of the Act on Certain Consumer Contracts of 1978, a consumer becomes the owner, without having to pay anything, of goods transmitted or delivered to him by an enterprise without his prior request, provided the delivery is not due to a mistake.

— In the **Federal Republic of Germany**, the general clause of unfair competition is applied. German courts will prohibit inertia sales and unwanted telephone calls. This doctrine is extended to include high-pressure salesmanship in the street (Anreißen).

There are no specific acts in the legislation of other EC countries besides the general rule of contract law that nobody can be a party to a contract of which he has not approved.

72 **3 Bonuses and gifts**

Modern sales practice frequently uses bonuses, gifts, premiums, etc., in order to promote a certain product. Children, for instance, may receive pictures if their parents buy certain cereals. Visitors to a supermarket may receive a free fountain-pen. Customers of a supermarket outside town may get a free ride or enjoy free parking. Subscribers to a newspaper or a book-club may receive an expensive book. Launching a new product, a big company will distribute the article at no cost to millions of consumers.

The above-mentioned methods — we could cite many more — seem to be quite common in all EC countries and the consumer may even enjoy getting goods or services at no extra cost. But these methods may be as detrimental to the consumer as to the functioning of the market system itself: the consumer may buy a certain product only in order to get a gift. Small competitors will have to give up business, because big companies systematically use gifts to gain market power.

The law regulating premiums, bonuses, gifts, etc., is extremely complicated, different and controversial in all EC countries. For reasons of comparative analysis, we would like to differentiate between *two approaches of the law*. The traditional approach regulated gifts *connected* with the main contract (premiums, trading stamps, Zugaben, primes). A more modern approach tries to regulate gifts *whether or not they are closely connected* with the conclusion of a contract, for instance articles distributed to the public in order to launch a new product on the market (cigarettes, toilet articles) or to win the attention of the public by means of games or gifts.

(i) Legislation on *bonuses*, *premiums*, etc., is quite old, but usually has no

intention of protecting the consumer. We would like to mention the following acts.

— Arts. 35 – 43 of the **Belgian** Act of 1971 provide for a very detailed regulation of 'offres conjointes'.

— In **France**, there are Acts of March 20, 1951 and December 29, 1972 restricting the use of 'primes' in the market.

— In the **Federal Republic of Germany**, a special Act of 1933, which is not only beamed at consumers, prohibits collateral gifts (Zugaben).

— In **England**, there is special legislation on trading stamps dating from 1964.

— In **Denmark**, Arts. 6 and 7 of the Marketing Practices Act prohibit collateral gifts and restrict the use of trading stamps.

— In **Italy**, administrative authorisation is required pursuant to Art. 43, Decree of October 19, 1938, No. 1933 in the field of premium (and price) sales. Under that Act, permission cannot be granted if the sale is against public policy (Art. 54a) or does damage to the public interest or by disturbing the normal development of national production and trade (Art. 54c).

— In **Luxemburg**, Art. 3 §1 of the Art of 1974 forbids 'vente avec primes'. They are only allowed in certain closely defined exceptional cases. Trading stamps are regulated by Art. 3 §4.

— In the **Netherlands**, the Act of 1977 'Wet beperking cadeaustelsel', in force since January 1, 1979, forbids collateral gifts.

(ii) *Gifts and games not connected* with a contract of sale or a contract for the supply of services have only recently attracted the attention of consumer policy. There is a trend towards stricter regulation of games and gifts, since they will induce the consumer to make non-rational purchase decisions and will also distort competition. We would like to mention the following legislation:

— The **French** Loi Royer of 1973, Art. 40 forbids gifts as a method of sales promotion. This rule does not apply if some (even petty) remuneration is asked for in exchange of the commodity or service. The rules do not apply if the gift is asked for by a charitable organisation. Lotteries have always been regulated by the French Act of May 21, 1836.

— In **Denmark**, Art. 8 of the Marketing Practices Act forbids games and price competitions.

— In the **Federal Republic of Germany**, the general clause of the Act Prohibiting Unfair Competition of 1909 has been 'discovered' by the courts in recent years in order to curb games and gifts. A general rule prohibiting the use of psychological means to induce somebody to enter into a contract (psychologischer Kaufzwang) is under development. Therefore, gifts and games will not be prohibited in general, but only if they act in such a way as to practically force the consumer into concluding a contract. The courts also take account of the general play of competition.

— In the **Netherlands**, the Act of 1977 forbids all gifts in the form of goods. By order of the Queen-in-Council the Act may be extended to include certain services. There are some exceptions in Arts. 3 and 4 of the Act.

73 **4 Other regulated marketing practices**

Legislation in many countries provides for specific regulation of certain sales

practices which may be detrimental to the consumer. Usually, the starting point for legislation is a general regulation of competition. We will just mention the following fields of activity, without going into details:

— *mail-order sales* (Great Britain, Italy; drafts are in preparation in Belgium and in Luxemburg)
— *closing-down and clearance sales* (Federal Republic of Germany, Italy, France, Netherlands, Belgium, Luxemburg)
— *sales at a loss* (vente à perte — France, Belgium, Luxemburg)

IV SYSTEMS OF CONTROL

74 The systems employed in controlling marketing practices resemble largely those employed in controlling advertising. We will not repeat what we have said in Chapter 3, Nos. 54–62. Specific civil sanctions attached to door-to-door sales and inertia sales have already been mentioned. We would just like to refer to the following:

— A *negotiation approach* is even more necessary for the control of unfair marketing practices than for the control of advertising. Trade practices change very rapidly. No law, unless defined in very broad terms, can change as quickly as trade practices in order to protect the consumer against harm and unfair salesmanship. That is why this method is used by the Danish and British legislators. It is one of the principal tasks of the Consumer Ombudsman in Denmark and the Director of Fair Trading in the United Kingdom to work out guidelines or codes of practice ensuring fair marketing practices.

— To the consumer it is most important that he be protected by law in his *individual rights*. Administrative or criminal sanctions are of no avail and interest to him if he cannot get rid of a contract he has concluded under conditions of unfair salesmanship on the part of a trader. Law has not always recognised the right of the consumer to withdraw from a contract, especially in countries in which a system of unfair competition legislation is employed. This will change under the reform movement described in No. 57.

— It is quite common in all EC countries for the relevant organisations of businessmen to fight for *voluntary codes* of conduct and rules of market behaviour. We will not go into details since the codes are very numerous. Consumer organisations do not usually take part in monitoring these codes, which may be very detrimental to competition and to the consumer's interests. Since there are no precise standards of fairness and good practice on the market, it is mostly left to the specific group of businessmen to define its conduct. This may bring about the danger of corporativism which cannot be in the interest of the consumer.

V CRITICAL EVALUATION

75 As we have pointed out in our comparative report, the law of the EC countries on the regulation of marketing practices in the interest of the consumer varies greatly and is evolving. It is hard to evaluate existing laws and to predict further

development since trade practices themselves change from day to day. We would only like to consider the following questions:

76 **1 General clause or specific regulations?**

Firstly, there is the question of legislative approach. We have seen that a general clause, supplemented by certain specific regulations, is used by some EC countries, such as the Federal Republic of Germany, Belgium and Denmark, while in other countries, such as France, Great Britain and the Netherlands, only specific regulations are known, at least as far as the consumer's interests are concerned. In our view, the introduction in all EC countries of a general clause would constitute a step forward if such a clause were implemented by a competent authority defining what marketing practices are regarded as harmful to the consumer and have to be fought against.

The legislator should develop a step-by-step approach regulating more precisely specific marketing practices that are detrimental to the consumer's interests. We think that the EC draft directive on door-to-door sales is a good step in that direction. It should be followed by a directive on inertia sales. Ambiguous trade practices, such as collateral gifts, premiums, free gifts, are probably not eligible for too detailed a regulation.

77 **2 Public authority**

Regulation of marketing practices calls for a public authority that negotiates with consumers and businessmen about fair marketing practices. Such authority exists only in some countries, i.e. only on a national basis. In view of the Common Market, it should be established on a *European basis* and should try to work out guidelines and codes of conduct for trades doing business in the EC notwithstanding their nationality. This would help to abolish discrimination due to the different regulation of marketing practices in the legislation of the EC countries.

78 **3 Civil sanctions**

As we have pointed out, the consumer is best protected against specific marketing practices if he can get rid of a contract he would not have concluded had a certain practice not been used. This principle is accepted to a small extent only. The law should require that the consumer be informed about his right to withdraw from such a contract. Such a right would cause businessmen to be more careful in their marketing practices.

CHAPTER 5

Safety of Products and Services

I GENERAL REMARKS

79 Technical progress does not only benefit the consumer. Mass production also involves a great number of risks to the consumer's health and property. That is why the aspect of safety is of prime importance to the consumer when he purchases a product or uses a service. His primary objective is to be spared injury to his health and damage to his property which may result from the use of a product or service. Preventive control measures serve this objective, which will be studied in Sections II and III. If the consumer's rights or person are injured despite or because of the lack of control measures, he will seek to recover damages from those responsible. Questions of liability will be dealt with in Sections IV and V.

80 1 The preventive aspect

Experience in recent years has shown — and in this respect we can speak of a European trend — that the enterprises themselves do not provide adequate preventive protection to the consumer. Therefore, the governments saw themselves faced with the task of ensuring the public the necessary protection. Even before the adoption of consumer protection programmes, laws were created which were of vital importance to two spheres of life of the consumer, namely, foodstuffs and drugs. Today, these two spheres are characterised as the principal item of consumer protection. They reveal the extent to which consumer protection has already been achieved through legislation and executive orders. The need for and the importance of comprehensive statutory regulation is recognised by all EC countries. Apart from products belonging to the 'classical' field of consumer protection, products whose dangerousness results from their production method are increasingly moving to the focal point of interest. Traditionally, the field of industrial production has been a domain of industry in which the latter controls the safety requirements.

Manufacturers try to check the dangers emanating from their products by establishing product standards which determine the safety aspects to be considered. Now legislation increasingly covers that field, even if the contents and extent of statutory regulations vary considerably in the EC countries. Mixed types prevail, combining state control measures and control measures taken by industry. As far as laws exist, they do not generally cover all products that are

dangerous to the consumer. Only under French law has it been a requirement since early 1978 that there should be no products threatening the consumer's safety and health. Safety regulations may be made under Britain's Consumer Safety Act, 1978. The lines of similar endeavours are beginning to become clear in Denmark. A general regulatory system permitting any order, regulation or the like to be made on safety was proposed by the Danish Consumer Committee and will probably be enacted shortly. Finally, reference should be made to special laws concerning high explosives, radioactive substances, arms and motor-cars, which exist in all EC countries. These laws are not specifically consumer protection laws, and so may be disregarded in this study.

While the instruments of control concerning products have already been developed to an advanced stage, the control of services is still in its infancy. That has to do with the fact that services are not made available by industry in the same measure as products. Yet in the field of services a development similar to that regarding the control of products is beginning to appear in outline.

81 2 Liability

If all means of protection that can be used in the course of the production process (i.e. governmental means as well as means created by industry/trade) are studied in their totality, it must be noted that they do not suffice to prevent the production of dangerous products and their passing on to the consumer. As dangerous and unsafe products come onto the market, damage results and the question arises as to who will be liable for the damage. The seller's primary obligation is to supply the buyer with a commodity which is unobjectionable in quality (Chapter 1, No. 13). Even though he may be responsible sometimes for the safety of the product, there remain a lot of cases in which the consumer's only chance of getting compensation is to hold the manufacturers liable. Hence, the type and scope of manufacturer's liability, if any, will have to be shown. There are no statutory rules in any EC country. It was incumbent upon the courts to design the law of manufacturer's liability, and now courts in all EC countries have established principles by which consumers may be protected. Finally, special importance will be attached to a comparison between the European drafts to amend manufacturer's liability under applicable national law and court practice.

II THE CONTROL OF THE SAFETY OF PRODUCTS

82 1 Means of control

To keep the production and marketing of dangerous goods to a minimum, control measures must be taken. The means of such control vary widely, though, depending on who is in charge: government, industry or consumer organisations. In principle, the government through its laws and their implementation is able to achieve a greater measure of binding force than industry within the frame of its self-control agreements. Consumers largely lack statutory powers, so that they depend on actual pressure to achieve their objectives.

As consumer legislation is the subject of this paper, state control of goods based on legislation will be the central issue of the study. Before examining state control measures, we must find out at what stage of production intervention is possible. The earliest possibility of intervention is in the production process itself. Such measures are of a *preventive* nature: they control the products before they leave the production line. There is also the possibility of preventive control if products have already reached the sphere of marketing, but have not yet been made accessible to the consumer. However, if dangerous products are already on the market, we must distinguish between: measures which have for their object the avoidance of an *abstract* danger to the consumer, and measures which have for their object the avoidance of a *concrete* danger to the consumer. We may speak of a concrete danger if scientific research methods have *proved* the dangerousness of a certain foodstuff; of an *abstract* danger if scientific research methods may *presume* the dangerousness without being able to *prove* that consumers may be endangered. In fact, preventive consumer protection is not guaranteed if the Acts demand for a concrete danger to enable the responsible agencies' intervention, because concrete danger means in practice that the agencies wait for an accident. The efforts of the supervisory agencies are then concentrated on avoiding the spread of the danger. Such measures are, however, not of a *preventive* nature; they are rather *retrospective*. Measures of an exclusively retrospective nature are those that *require* that damage has occurred.

The consumer is protected the better, the earlier there is intervention. Therefore, from the consumer's point of view preventive measures must be the goal of effective consumer protection. More recent acts as well as proposed reforms tend to be preventive in effect.

83 **2 The control of foodstuffs**

Long before the consumer protection movement started in Europe, governments had enacted laws for the benefit of public health.

- **Denmark**, Food Act of 1973
- **Great Britain**, Food and Drugs Act of 1955; The Materials and Articles in Contact with Food Regulation of 1978
- **Netherlands**, Warenwet of 1935
- **Federal Republic of Germany**, Lebensmittel- und Bedarfsgegenständegesetz von 1974
- **France**, Code de la Santé Publique
- **Belgium**, Loi rélative au commerce des produits de l'agriculture, de l'horticulture et de la pêche maritime du 1975 et La Loi rélative à la santé des consommateurs en ce qui concerne les denrées alimentaires et les autres produits du 1977
- **Italy**, Act No. 283 of 1962
- **Ireland**, Sale of Food and Drugs Act of 1875; Health Acts of 1947 and 1953; Supply of Food and Drugs (Milk) Acts of 1935 and 1936
- **Luxemburg**, Loi du 25 septembre 1953 ayant pour object la réorganisation du contrôle des denrées alimentaires, boissons et produits usuels.

84 *(a) Scope of application*

The various Acts mentioned are similar in *scope*. The legislators focus their endeavours on the consumer's protection against *foodstuffs* endangering his health. In addition, the Acts usually permit rules to be made concerning products which in one way of another come into contact with footstuffs, as for instance packing material, household appliance, cooking appliances. For the same reasons of public health, food laws cover also detergents and cleaning agents which likewise come into indirect contact with foodstuffs.

In response to the consumer protection movement, the above-mentioned Acts were amended in the 1960's and 1970's. The contents of the amended Acts was essentially influenced by appropriate initiatives taken within the EC. Overall, these amendments (Federal Republic of Germany, France, Belgium) and reform movements (the Netherlands) greatly improved the consumer's legal position. The scope of the Acts was extended and above all the possibilities of intervention shifted increasingly to the control of the production process.

85 *(b) Basic patterns*

The *pattern* of all national statutes is as follows: Basically, they provide a framework establishing general rules on products and marketing. These general rules are implemented through regulations and/or standards determined by commissions of experts. In consequence of these legal systems, the decisive problems have been solved in a number of regulations. Generally, the authority issuing an order is the ministry concerned which is obligated either by operation of law to consult the business circles (including consumer organisations in Denmark) concerned (the Netherlands), or consults them in actual fact, which in the final analysis should amount to the same. An interesting peculiarity can be reported from the Netherlands, where public trade corporations have the power to adopt regulations on quality and safety of products which are binding as if law on their (compulsory) members. If the regulation issued by the public trade corporation and the governmental order exist side by side, the order issued in pursuance of the Nederlandse Warenwet is immediately revoked unless such revocation is contrary to public health or fair trading. The priority of the regulations by public trade corporations is retained by the Bill to reform the Warenwet. However, the right of revocation is extended beyond public health and fair trading to include safety and information on goods (Chapter 2).

The consumer's rights flow less from framework legislation than from the many orders issued under the Acts, which now for the most part reflect a translation of pertinent EC directives. It goes without saying that a comparison of the orders would go beyond the scope of this study. What can be said, though, is that the various orders are essentially identical in substance. That is why we want to confine our analysis to finding out the ways and means legislators use to protect the consumer. Three possibilities can be distinguished which will be studied one after the other here: preventive control measures (c), measures aimed at the observance of the laws (d), and sanctions available in case of contravention (e).

86 *(c) Prevention*

Preventive control measures aim at ensuring that only safe products are manufactured and sold. However, manufacturers of foodstuffs are not obliged to prove the harmlessness of each product. It is true that such procedure would ensure most effective health protection, but it would be very difficult to implement in view of the multitude of products. In all EC countries, foodstuffs are controlled uniformly in such a way that the legislator or the authority issuing orders prohibits manufacturers from using certain substances or allows them to use only specific additivies. In some cases, the prohibition or order is expressed in the act itself while in others the legislator is authorised to issue new orders and prohibitions or to supplement general prohibitions. Marking and labelling regulations serve to ensure compliance with the orders and prohibitions (see Chapter 2, No. 36). As regards legislative procedure, all acts provide for the prohibition of all foodstuffs and food additivies likely to endanger the consumer. These provisions are the essentials of consumer protection. The general clause is specified by a number of statutory regulations and orders issued in conjunction therewith which may relate to the composition, incorporation of extraneous substances, prevention of contamination and conditions for tender, transport and storage. Hereunder is a list of the different procedures followed by the national legislators:

— under British, Dutch and German laws lists of prohibited substances are drawn up;
— French, Belgian, Luxemburg and Italian laws pursue the same objective by drawing up positive lists;
— the Danish acts provide for both: lists of prohibited substances and positive lists.

An interesting further development becomes apparent in the Dutch Bill to Amend the Warenwet and in the Danish Food Act which authorise the authority involved to prescribe that manufacturers guarantee the presence of certain components which are important from the health point of view. As far as that goes, the legislation aims at influencing quality itself, the legislator himself taking the initiative.

In all countries, the legislator has attached special importance to the admissibility of *food additives*. Finally, the legislators have decided to subject substances to the requirement of prior approval by the executive power. In this respect there seems to be agreement in all EC countries. In addition to measures aiming at the control of the product, national legislation generally provides for the control of the enterprise. This is done uniformly in all EC countries in such a way that any person who desires to engage in the manufacture of foodstuffs must report the commencement of operations to the authority concerned. This is to prove qualifications and also certain requirements as to the organisation and design of the enterprise attached to registration. Statutory provisions to that effect are not generally included in the food laws but in national trade regulations. Especially in France, the control of the enterprise itself is taking an ever-increasing significance. However, such regulations do not generally serve to

protect the consumer. As far as that goes, we shall refrain from a description in detail.

87 (*d*) *Inspection*

The success of control under food law is entirely dependent on efficient *inspection*. In many countries the special technical character of food laws has given rise to the formation of foodstuff 'grant departments' or 'inspection departments' or to the clarification of all aspects which in this field belong to the public prosecutor's duties. As far as we have been able to ascertain, there are special authorities in all EC countries which are in charge of foodstuff inspection. There is either centralised or decentralised management, as for instance in the Netherlands and the Federal Republic of Germany, depending on the structure of the national states. The main task of the authorities concerned is to ensure by appropriate measures that foodstuff regulations are complied with. The national acts determine the scope of the powers granted:

— the Acts permit entry to properties, offices and business premises;
— inspection inside and usually to some extent also outside these premises;
— inspection of business records;
— the right to demand information;

— The most important method, though, is that of scientific inspection. This is a matter of organisation and legal power given to laboratories required to analyse foodstuffs for possible non-conformity with the technical and chemical standards of the foodstuff regulations in force, or of the food codex which is officially recognised as having legal effect. The status of these laboratories varies widely. For example, there may be control either directly or indirectly by public authorities (official laboratories or laboratories controlled by the administration), or there may be private scientific institutions that are officially allowed to perform specific inspection duties. Sampling is the most common method used by scientific inspection bodies in discharging their duties.

88 (*e*) *Sanctions*

If the authorities have discovered a violation of foodstuff regulations, the question arises as to what action they can take against the enterprise involved. The sanctions available to the inspection departments may be classified as administrative and penal powers.

— The most important *administrative* measures are the prohibition of the further sale of dangerous products and the manufacturer's obligation to recall products that have already come onto the market. While it is possible by law in all EC countries to issue a prohibition, a recall obligation with respect to adulterated, spoilt or harmful foodstuffs can be imposed only under Belgian, Danish and German laws and with certain qualifications under French, Luxemburg and Dutch laws. The French Act (loi sur les fraudes et falsifications du 1905), the Dutch Act (Wet op de ekonomische delicten) and the Luxemburg Act (loi du 25 Septembre 1953) authorises the recall of foodstuffs only if an offence has been committed earlier on.

— Again, it is possible in all EC countries to *punish* contraventions of foodstuff regulations by a fine or in grave cases even by imprisonment. In the Federal Republic of Germany, Denmark, Belgium, Luxemburg, Great Britain, Ireland and Italy, this power follows from the food laws concerned. In the Netherlands, France and Luxemburg, these powers result from the criminal laws mentioned earlier.

In addition to fines and imprisonment, the laws also provide for the confiscation of goods. In principle, such a sentence may be passed only if formal criminal proceedings were instituted. Only under **French** law are individual citizens allowed to institute criminal proceedings in some cases (Chapter 9, No. 211).

89 *(f) Civil-law remedies*

The civil-law consequences of a contravention of the law are not regulated by the food laws. Usually, contraventions of the law do not void the contract. Only in special cases is a contract to be regarded as contrary to good morals. What is of greater significance to the consumer is the fact that contraventions of the laws involved may give rise to liability (see No. 102).

90 **3 The control of cosmetics**

Today, cosmetics are an integral part of our consumer world. The growth of this branch of industry multiplied the dangers to the consumer. For, in addition to herbs and ointments, medicinal substances are added to cosmetics to enhance their effect. e.g. hormones. Increased activity on the part of the national legislators to avert the dangers outlined earlier can be noted. Development in the EC countries was essentially influenced by the EC Directive of 1976 concerning cosmetics.

We may note the following legislation:

— **Belgium**. Currently, the legal position is still determined by three regulations which were issued under the old Food Act of 1964. Now, under the Act of January 24, 1977 a regulation has been issued (Arrêté royal du 10 mai 1978 relatif aux produits cosmétiques) which will introduce a completely new provision effective May 1, 1979. The regulation first of all defines what is understood by cosmetics. In addition, the lists of prohibited substances or substances that are subject to restricted admission have been revised.

— **Luxemburg**. The Act of 1953 (ayant pour objet la réorganisation du contrôle des denrées alimentaires, boisson et produits usuels) likewise regulates cosmetics and toilet articles. There is no special regulation defining in greater detail the requirements for cosmetics.

— **Federal Republic of Germany**. Here the basis is the Food and Consumer Goods Act which also regulates cosmetics. It includes a definition and a number of prohibitions and legal bases of regulation. The Act was put into more concrete terms by the Regulation of December 16, 1977. The Regulation essentially deals with the substances which are prohibited in the industrial manufacture of cosmetics or may be used to a limited extent only.

— **Netherlands**. Through the regulatory power of the Warenwet of 1935, the Queen-in-Council in 1968 issued a Cosmetics Decree which was amended on October 19, 1976.

— **Denmark**. Regulations concerning the control of cosmetics are based on the Drugs Act. The Minister of Health is authorised to issue rulings submitting cosmetics to the Drugs Act.

— **Great Britain**. Along the lines of the EC directive, a Cosmetics Product Regulation was issued on January 2, 1979.

— **Italy**. So far, there has been no special control of cosmetics. However, following the EC directive on this subject, a proposal is now under consideration. As regards its contents, the proposal deals with the same questions, i.e. which substances are to be banned and which may be permitted and within what limits.

— **Ireland**. So far as is known, there has been no legislation up to now.

— **France**, Loi no. 75.604 du 10 juillet 1975 sur les produits cosmétiques et d'hygiène corporelle et arrêtés du 7 mars 1977, 22 mars 1977 et 28 avril 1977. The Act gives a definition of cosmetics and lists prohibited substances and substances which may be introduced within certain limits only. The above-mentioned law forms part of the 'Code de la Santé Publique', Art. L.658.

A comparison of the various acts and regulations teaches us that the individual states provide for the contents and scope of the control of cosmetics either in their food laws (Belgium, Luxemburg, Federal Republic of Germany, the Netherlands) or in the Drugs Act (Denmark).

All regulations as well as drafts — irrespective of their specific design — have in common that the control system corresponds to that used with respect to foodstuffs. The legislators rely on a system of prohibitions according to which the manufacturers must comply with the lists of banned or permitted substances. As far as that goes, the above statements are largely also applicable to cosmetics. Nevertheless, there are some important differences which should be noted.

Special mention should be made of the tightening of the preventive control of cosmetics by some sort of prior registration as is provided for under Belgian and French laws and also in the Bill amending the Italian Act. Under French law and the Italian bill, the manufacturer of a new cosmetic must deposit complete documentation on the composition and toxicity of the product before putting it on the market. While the French manufacturer must act as mentioned above, the Italian manufacturer has to inform the Ministry of Public Health only on request. Finally, under Belgian law (Act of 1977) the King is authorised to require prior registration of certain cosmetics. However, so far the King has not yet acted upon his power. The above-mentioned system of control does not involve a true prior application procedure, in this respect there are important differences regarding the control of drugs.

91 4 The control of drugs

We may note the following legislation:

— **Ireland**, Food and Drugs Act of 1875
— **Great Britain**, Food and Drugs Act of 1955, Medicines Act of 1968
— **Italy**, Decree No. 478 of 1927
— **Netherlands**, Wet op de genees middelen vor ziening of 1958

— **Luxemburg**, loi du 4 aout 1975 et un règlement d'exécution du 12 novembre 1975
— **Belgium**, Loi sur le contrôle des médicaments du 1964
— **Denmark**, Medicines Act of 1975
— **France**, Code de la Santé publique
— **Federal Republic of Germany**, Arzneimittelgesetz of August 24, 1976

92 (*a*) *Prevention*

The national drugs acts have as their stated aim the consumer's effective protection against harmful drugs. There is agreement in so far as this aim can only be achieved through appropriate preventive powers. Of course, as regards the scope of preventive control measures, there are considerable differences within the EC. Four control systems can be distinguished:

— The sale of harmful drugs is prohibited. In the event of contraventions, the manufacturer is liable to prosecution. This modest possibility of control exists in **Ireland** and in **Great Britain** (under the Food and Drugs Act of 1955). The main provision runs as follows: 'No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser.' No proof of actual injury is required in proceedings under that section of the Act.

— In **Italy**, the **United Kingdom** Medicines Act (now of 1978) and in the **Netherlands** drugs may be marketed only after they have been licensed by the authority concerned and have been recorded there. All countries have in common that the manufacturer has to supply certain documentation. However, the extent of the necessary documentation varies. The most comprehensive obligation to furnish information seems to exist in the Netherlands, where the manufacturer must furnish information regarding, inter alia, the composition, the effect of the drug and side effects, if any. Under British law, the Committee on the Safety of Medicines merely requires that the manufacturer should furnish specified information on tests, etc. The Dutch, Italian and British authorities' activities are limited to licensing. They are not authorised to conduct their own tests or examine drugs in substance.

— The **Belgian** Act somewhat tightened the powers of intervention. Firstly, there is an obligation to get drugs registered. The harmlessness of a drug must be established by the manufacturer on the basis of documentation including the results of analytical pharmacological, toxicological and clinical investigations. The manufacturer is not, however, required by law to prove the effectiveness of the drug; he has only to prove that the drug is not harmful ('pas nuisible' ou 'innocuité'). As regards the obligation to furnish information, the requirements to be met in **Luxemburg** are about the same as those in Belgium. However, the manufacturer is not obligated to prove the potential harmlessness (l'innocuité). On the other hand, the Minister of Health may demand proof of the potential harmlessness just as he may demand proof of the therapeutical effectiveness.

— Extensive powers exist in **Denmark**, **France** and of late also in the **Federal Republic of Germany**, where the proof of effectiveness has to be furnished for each drug to be put on the market. The burden of proving effectiveness is on the manufacturer, who in order to meet this obligation has to submit the results of

analytical, pharmacological, toxicological and clinical investigations. The application will be rejected if the manufacturer fails to prove the effectiveness of the drug.

To register a drug, Denmark demands in addition to the proof of effectiveness that the product should include a novelty element, which according to the Medicines Act means that the drug must be suitable from a health point of view as compared with already approved drugs. This is designed to limit drugs to a surveyable — and thus controllable — number. After all, drugs on the market in Denmark account for only about one tenth of those on the market in the Federal Republic of Germany. Despite the positive experience gained in Denmark as well as in Norway and Sweden, the German legislator could not make up his mind to adopt provisions to the above effect when amending the Drugs Act.

Only a control system of the type existing in Denmark, France and the Federal Republic of Germany guarantees in some measure that the dangers involved in the manufacture, marketing and use of modern potent drugs will be guarded against. It is all the more deplorable that up to the present only very few countries have obeyed the first EC Directive on the Harmonisation of Legal Rules on Drugs of January 26, 1965 which provides for precisely the examination procedure described above. Strictly speaking, it exists in only two countries, for the German Act with all its consequences will take effect only in 1990. Until that date, those drugs may escape the requirement of prior application which have been on the market for several years and have caused no danger to the consumer. Even if from the consumer's point of view the control of drugs as to their substance constitutes a remarkable step forward, it should not be overlooked that the above-mentioned regulation enables public authorities to decide on the level of medical science at any one time. Excessively bureaucratic requirements for the proof of effectiveness may result in drugs being withdrawn from the market which do have therapeutic effects, but which cannot be proved in sufficient measure, for instance through a clinical test.

93 (*b*) *Basic patterns of the Acts*

If we disregard application procedures and national legislation is compared, far-reaching agreement can be noted. Drugs acts, like food acts, are frameworks and therefore reference may be made to the foregoing observations on food regulations. In addition to the application procedure, the Acts generally contain the means of control through general clauses prohibiting all drugs that endanger the consumer. The general clause is specified by an appropriate statute, the issuance of preventive regulations for the consumer's protection being possible. Naturally, the system of prohibitions is not as important as in the case of food law. By contrast, of greater importance are the measures that aim at controlling the manufacturer's qualifications. Consequently, manufacturers of drugs in all EC countries require a special permit before they can start operations. To start operations, it is, as a rule, necessary to prove that the responsible persons involved in manufacture hold the necessary qualifications. The provisions governing the granting of permits are closely connected with the regulations enabling intervention in the working organisation. Apart from regulations on manufacture, inspection, storage, packing, maintenance and filing of records

relating to business organisation, requirements for the personnel, the quality of the premises and sanitation may be made. The contents and scope of measures regulating the working organisation is not the same in all countries, although powers to intervene exist in one way or another. The German Drugs Act seems to provide for most extensive regulatory powers, without such detailed regulatory powers having been made use of in the past.

Just as in the case of food law, it is necessary to supervise the enterprises manufacturing drugs. It is incumbent on the public authorities concerned to control compliance with statutory regulations. The powers, i.e. sampling, internal audits, right to information, are largely identical with those applicable under food law.

94 (*c*) *Sanctions*

The administrative sanctions available are tailored to the control system in use in each case. Generally speaking, the authorities concerned may remove drugs from the shelves, prohibit their marketing and even order their recall. In addition, the Belgian and German Drugs Acts contain penal clauses specifying when the manufacturer, importer or any other person responsible for the manufacture or distribution of drugs shall be deemed to have violated his statutory obligations. Fines may be imposed and in grave cases even imprisonment.

5 The control of products other than foodstuffs, cosmetics and drugs

95 (*a*) *The importance of standards*

The legal position concerning products other than foodstuffs, cosmetics and drugs is very different in the EC countries. True, the legislators have recognised that the consumer's protection against unsafe and harmful products must be increased. However, there is no agreement as to the way in which this aim is to be achieved. This, for once, is due to the fact that the variety of products limits the possibility of government control. Control that obliges the manufacturer to prove the harmlessness of the product as the most effective preventive measure comes into question, if at all, only in the case of products which endanger the consumer beyond the normal measure. Poisons, explosives and certain chemical compounds ought to be mentioned. In these respects there are special laws, some of which provide for governmental control of that type. Of far greater importance to the consumer, though, is the variety of appliances he uses every day. However, here there is a conflict of legislative initiatives and privileges enjoyed by trade and industry, so that fundamental reforms seem to be difficult to implement, for the majority of products today are manufactured in line with certain technical standards for whose design trade and industry have traditionally been responsible. The disadvantage to the consumer is that even product standards established by the manufacturers themselves are not binding in principle upon the persons concerned. That means that not even minimum standards established by industry are guaranteed for the purpose of protecting the consumer. Against this background, which is essentially identical in all EC countries, the following types of action may be distinguished.

— By means of appropriate acts or contracts, the EC countries try to exert an increased influence on standardisation. It is interesting to note that in this respect no attempt is being made to submit standardisation completely to the control of public authorities. Rather, reform endeavours are confined to letting the state or in some cases also consumer organisations participate in standardisation (see No. 96)

— **Belgium**, the **Federal Republic of Germany**, **Italy** and **Great Britain** have subjected *certain* products to safety requirements. Thus, product standards become binding on the manufacturer. This is not effected, though, in such a way that the acts make direct reference to the product standards established by private institutions. However, it may be assumed in principle that products coming under the act will be deemed sufficiently safe if they were manufactured in compliance with national standards (see No. 97).

— **France**, **Great Britain**, **Ireland** and probably very soon also **Denmark** have decided in favour of a completely different type of action. The laws enacted resemble strongly the food laws, i.e. there is merely framework legislation leaving the authorities concerned a broad scope to regulate the safety requirements for individual products by means of regulations. The framework legislation itself has no direct effect. There is protection only inasmuch as the bases of regulation are put into concrete terms by means of regulations (see No. 98). This way of action enables the authorities concerned either to declare the safety standards established by industry to be legally binding or to lay down the necessary safety requirements for products themselves. Depending on how precise the design of the safety requirements is, the boundaries between governmental regulations and private standardisation activities become blurred. In the final analysis, the legislators have opened up the possibility for the state to establish safety requirements without the state on that account having to take over the entire machinery of private standardisation.

— In this conjunction reference should also be made to the possibility provided for in some food laws of issuing regulations on specific consumer goods (see No. 99).

96 (*b*) *Standards institutions*

The most important national standardisation institutes are:

— the Deutsche Institut für Normung e.V. (The German Industrial Standards Institute); Verband deutscher Elektrotechniker e.V.
— l'Association Française de Normalisation (AFNOR)
— l'Institut Belge de la Normalisation (IBN) for industrial products and le Centre-Electro-Technique Belge for electrical household appliances (CEB).
— the British Standards Institution (BSI)
— the Danish Standardisation Council
— the Italian Electrotechnical Committee (Comitato Elettrotecnico Italiano, CEI)
— the Dutch Normalisation Institute (Nederlands Normalisatie Instituut, NNI) and its electrotechnical branch, the Nederlands Elektrotechnisch Comité

— the Irish Institute for Industrial Research and Standards

The respective national institutes are state-recognised organisations under private law. The procedure of standardisation is regulated very differently in the EC countries:

— In **France** (loi du 1941 et de nombreux textes postérieurs), the procedure is regulated by law. Standardisation is supervised and directed by a Standardisation Commissioner who is appointed by the Minister of Industry. The government has a far-reaching influence on the make-up of the individual organs of AFNOR. Each standard is subjected to a homologation procedure by means of which it is checked whether the standard is in contrast to the public interest.

— **Belgium**. Just as in France, there is a statutory homologation procedure for the IBN and the CEB. The procedures are regulated by the Acts which authorise these Organisations to make use of collective marks: BENOR (AR du 10 avril 1954), CEBEC (AR du 13 août 1957). In substance, the homologation procedure provided for is identical with the French procedure.

— All **other EC countries** have left the organisation of the standardisation procedure to the national institutes, which does not mean, though, that governmental organisations have no influence. In some cases, the mutual relationship is governed by a contract to that effect, as for instance in the Federal Republic of Germany. The general rule is that the government participates in the procedure, but has no decision-making or testing powers.

Consumer participation in the standardisation procedure is designed in a similarly varying manner. In the Federal Republic of Germany, England and the Netherlands, the consumer's interests are safeguarded by a special committee which has only an advisory function. The Danish Consumer Council and the Danish Home Economics Board are represented in the Danish Standardisation Council. In Belgium, consumer organisations do not take part in the standardisation procedure at all. In consequence of the private-law organisation of the standardisation institutes, the established standards are not binding in principle on the manufacturers affected by the respective standard.

In France and in Belgium the legal position is different. The French minister concerned may declare standards to be legally binding (AR du 1941). The Belgian King has the same power insofar as producers or suppliers representing a majority of a manufacturing branch request the King to do so (AR du 1935). Unlike France, the Belgian King's power is not connected with the regulation of the homologation procedure. The Belgian AR du 1935 thus is another way for the government to intervene in the standardisation procedure. However, this power is used relatively seldom in the two countries. The standard which has not been declared to be legally binding is of importance to the consumer only if the contracting party undertakes to comply with the standard by reference to that effect in the contract.

97 (c) *Specific regulations*

To enhance the consumer's safety, the Belgian, German, British and Italian legislators enacted special regulations on specific dangerous products. Under these acts, the manufacturer is obligated in the first place to manufacture only safe goods which do not endanger the consumer. Depending on the scope of the

acts, the following distinctions may be made:

— The **Belgian** Act (Art. 4 de l'AR du 1977) covers apparatuses and electric machines. The statutory obligation applies equally to the importer and the supplier.

— The **German** Act (Art. 3 of the Gerätesicherheitsgesetz of 1968/1979) submits technical labour materials to the same requirements. Among the technical labour materials rank operating equipment fit for use, especially tools, and also household appliances, sport equipment and amateur handicraft equipment as well as toys, but *not* household appliances coming under entertainment electronics. Under German law, only the manufacturer and the importer are obliged to proceed in such a way when manufacturing or importing products that users or third parties are protected against dangers to their life and limb. However, a bill dating from 1977 provides for an extension of that commitment also to the supplier.

— The **British** Act (Section 6 of the Health and Safety at Work Act of 1974) relates to articles for use at work. Designers, manufacturers, importers, suppliers and installers must ensure, so far as is reasonably practicable, that such articles are safe for their proper purposes. Many more specific regulations have been made under the Consumer Protection Act, 1961, and the Consumer Safety Act, 1978.

— **Italy**. The Italian Sectorial Act in the field of consumer goods covers only small household appliances. The control of production standards in this market area is provided for by Act No. 791 of 1977, whose enforcement regulation must be issued by the Ministry of Industry and Trade.

All four Acts have in common that they obligate the groups of persons concerned to respect the consumer's health and property without making special reference to the product standards set up by national standardisation organisations. However, products that are governed by the Act are considered safe if they comply with the national product standards. The indirect result of this is that product standards are binding upon the manufacturers. As regards the measure in which they are binding, there is an essential difference between the Belgian and the German Acts. Since the enactment of the law, Belgian products must bear an appropriate quality label (CEBEC) indicating compliance with the product standard, provided the appliances do not comply with international or European standards or provided such standards do not exist. Under German law, the manufacturer or importer can guarantee the safety of the product also by means other than those of compliance with the national product standard.

The application of the legislative machinery to the classification patterns of preventive/repressive control presents the following picture: the acts accept the standards established by industry, some of which do not take sufficient account of the consumer's interests. Only the German government is entitled to define product standards if such standards do not exist in a certain branch of industry. The German authority involved has not yet acted upon its power, though. That is why the degree of control (whether preventive or repressive) is contingent upon the extent to which supervisory authorities are entitled to control product standards. Such supervisory authorities exist in the Federal Republic of Germany (industrial inspection boards), in Great Britain (Health and Safety Executive) and in Belgium. In Italy, the competent bodies have yet to be

appointed by the Ministry of Industry and Trade.

State control is concentrated in the field of retrospective control; that is, generally the authorities concerned do not act until after damage has occurred. If the dangerousness of a product has become apparent, the authority or minister concerned is authorised to apply sanctions.

— All Acts permit the further sale of the product to be prohibited;
— only under Belgian law is recall also possible;
— all four Acts include special penal sanctions if the responsible persons violate their legal obligations.

98 *(d) Framework legislation*

Framework legislation authorising the authorities concerned to lay down safety requirements for certain products by means of regulations exist in:

— **Great Britain.** The Consumer Safety Act of 1978 will repeal the Consumer Protection Act of 1961, as amended in 1971. The Consumer Safety Act, like the Consumer Protection Act, is designed to promote the safe use of particular commodities (other than food, drugs, medicines, road vehicles). Its purpose is to enable the Secretary of State for Trade (formerly Prices and Consumer Protection) to improve the consumer's protection by issuing regulations on safety aspects. Regulations can be issued which determine the contents or structure of goods or their packing or labelling. Since 1961, many regulations have been issued. So far, the following products have been regulated: oil heaters, nightdresses, toys, stands for carry-cots, colour codes for electrical appliances, electrical blankets, cooking utensils, domestic heating appliances, pencils, pens, crayons, domestic electrical equipment, cosmetics (see No. 90), perambulators and push-chairs, babies' dummies, balloon-making compounds. The regulations specify standards to which the commodities must conform. As the standards are normally those laid down by the British Standards Institution (BSI), the authority concerned thus gives product standards the binding force they would not otherwise have in so far as they were established by private institutions.

— **Ireland.** The Industrial Research and Standards Act of 1961 is in some respect similar to the Consumer Protection Act passed in Britain that year, but is concerned primarily with the promotion of research and the standardisation of commodities, processes and practices. Standards for children's nightdresses, toys, electrical appliances, caravans and mobile homes have been laid down by the Institute for Industrial Research and Standards and made the subject of appropriate regulations.

— **France.** The French Act (Loi sur la protection et l'information des consommateurs de produits et de services, 1978) establishes general rules of safety and fairness (loyauté). The Act includes a general authority to issue regulations concerning manufacture, import, purchase, sale, distribution free of charge, marking, packing and use if the goods are dangerous to the consumer's health or safety. These regulations reflect the framework design known already from the food laws. In the final analysis, the contents of the Act is determined by regulations.

— **Denmark**. A similar solution by means of a general clause is in the offing in Denmark.

The British, Irish and French Acts differ in their scope of application. The French and British Acts currently constitute the most consistent attempt at protecting the consumer in a comprehensive way against dangers resulting from technical production. The Acts cover almost all products for which regulations to protect the consumer's safety may be issued at all stages of their production and marketing. At the request of the ministries, the French Act even permits governmental bodies to establish standards in the field of sanitation and safety. The weakness of the Acts is definitely that they must be translated into regulations to bring about effects at all. Experience with comparable regulation reservations under food law make us sceptical.

There are also considerable differences in the sphere of sanctions:

— *Administrative means*: The possibility of prohibiting further sales exists under French, British and Irish laws. Under French law, the minister concerned may even order the recall of dangerous products or their destruction. British law also gives such powers. The above-mentioned British Consumer Safety Act enables the Secretary of State to serve on individual traders notices to warn under which the trader must warn the public at his own expense of dangers arising out of goods he has sold.

— *Penal sanctions* exist primarily under the French Loi sur la répression des fraudes et falsifications en matières de produits et de services, modifiée 1978. The Act forbids on penalty any attempt to deceive as to the nature of a product, its origin, essential qualities, quantity and use. The manufacturer or seller of dangerous products also incurs criminal liability if he fails to inform sufficiently about the risks involved in the use of a product. However, this presupposes the existence of a contract of sale.

99 (e) *The application of food laws*

The Dutch, German, Belgian and Luxemburg food laws do not cover only foodstuffs proper but also to a certain extent consumer goods which are not connected directly or even indirectly with foodstuffs.

— **Netherlands**. Pursuant to Art. 1 of the Warenwet, those goods also come under the Act which have been designated by the Queen-in-Council, such as moped helmets and toys.

— **Federal Republic of Germany**. The German Food Act treats consumer goods separately, without defining what is understood by consumer goods. After all, the sphere of regulation covers products as heterogeneous as toys, detergents and cleaning materials.

— **Belgium**. In much the same way as the Luxemburg legislator, the Belgian legislator uses the term 'produits d'usuel'. The legislative source documents show that in this connection only toys, pencils and crayons had been thought of.

Even within the narrow scope of the Acts, the authorities concerned have made only limited use of their regulatory powers, which means that, for the most part, the consumer's protection exists on paper only. The treatment of such products in food laws may be attributable to the fact that here the protection of the consumer's health is more important than his safety. After all, toys,

pencils and crayons are precisely the items coming under the British Consumer Protection Act and the Irish Industrial Research and Standards Act.

100 6 Appraisal under legal-policy aspects

The EC countries have largely harmonised the control of foodstuffs. Since its establishment, the EC has worked intensively in this field. Numerous directives illustrate the efforts made. An important EC directive has also been passed for cosmetics. However, this directive has not yet been completely translated into practice, as so far there are no indications that the states in which there is no special control are making any efforts to amend their laws. The situation is problematic in the law governing drugs. Although an appropriate directive has been in existence for 13 years, only three countries have introduced a control procedure for the approval of drugs. This is all the more deplorable as the dangers that may flow from drugs that have not been tested sufficiently are increased rather by the multitude of products. Therefore, it would be worth endeavouring to demand a novelty element in the drug to be approved, as is the case in Denmark. While in the fields described above, the lines of a development pointing to an approximation under the aspect of intensified preventive control are beginning to become clear, the situation is rather confusing with respect to all other dangerous products. Although the national legislators recognise in principle the dangers that may flow from industrial products, they have — with the exception of France and England — so far been unable to come to a decision on a more comprehensive control. In the first place, a legal imperative would be required to the effect that products should be manufactured only so as not to endanger the consumer's safety and health. In long-range terms, the government's influence on standardisation should be strengthened. The standardisation institutes on which industry exerts an influence do not guarantee adequate protection of the consumer's interests. The main problem in controlling dangerous products, foodstuffs and drugs, is the enforcement of the laws. Supervisory authorities for the most part lack both the necessary powers of intervention and — even more serious — the financial means and personnel to accomplish in an appropriate way the tasks assigned to them. As a result, the authorities are able to intervene only in cases of gross grievances, which means that they will take action only after damage has occurred. As long as the enforcement machinery has not been elaborated sufficiently, it is pointless to call for new laws. The committed bodies protecting the consumer must therefore strive to use their influence in ensuring that the enacted laws are translated into practice. To improve law enforcement, it should be considered whether it is possible to let consumers and consumer organisations share in the implementation of the laws. Only under French law are consumer organisations able without restriction to particular points of issue to take action over dangers to the consumer.

101 III THE CONTROL OF THE SAFETY OF SERVICES

When describing possible systems for the control of the safety of services, we are faced with the question of whether services can be controlled as regards their

safety in the first place. A service may be good or bad, but it seems hard to imagine that a service can be unsafe. The problems are even more obvious if one realises the variety of subject matter of a service contract. Most frequently, the contracting party's obligation merely consists in rendering a service (repairs, contract to manufacture). A service is also deemed to exist if the contracting party lets to the consumer any facilities or objects to be used. All EC countries class the two cases mentioned above with service contracts. This does not apply, though, to cases in which supplies of things (water, gas, electricity) are concerned. While under German law such contracts are considered to be contracts of sale, French and Belgian laws regard them as service contracts. The difference will not perhaps affect the legal side of the problem, but in actual fact, irrespective of the legal nature, the central element of the contract is not a service but a thing that may be dangerous. Accordingly, possible controls are controls of services only under legal aspects, while in actual fact they amount to controls of things. Much the same is true for the types of contract mentioned earlier, under which a thing is let to the consumer to be used. From that thing dangers may flow (camping equipment, swimming pools) which should be prevented by means of appropriate sanitation and safety requirements. By contrast, if the subject matter of the contract is but a service, the quality of such service is most important to the consumer. Dangers may result from inferior quality, but not from inadequate 'safety'. No doubt, the safety aspect and the quality aspect cannot be separated from each other entirely, and yet in the case of *services* the *quality aspect* has priority. The control of the quality of services is dealt with in Chapter 6.

(i) In line with the view taken here, we will describe in the following legislative activities directed at the control of gas, water and electricity supplies as well as at services letting to the consumer a thing to be used. It is an established fact that gas, water and electricity supplies are state-controlled in all EC countries. The regulations, which differ widely as regards details, cannot be described here, since it is not intended to extend the scope of the study also to these questions. Legislative activities, it should be noted, relate primarily to the field of recreation. Acts regulate the requirements to be met by camping equipment, hotels and bathing facilities in order to protect the consumer from dangers to his health.

(ii) A peculiarity in the field of safety control of services can be reported from France. The Loi sur la protection et l'information des consommateurs, which was passed in 1978, relates not only to products but also to services. The Act lays down the service contractor's general obligation to render services so as not to endanger the consumer's safety and health. The Act authorises the issuance of regulations permitting intervention from the production state up to the sale. A striking feature is that the authorisation is clearly tailored for the production of goods. The Act does not enter into the specific problems presented by the control of a *service*. In a special article, it merely lays down that it is also applicable to services. Since, as far as we have been able to ascertain, no regulations on services have been made so far, it remains to be seen in what way the authority involved will define the concept of 'safety' of services. After all, the broad legal concept of services also permits the regulation of the things to be supplied. What

remains to be pointed out is the fact that the loi sur les fraudes et falsifications now also applies to services.

IV CIVIL LIABILITY FOR PRODUCT SAFETY

102 1 Product damage and product liability — concepts

The main subject of this section is product liability. The term 'product liability' characterises liability for personal injury or damage to property caused by a product during consumption. Whenever product damage occurs, the question arises whether, under what conditions, to what extent, and from whom the victim may claim compensation. It is impossible to discuss all aspects of product liability in this study. Therefore, we have decided to restrict the subject to certain aspects.

Firstly, a distinction can be made between two kinds of loss or damage — the loss or damage inherent in the deal under which the product is acquired (loss on the bargain), and the loss or damage suffered by the purchaser or a third party because the product caused personal injury (whether or not resulting in death) or property damage (damage to property other than the product supplied). The analysis will deal with the latter forms of loss or damage. This means that, in principle, contractual liability will not be taken into consideration unless such liability relates to loss or damage caused by the product. Secondly, the study will not deal with cases in which there is a contractual relationship between the manufacturer and the consumer. Product liability covers primarily the cases in which the manufacturer did not conclude a contract with the consumer. This development results from the present level of technical progress. Basically, there will be a chain of supply, beginning with the manufacturer and ending with the consumer, the consumer and his contractor being the end of the chain.

103 2 The dangerous product

As we mentioned before, none of the EC countries have introduced special comprehensive legislation on product liability. That is why solutions to the problem of product liability must be found in the provisions of civil or common law. This means that the manufacturer is not automatically liable if his product is somehow connected with an injury. On the contrary, the manufacturer is only liable under certain conditions, which differ from one country to the other. Despite these differences, all national attempts at finding a solution start from a common basis: the essential thing is to define liability for the *dangerousness* of a product and to ascertain whether or not the dangerousness is attributable to the consumer's incorrect and hazardous handling of the product. Today, damage or injury is mostly product-related. Even if the damage or injury cannot be claimed to have been caused directly by the product, it is nearly always somehow related to a product. Product-related damage or injury does not always entitle the injured party to claim damages. Only in the case of product damage caused by a dangerous product is the injured party entitled to claim damages. The basic rule of product liability in all countries is that liability for product damage will be involved only if damage has been caused.

3 Manufacturer's liability

First, we shall examine the manufacturer's liability, i.e. manufacturer as contrasted with distributor or supplier (see Section 4).

104 (*a*) *Liability for fault*

The dangerousness of a product does not suffice to give rise to manufacturer's liability. A basis of liability is needed, otherwise the manufacturer will not be liable. The manufacturer will be liable if the dangerousness of the product results from his fault. The manufacturer has a duty of care towards the public at large. Failure to take steps to eliminate danger inherent in a product gives rise to liability for fault (or, in Anglo-American law, negligence liability).

The legislative bases are:

— Federal Republic of Germany, Art. 823, Bürgerliches Gesetzbuch
— Netherlands, Art. 1401, Burgerlijk Wetboek
— France, Art. 1382, Code Civil
— Belgium, Art. 1382, Code Civil
— Luxemburg, Art. 1382, Code Civil
— Italy, Art. 2043, Codice Civile
— Denmark, Rules of Court Practice
— Great Britain, Rules of Common Law on Torts
— Ireland, Rules of Common Law on Torts

(i) The duty of care obligates the manufacturer to manufacture only products that do not endanger the consumer. Any dangerous substance in a product must be eliminated by the manufacturer as far as possible. In designing the product and deciding whether it should be accompanied by operating instructions or a warning, etc., the manufacturer must base his decision on the situation in which he must expect the product to be used, considering its nature, designation, etc.

Whereas in Denmark, France, Belgium, Luxemburg, Italy, the United Kingdom, Ireland and the Federal Republic of Germany the duty of care (Verkehrssicherungspflicht) is the essential element, in the Netherlands this duty is not deemed sufficient to give rise to liability. In the Netherlands, a contravention of the duty of care does not make non-fulfilment of the duty of care an unlawful act (correktmatig). The Hooge Raad has not adopted the view that the mere marketing of a defective product is in itself an act which is contrary to the duty of care to be fulfilled in order not to endanger third parties' health or property. To assume such an act, it is necessary that there be *additional circumstances*, such as a statement about the product concerned, insufficient control or instructions.

To fulfil his duty of care, the manufacturer of a product must usually rely upon his employees. For product liability in tort, it is of great importance that there be extensive liability on the part of the manufacturer for the torts of his employees. English, Irish, Danish, Belgian, French, Luxemburg and Dutch laws provide for such extensive liability. With certain qualifications, this principle also applies to German law under which the manufacturer may exonerate himself from liability by proving that he exercised reasonable care in selecting

his employees. However, in practice the possibility of exoneration is of very limited importance (see paragraph iii below).

(ii) The German approach of classifying in different fixed categories why a product has become dangerous and/or defective has been adopted by most Danish writers. They distinguish among defective design, defective production, defective instruction and development defect. When a distinction is made between defective production and defective design, the decisive factor appears to be the number of products showing the defect; defective design is deemed to exist if a whole series of products is affected, defective production if only a single product is involved. In drawing a line between defective design and development defect, legal writers seem to have used another criterion, i.e. the principle of fault. The design is taken to be defective only if it is faulty (the design is faulty if it fails to conform to the current standards of technology and science), while the development defect does not involve any fault (the damage was unforeseeable and unpredictable as the product met the standards and therefore was considered safe). These statements may give the reader an idea of the difficulties involved in the establishment of categories. The four types of defect, however, do not only serve as a means of classification. The fact that a dangerous and/or defective product belongs to a specific category will determine other conditions necessary for liability.

— The **German** system of classification is well known also in **Dutch** law. The establishment of the four types of defects serves to detail the above-mentioned additional circumstances.

— **French**, **Belgian** and **Luxemburg** laws do not apply a system of classification. Generally, a product is considered defective if the consumer cannot use it for its designated purpose. A defect makes the merchandise unfit for use as intended by the consumer. On the whole, it may be said that a product is defective if the defect consists in a shortcoming which affects the essential nature of the object.

— **English** law starts from the following basis. In a tort of negligence (or in **Scotland** reparation) action, there are at least five main factors to be taken account of: (1) the likelihood of accident, (2) the gravity of such accident, (3) the obviousness of risk, (4) the cost of prevention or reduction of risk, (5) the inherent risk attaching to the goods or activities in question. When comparing the different approaches, we learn that Belgian and French laws clearly state the influence of contractual liability on the definition of faultiness (see No. 105). Yet these as well as the other legal systems do not try to give a definition of what is exactly meant by 'defective'. Faultiness depends on the duty of care to be fulfilled by the manufacturer.

(iii) Basically, the victim of a defective product has to furnish proof to the effect that the damage sustained is due to fault on the part of the manufacturer. It is one of the essentials of product liability that consumers are often unable effectively to furnish proof to the above effect. The difficulties result from the fact that negligence presupposes individual fault. However, owing to the complexity of the manufacturing process, it is almost impossible for the injured consumer to establish fault on the part of the manufacturer, for example due to defective design, or fault on the part of his employees. Since the national law systems do not contain specific rules, the courts have developed practical

approaches to help the consumer. Thus, quite different rules have been established.

— Under **Belgian, French, Luxemburg, English** and **Irish** laws, the consumer still has to prove individual fault. However, the English consumer is not definitely obligated to pinpoint the actual act of negligence which gave rise to the damage, or to eliminate every conceivable possibility of damage caused without fault on the part of the manufacturer. The burden of disproving negligence is put upon the manufacturer if the circumstances apparently give no other explanation.

— In the **Federal Republic of Germany, Denmark**, the **Netherlands** and **Italy**, the courts have shifted the burden of disproving negligence to the manufacturer. Negligence on the part of the manufacturer is presumed unless proof to the contrary is furnished. In German law, the reversal of the burden of proof is applicable not only to the manufacturer but also to executive employees. Such extension of the principles of manufacturers' liability should be rejected because it is contrary to the generally accepted rule that the manufacturer shall be liable in principle for damage attributable to the production line.

Under German law, the possibility of furnishing proof to the contrary plays a part only in the case of unavoidable 'escapers' (defects that cannot be avoided despite careful control) which occur again and again, and in the case of development defects. Such defects are not attributable to blameworthy conduct. This problem seems to be peculiar to German law.

Under Danish law, contrary to German law, liability for escapers is practically strict liability. However, if the manufacturer is able to prove that the damage in question is due to a development defect, i.e. a hitherto unknown danger which at the present stage of technological and scientific development could not and ought not to have been known, he will not be liable.

(iv) Under liability for fault, any person who has been injured by a defective product is entitled to a claim. This comprehensive liability derives from the underlying legal basis which provides that the manufacturer has to take care that only safe goods are manufactured. The duty of care towards the public has to be met. This legal rule is applicable in those countries in which violation of the duty of care constitutes the essential element of liability. Under Dutch law, additional circumstances must prevail, and under English law it is also relevant that the consumer would not have been likely to examine the product.

(v) As liability in tort presupposes negligence or fault on the part of the person causing the damage, each member of the chain may be exposed to product liability if it is through his negligence or fault that damage has been caused by a product. All persons involved in the manufacture and supply of goods (see Section 4, No. 107) have the same basic responsibility, i.e. to prevent the marketing of defective goods; yet the obligations resulting from this principle upon the individual member of the chain differ widely in line with the members' different functions in the chain. These principles exist in all the countries dealt with here. That is why the supplier as well as the ultimate manufacturer may incur the same responsibility. If both persons committed a fault, they will be jointly and severally liable (in solidum). However, if the damage can be proved to be solely due to the ultimate manufacturer's fault, only he will incur liability.

Considering the brief on which contributions to this comparative analysis are based, we cannot deal in detail with the different obligations of all members of the chain and then compare the different requirements. We can state, though, that the German courts appear to have established the most developed system of duties.

105 (*b*) *Strict liability in tort*

(i) Although strict liability on the part of the manufacturer does not exist in any of the EC countries, there are signs that under existing law manufacturer's liability is tending to go in that direction.

True, in principle the manufacturer is responsible for product damage caused by a dangerous product only if the dangerous feature of the product is attributable to a fault. In actual fact, though, this principle is followed in legal practice to a limited extent only. Transferring the burden of proof in the sphere of fault prepares the ground for strict liability. Moreover, in all EC countries a trend is discernible towards the courts increasingly refraining from demanding proof of individual fault. Fault is increasingly objectified. The courts generally accept the product standards established by the organisations concerned. If the manufacturer failed to comply with the standards concerned, the product is considered to be defective, which implies fault on the part of the manufacturer.

Special regulations giving rise to strict liability on the part of the manufacturer exist in France, Belgium and Luxemburg.

— France, Art. 1384, Code Civil
— Belgium, Art. 1384, Code Civil
— Luxemburg, Art. 1384, Code Civil

The essential point of this liability can be described as follows: the person having a product under his control is held liable for all damage caused by this product unless he proves the applicability of force majeure. It can even be said that a sort of strict liability is provided for on the assumption that the person who is liable is in possession of or can exercise 'usage, direction et contrôle'. Such liability may be characterised as strict liability because negligence does not play any part.

Since such liability presupposes the possibility of control, the provision is felt to be inapplicable to cases of product liability. It may be recalled that in the area of product liability damage may occur if the manufacturer has put the defective product on the market and therefore has lost control. The French Cour de Cassation, however, distinguishes between 'garde de la structure' and 'garde du comportement', i.e. on the one hand the state of the product and, on the other, responsibility for its application in a concrete case. It is not yet clear if liability of the 'guardien' can be claimed in the area of product liability. While the courts of Luxemburg are inclined to follow the French interpretation, the Belgian courts have not adopted the differentiation between the garde de la structure and garde du comportement.

(ii) A peculiarity can be reported from the Federal Republic of Germany. Here, the legislator with effect from January 1, 1978 introduced strict liability for the manufacturers of drugs. This law reform was occasioned by the

Contergan catastrophe. The Act had for its primary object the inclusion of liability for development defects. This object has finally been achieved, although the consumer's protection is not comprehensive in the sense that in the event of damage the manufacturer will only be liable to the amount of DM 200 million. The damage that resulted from the Contergan drug exceeded by far that amount.

106 (c) *Manufacturer's quasi-contractual liability*

Liability of a contractual nature on the part of the manufacturer who is not the consumer's contractor has never played an important part in the Netherlands, Denmark, Italy, the Federal Republic of Germany or the United Kingdom. Attempts in legal literature at construing a sort of contractual liability in those cases have been rejected by the courts. The legal position in Belgium, Luxemburg and France is completely different.

(i) Liability is based on Art. 1645, Code Civil under which the seller by way of exception is liable for damage if he knew of the defect. The French courts have considerably extended the professional seller's liability. The courts proceed on the assumption that the professional seller is obliged to know defects in the things sold by him. Consequently, the seller who should know the defect on account of his industrial activity and the seller who actually knows of the defect are put on an equal footing. Under French law, the presumption of knowledge does not constitute a reversal of the burden of proof. The professional seller cannot escape liability even if he can prove that it was impossible for him to know the defect. Consequently, there is a sort of contractual liability which also includes liability for development defects which the seller was unable to know at all. Under Belgian law, the professional seller is not strictly liable. While the Belgian courts extended the professional seller's liability, the presumption of knowledge is rebuttable. The law of warranty leaves him specific defences: in particular, he may prove that the defect did not exist at the time of sale. Therefore, contractual liability under Belgian law is liability for presumed negligence. Under Luxemburg legislation, no final decision has been taken as yet. But the courts seem to be inclined to favour the Belgian interpretation of the Code Civil.

However, under Belgian and French laws liability for damages does not include all defects. Rather, liability is restricted to hidden defects (vice caché). This concept is the starting point for the claim system the Belgian and French courts have developed in the area of contractual liability. We must distinguish between hidden defects and apparent defects. This distinction is important because in the latter case the manufacturer will not be liable. A defect is deemed to be apparent if an attentive consumer exercising reasonable care and diligence could have recognised the defect at the time the product was bought. A defect is deemed to be hidden and therefore gives rise to liability if the buyer/consumer would not notice the defect after having examined the product in the usual way. The buyer/consumer is not obliged to make exceptional investigation. Only in certain circumstances (e.g. when buying a house) do the judges feel that the buyer ought to be helped by an expert.

(ii) The contractual liability described above entitles only the contracting

consumer to claim damages. Contractual liability is not applicable in those cases in which a member of the buyer's family or a bystander is injured by a defective product. Strict liability is thus decisively limited. Third parties who were injured by a defective product will only recover damages if the prerequisites for liability for fault are found.

(iii) You will remember that only those cases will be examined in which the manufacturer is not the seller. But who else apart from the seller may be held liable in the chain of supply? The decisive improvement brought about by the development of contractual liability under Belgian and French laws lies in the fact that the buyer is free to decide whether to take action against the final vendor or the intermediate vendors in the chain of supply, including the manufacturer. Liability is based on the reasoning that the duty of guarding against hidden defects is inherent in the merchandise and thus passes on successively to each member of the chain. 'La garantie est inhérente à l'objet même de la vente et appartient aux acheteurs successifs comme détenteurs de la chose en vertu d'un droit qui est propre à chacun d'eux.' If the opposite party is not the manufacturer, the defendant can have recourse to his supplier. As the latter can act in the same way, the manufacturer at the end of the chain may be ultimately liable for the loss (action directe).

(iv) An interesting further development of the law of contract is in the offing in the Netherlands. The Consumer Sales Bill entitles the purchaser of a commodity to hold the manufacturer liable if the goods do not possess the qualities the buyer may have expected. The extent of damages is explained in detail in Chapter 6, No. 136.

107 4 Distributor's and supplier's liability

The vast majority of products reach the ultimate consumer in the same state in which they leave the manufacturer's plant. The distributor and the supplier merely have to organise the distribution of products. There are significant differences between their liability and that of the manufacturer.

108 (*a*) *Liability for fault*

As a rule, the distributor and the supplier do not make alterations to a product. However, liability for fault presupposes, as we have seen, responsible participation in the manufacture of the product causing the damage. That is why suppliers will be liable for fault only in a small number of cases: for instance, if, exceptionally, the two above-mentioned persons can be blamed for making the product dangerous (through alterations, excessively long storage, improper storage). In such state of affairs, French, Luxemburg and Belgian laws show a special feature. Theoretically, the contracting consumer is entitled to base his claim on warranty (see Section b, No. 109) and liability for fault. But pursuant to the rule of 'noncumul', the contracting consumer may base his claim only on the violation of contractual obligations.

109 (*b*) *Distributor's and supplier's contractual liability*

In so far as the distributor and the supplier are *not* at the same time the

consumer's contracting parties, liability is incurred only under French and Belgian laws within the framework of the principle of vice caché developed in court practice. By way of an action directe, the contracting consumer may hold liable any person in the chain of supply.

In all other EC countries, contractual liability, if any, gains importance only if the distributor or the supplier has actually contracted with the consumer. Except in Denmark and the Federal Republic of Germany, only the buyer is entitled to a claim. Members of the buyer's family or bystanders who are injured by the product cannot assert a claim for damages under the law of contract. Graduated by severity and extent of liability, the following distinctions can be made:

— **British** and **Italian** laws include the most comprehensive provisions. Under these laws, the buyer may assert claims for damages against the supplier or distributor if the product bought causes injury or loss in the course of normal use. As regards Italian law, this obligation follows from Art. 1490, Codice Civile (warranty against defects in things sold). British law comes to the same conclusion. The seller or supplier is liable under the vital provision of the Sale of Goods Act, as amended in 1973 (re guarantees that the product is of merchantable quality, see Section 14, §2). Despite the common basis, there are two essential differences. For one thing, the seller in the UK will be held liable under the Sale of Goods Act irrespective of any negligence, while under Italian law the supplier is bound to compensate the consumer for damage unless he can prove that it was through no fault of his that he had no knowledge of the defects. Defects of development are thus excluded from liability. And for another, it is pointed out that contrary to British Law the Italian rule is applied very rarely so that it is of little importance in practice.

— **Ireland.** Currently, the rules of common law and the original Sale of Goods Act of 1893 apply. The Sale of Goods and Supply of Services Bill of 1978 is similar to Section 14 of the British Sale of Goods Act in its amended form. In that respect, the same legal principles as in Great Britain should be applicable in Ireland soon.

— In all other countries (**Denmark**, the **Netherlands, Federal Republic of Germany**) claims for damages aiming at making good a product injury exist as a matter of principle only if the contracting parties made an express agreement to that effect. Under German law, such agreement between the parties may be implied from the circumstances of the case. However, the courts are rather reluctant to assume such agreements. It is self-explanatory that in those countries in which liability for damage is more stringent in principle, express agreements about the extent of liability are possible (see the Italian Act, Art. 1512 Cc — warranty of proper functioning).

110 (*c*) *Vicarious liability*

The concept of vicarious liability characterises in principle the employer's liability for his employees (see No. 104). But also in those cases in which the supplier or distributor is held liable for faults committed in previous links in the chain of production and distribution, we may speak of a special form of vicarious liability. Such liability exists in Belgium, Luxemburg, France and Denmark.

— Under **French** law, the distributor or the supplier is liable for all defects of the product without any possibility of exoneration.

— Finally, under **Belgian** and **Luxemburg** laws, the distributor or the supplier is liable in principle for any act on the part of the manufacturer or subcontractor giving rise to liability. He may, however, escape liability if he proves that he could have no knowledge of the defect (e.g. development defects).

— According to **Danish** law, a professional or a commercial distributor or supplier is held responsible for any fault committed in previous links in the chain. As this is liability for fault, as under Belgian law the supplier is not liable for development damage. This form of liability bears only on a party who operates a commercial enterprise constituting a link in the chain of production, transfer, distribution and supply which the product has followed, and not, for instance, on a private consumer who sells a product. The only requirement is that the supply be made in the course of business, the type of contract not being relevant. The supply does not even have to be made in accordance with a contract if it is performed in the business context.

5 Causation, foreseeability, nature and measure of damage, limitation

111 (*a*) *Causation*

In all fields of law, the injured consumer has to prove the defect, the damage and the causal link between defect and injury, irrespective of whether he bases his claim on contractual liability or on liability for fault, even though causation generally is of importance in the area of tortious liability only. While a defect can be proved with the aid of appropriate evidence, the problems resulting from the peculiarity of the industrial production method which are presented by the proof of causation are often all but insurmountable. The courts, which for want of statutory regulations are in charge of finding solutions to these problems, tend without exception to reduce the requirements of the proof of causation.

— Under **Belgian** and **French** laws, the consumer is deemed to have furnished proof if he eliminates the inadequate causes and demonstrates that the other causes are within the manufacturer's sphere of responsibility.

— **German** law enables the consumer to produce what is known as prima facie evidence. The consumer has to prove that according to normal experience of life the defect in the product that caused the damage arose in the ordinary course of events in the manufacturer's sphere of control. If the consumer prevails, the manufacturer must defeat the prima facie evidence. But the manufacturer does not have to prove the contrary, he only has to show that the ordinary course of events does not lead to the alleged result.

— **Danish** law is similar to German law. However, if it is obvious that the product is dangerous and likely to cause damage of the nature under consideration here, the manufacturer cannot avoid liability merely because the damage may also be attributable to other causes, unless there are specific reasons for assuming that the damage is more likely to stem from such other causes rather than from the danger inherent in the product concerned.

— **Dutch** law appears to provide for the most far-reaching assistance for the consumer. In cases in which damage is caused by goods — a tort in product

liability cases — the courts usually accept the facts alleged by the plaintiff, e.g. that the product was defective. Then it is for the defendant to prove that the facts were different and that his product was not defective. Although in theory, therefore, the plaintiff has to allege and prove causation, the courts often assume it.

— **Italy**. The Italian courts show a growing trend towards reversing the burden of proof. Such trend was started by a decision of the Corte di Cassazione in 1964.

— In **Great Britain** and **Ireland** the courts seem to be less inclined to act along the lines followed by the courts in the countries mentioned above.

112 (*b*) *Foreseeability*

Only under Danish law (liability for fault *and* contractual liability), under French law (*only* contractual liability) and under Belgian law (*only* liability for fault) is the foreseeability of damage a prerequisite for liability. The damage must have been foreseeable at the time of sale. Yet who should have foreseen such damage? Does liability presuppose that in a particular case the manufacturer foresaw the possibility of damage or is it contingent upon the fact that any manufacturer of the products in question should have duly considered the risks of damage? The courts tend to favour a more objective type of foreseeability. Therefore, the question amounts to what a reasonable person would regard as a probable consequence of his conduct if he applied his mind to it.

113 (*c*) *Nature and measure of damage*

Regulations on the nature and measure of damages are almost identical in all EC countries.

In the case of personal injury, direct financial loss, such as the cost of medical treatment and the loss of income, must be taken into account in the assessment of damage. As far as injury is due to a tort, the injured party may claim pain and suffering. Damage to property covers tangible objects and consequential damage. By contrast, the legal position is more complicated in the case of compensation for a purely economic loss. Purely economic losses are not usually made good if liability is based on liability for fault. This does not apply to those cases in which the consumer may hold the manufacturer liable under the contract. In such cases also purely economic losses are made good. From purely economic losses, we should separate losses which are but a consequence of product defects. These are losses which are always covered by manufacturer's liability proper.

In all EC countries, claims for damages are not limited in amount. De facto, they are limited in that the courts, at least as regards personal injuries, shape their rulings to accord with standard values for the most part established by insurance companies. The general rule is that apart from certain reservations with regard to, for example, traumatic neuroses, the victim's state of health does not play any part. Some specific differences concerning liability for fault exist under Dutch law. See Arts. 1406 and 1407 of the Dutch Civil Code,

important exceptions are stated which relate to particular rules with respect to death and personal injuries.

There are differences in the manner of payment which may either be effected in a lump sum or by way of instalments. Under Danish, Italian, Dutch, Belgian, French, Irish and English laws, damages are normally paid in a lump sum; only under German law are they paid in instalments.

114 *(d) Limitation*

Questions of limitation do not play an important part in the field of liability for fault. As far as we have been able to ascertain, the period of limitation usually begins to run from the time the damage and the responsible tortfeasor are known. The periods of limitation provided for have not so far resulted in any disadvantage to the consumer. The legal position is completely different, though, in the field of contractual liability. Art. 1648 of the Code Civil provides that an action for damages must be brought within a short period of time (bref délai). The Act does not specify more precisely what is understood by such period. It was incumbent on the courts to construe the Act which has led to quite different results in Belgium, Luxemburg and France.

— **Belgium**. The courts work mainly from the fact that the consumer must assert his claims within one year from the date of conclusion of the contract. In some cases, the courts assume a friendlier attitude towards the consumer: the period begins to run from the time the defect is known and negotiations between the parties will suspend the running of the period of limitation.

— **Luxemburg**. The courts are more helpful towards the consumer than in Belgium. The period of limitation begins to run only after negotiations between the parties have failed. The pre-draft of an Act to Amend Art. 1648 du Code Civil (projet de loi no. 2217) provides that the period should run only from the time the defect is known or from the time at which the purchaser should reasonably have detected the defect. It is intended to embody in the Act also the interruption of the period of limitation due to negotiations.

— **France**. Claims must be asserted within about one month after the purchaser has discovered a defect. In addition, it is taken into account whether the seller put the buyer off with promises and whether the seller allowed the buyer time to analyse the defect, if need be, also in a time-consuming way.

The different construction of the short period (bref délai) results in considerable uncertainty about the law for the consumer. If, as in the case of Belgium, a one-year time limit is assumed, claims by the consumer, if any, are mostly useless since defects in a product often will become apparent only much later.

115 **6 Defences**

When a defendant is liable in accordance with the rules described above, the plaintiff's conduct may constitute a defence. Contributory negligence and the assumption of risk are generally accepted defences in product liability, regardless of whether liability is strict liability or is based on negligence or warranty. The assumption of risk is a complete bar to recovery, while contributory negligence involves a distribution of liability, depending on the degree of negligence

displayed by either party or — in the case of strict liability — displayed by the plaintiff.

Another possibility of defeating the injured party's claim is to free oneself from product liability through appropriate exemption clauses. Two instances should be distinguished: (i) liability may be excluded by contract if, by way of exception, a contract exists between the manufacturer and the ultimate user. As contractual exemption clauses are dealt with in Chapter 6, we would like to refer to the statements made there; (ii) exemption clauses may be printed on the packing. The question is whether such exemption clauses can have legal effects also in the absence of contractual relations. Problems seem to have emerged only in Great Britain. At any rate, the Unfair Contract Terms Act of 1977 forbids such clauses within certain limits (see Chapter 6, No. 141).

116 7 State liability

The question of state liability comes into play in those cases in which the state performs control functions in the production line, i.e. within the framework of food and drugs law and in the field of standardisation, in so far as governmental agencies participate in the standardisation procedure. If consumers have suffered a damage through drugs, foodstuffs or appropriately tested products, it is natural to check whether it would not have been possible to prevent the damage through early intervention by the supervisory authorities.

The **German** law of state liability takes as a criterion the question whether the authorities fulfil the obligations imposed on them by the legislator exclusively in the interest of the general public; in such case, violation of their duties does not even give rise to liability vis-à-vis third parties if the latter are injured in consequence of official activity. By contrast, if, apart from safeguarding the public interest in general, the official activity is directed mainly at the protection of the individual, the latter is entitled to claim damages. The courts have not so far decided whether the supervisory authorities involved by operation of law also fulfil their duties in the interest of the individual consumer. However, new decisions from the area of banking law seem to indicate a growing trend towards limited protection.

— Under **Belgian** law, the situation is completely different. The courts have imposed on the public authorities concerned the duty of care applicable to manufacturers. There is even a correlation between the privileges some organisations enjoy and their duty to act with care in order to protect the consumer against harm. Hence, it follows from this completely different basis of liability that public authorities are liable to the consumer for damages if they fail to fulfil the duties incumbent on them. There is perhaps a common feature in that liability presupposes fault.

— **France.** While by law liability on the part of the state is possible, in actual fact there is no court practice.

— In **Great Britain** and **Ireland** just as in France, liability on the part of the state can be envisaged under the rules of common law. However, there do not seem to be any reported cases in the area of product liability.

— **Netherlands.** The question of civil liability on the part of public control authorities in consumer affairs has never arisen under Dutch law.

— **Luxemburg**. As in Belgium, there is no special legislation, but the same rules as those developed by the Belgian courts are applicable.

— According to **Danish** law, the state may be liable for product damage if a public authority has acted negligently in the fulfillment of obligations aimed at protecting not only the public at large but also the individual consumer against the marketing of dangerous products.

— **Italy**. Liability on the part of the state has never been an issue so far. It might, however, be acknowledged in cases of official acts or omissions if, for instance, a product has been put on the market without the necessary control through public administration. If this results in a dangerous product circulating in the market, the ministry involved might be considered liable under Art. 28 of the Italian Constitution.

117 8 Loss adjustment through manufacturer's, distributor's or supplier's insurance

An *obligation* to insure against product damage exists in the EC countries, if at all, only with respect to special sectors, such as travel agencies (Belgium), drugs (Federal Republic of Germany), sales by mail (Italy). Otherwise, the responsible persons are free to take out insurance against risks resulting from production. There are considerable differences in the EC countries as regards the professions taking out insurance:

— In **France** and **Italy**, insurance is not common.
— In **Luxemburg**, insurance is not common, but a trend towards insurance is beginning to appear in outline.

— By contrast, in the **Netherlands**, the **United Kingdom**, **Ireland** and **Belgium**, it is common practice for manufacturers to take out insurance against the consequences of product liability. However, Belgian suppliers are not insured against these risks with the exception of some liberal professions, e.g. pharmacists, druggists.

— In **Denmark** and the **Federal Republic of Germany**, a special situation prevails. In Denmark, retailers' product liability has since 1964 been included in the general business liability insurance which is taken out by practically every business enterprise. This form of insurance does not, however, cover the manufacturer's, importer's or wholesaler's product liability. In order to meet the demand for product liability insurance for these groups, the insurance industry in collaboration with business itself developed a type of insurance combining business and product liability. This type of insurance is winning popularity.

In the Federal Republic of Germany, it has been doubted whether the ordinary liability insurance policy really covers all aspects of product liability. Insurers have therefore developed what they call a 'product concept', namely, a set of additional clauses to ordinary liability insurance. Meanwhile, we can say that liability insurance also covers product liability. It should be noted that the insured party's rights pass to the insurer insofar as the latter has indemnified the insured party for specific damage.

118 9 Evaluation and critical analysis

Comparative analysis has shown the differences among the liability systems and the conditions governing liability. From our study we learnt that the scope of consumer protection varies widely in the EC countries. French and Belgian laws seem to protect the consumer best under the rule of contractual liability. Yet even here there are loopholes in the protection which prejudice consumer rights. We should remember the limitation of contractural liability vis-à-vis the contracting consumer, the problems resulting from the differentiation between hidden and apparent defects and, last but not least, the unclear and uncertain points in the determination of the term limitation. De lege lata, not even French/Belgian/Luxemburg laws meet the requirements of comprehensive protection of the consumer against dangers issuing from products.

All the more are there loopholes in liability for fault preventing the consumer's comprehensive protection. We will leave open the differences between the reversal of the burden of proof as to negligence and the prima facie evidence of negligence. Either approach may still involve the danger of forfeiting one's right if product damage is due to an 'escaper' or a development defect, where fault on the part of the manufacturer is not out of the question. Other difficulties result from the onus of proof as to defects and causation. The courts have certainly realised the problems encountered by the consumer and have taken account of them in a variety of ways. We have noted the general trend towards objectifying the concept of defect and inferring fault from the existing defect. Finally, the courts accept causation between defect and injury if injury is the usual consequence of such defect. In this connection, it is not reversing the burden of proof which is the decisive issue, but rather the growing impossibility for the manufacturer to exonerate himself. However, all the endeavours made by the courts cannot obscure the fact that it is a most uncertain undertaking for the injured consumer to go to court to enforce his claim for damages, since he cannot predict the outcome of litigation. That is why people generally have come to realise that they can get to the roots of the manifold problems involved in manufacturers' liability only by means of new statutory regulations. The United Kingdom and the Netherlands have formed commissions to recommend reforms. The Bill on Volume 6 of the new Dutch Civil Code, which was published in 1960, contained a specific provision on product liability. This provision was abandoned again because the government wanted to wait for the results of the discussions within the European Commission and the Council of Europe. Likewise, the German government has decided to work towards a European reform. The lines of a similar development are beginning to become clear also in the United Kingdom. The British Royal Commission on Civil Liability and Compensation for Personal Injury in its report in 1978 supported product liability rules.

119 10 European drafts on the harmonisation of product liability

The lines of a solution to the problems on an all-European basis are beginning to become clear. The Council of Europe and the EC Commission have presented drafts on the harmonisation of product liability. Both drafts support the

introduction of strict liability. The essence and purpose of the break with liability for fault is above all the desire to include in liability the risk of development defects. However, both Commissions could not decide in favour of pure liability for damage caused. To give rise to manufacturer's liability, the injured party does not only have to prove the defect and the damage, but also causation between the two. As far as that goes, the drafts do not differ from the legal position prevailing in the EC countries. As far as these requirements are concerned, national rules continue to be applicable. Unfortunately, both drafts intend to limit liability. Preference should be given to the proposal developed by the EC Commission because that draft includes compensation for damage to property, whereas the draft by the Council of Europe provides for compensation only in the case of personal injury.

It is a fact that either draft, if it were ever to become law, would considerably improve the consumer's legal rights. We should nevertheless make some comments on the weak points of the drafts. Both drafts aim at abandoning the principle of fault as a basis of liability. In order not to leave a loophole for the principle of fault via the concept of defect, both drafts started from an objective concept of defect. Nevertheless, preoccupation with the concept of defect reveals that people continue to emphasise blameworthy conduct on the part of the manufacturer in justification for liability for damages. However, the reason for manufacturer's liability is not the manufacturer's increased individual responsibility but the production process causing dangers. That is why it would be better to disregard the product and to concentrate solely on the production process. If industrial manufacturing methods are concerned, the manufacturer will have to compensate all losses caused by his products on condition that they had been used as provided. Only pure liability for damage caused might solve the problems presented by industrial production. However, even the best of liability regulations cannot obscure the fact that they can have for their object only the spreading of risks and compensation for damage. Protection against dangerous products would be most effective if damage were prevented through comprehensive safety precautions laying down compulsory rules for the production process, compliance with which would have to be controlled by the state.

V CIVIL LIABILITY FOR THE SAFETY OF SERVICES

120 1 The safety of services

The question of liability for the safety of services raises the problems already dealt with in control of the safety of services. We suggested that in the case of services the quality aspect had priority over the safety aspect. With a slightly different objective, what has been said applies also to the liability problems.

This is due to the different 'methods of production' of goods and services. The production of goods is fully industrialised. The industrial production process brings about specific dangers to the consumer which did not previously exist. His legal position is weakened further by the fact that the manufacturer and the seller are not identical. The consumer is the ultimate link in the chain of

supply. And although the product passed through many hands, the consumer usually gets it in the condition in which it left the factory. The only person directly liable to the consumer is the seller, who has no influence whatsoever on the manufacture of the product sold. This situation is characteristic of the consumer's typical legal position with respect to manufacturer's liability: his contracting party is the wrong party and the person responsible for harmful manufacture is difficult or impossible to sue.

In the services sector, the situation is different. Industrialisation in the services sector has been negligible so far. First signs of industrialisation are showing in some sectors of the economy, e.g. in the entire sector of repairs, production of prefabricated houses. Owing to the lack of industrialisation in the services sector, the consumer has not so far been exposed to the dangers sufficiently known from the production of goods. Services do not as yet endanger his personal safety in the same measure as goods. The level of industrial development entails that the production and distribution of services is controlled by one party, i.e. the immediate supplier. We might split up the economic function, for instance, if the service, perhaps repairs, is rendered by a large enterprise and the consumer makes a contract only with the party arranging for the service. As such a development on a broad scale is not as yet identifiable in the services sector, the consumer's legal position is as follows: the consumer' contracting party is the person who renders and sells the service; special dangers similar to those linked with the production of goods jeopardising his safety do not yet exist to a legally significant extent. Dangers to the consumer always result from inferior quality, which is why liability of the supplier of services is dealt with in Chapter 6.

121 2 Manufacturer's liability on the part of the supplier of services

The economic development is correlated to the status of the legal control instruments. There are no indications on a broad scale in any of the EC countries amounting to an extension of the principles of manufacturers' liability to the suppliers of services. Liability of the supplier of services for personal injuries to the consumer, if any, is generally regarded as a problem of contractual liability. Although in some cases the situation will be similar to that arising in the production of goods, the national courts do not make use in the services sector of the principles developed with respect to manufacturer's liability. If at all, this problem is dealt with at a scientific level.

An exception should be reported from Denmark, though. The special type of vicarious liability (see No. 110) on the part of the professional or commercial distributor or supplier for any faults committed in previous links in the chain of production and distribution as developed by the Danish courts applies to any kind of contract of services. Liability under Belgian, French and Luxemburg law, which can be compared therewith, is limited to contracts of sale. It is to be expected that in view of the advancing industralisation also the bases of liability in the law governing services will change to conform to the statutory regulations on products.

CHAPTER 6

Quality of Products and Services

122 I GENERAL REMARKS

Apart from the safety of products, what matters most to the consumer when purchasing a product or availing himself of a service is *quality*. He is interested in buying a product that is unobjectionable in quality or in getting a service that is performed properly. His interests are safeguarded best and most effectively by measures of preventive control. Preventive control measures ensure that the consumer is protected against loss of property and annoying trouble in relation to the seller (see Sections II and III). If the product or the service is not faultless despite appropriate control or because of the lack of control, it is decisive what rights the consumer has against the seller (see Section IV).

In contrast to safety, the quality of products or services is not virtually subject to state control. Laws which have for their object the control of quality exist in isolated cases only. In this conjunction, the German and French Correspondence Course Protection Acts should be mentioned, which allow to test correspondence courses for their usefulness to the consumer (see No. 127). That is why in the final analysis the manufacturer or supplier of services is solely responsible for the degree of quality. By means of quality standards largely developed by industry itself, industry lays down average or minimum requirements for a broad sector of industrial production. A certain control of the quality of goods and increasingly also of services by independent third parties is achieved through the publication of test results arrived at by national goods testing institutes (see Chapter 2, No. 36). For, if a product or a service comes off badly in the test, the manufacturer/supplier of services may have to remedy the quality defects noted on account of the fact that the majority of the consumers refuse to buy the product or to avail themselves of the services. At the same time, the test results, some of which are also published in the daily press, enable the consumer to gather comprehensive information.

Since statutory quality control exists to a very limited extent only, liability of the person who sold and delivered the product or rendered the service to the ultimate consumer becomes a central issue of the body of subjects to be dealt with. Liability for the quality of products and services is subject to the law of contract. That is why, in the case of complaints and litigation, the party to be held liable is the contracting party and not the manufacturer as in the case of the lack of safety. The lines of a surprising development are beginning to become clear in **Dutch** law, for the Consumer Sales Bill provides for direct action by the buyer

against the manufacturer. The fact that in the area of sales contracts covering technical appliances the seller's liability is replaced by a promise of warranty on the part of the manufacturer is indicative of liability being somewhat shifted to the manufacturer. However, as a rule, the contracting party's liability is not determined by the national statutory regulations on warranty, for contractual liability comprises non-cogent provisions (i.e. provisions which are not binding upon the parties to the contract) from which companies deviated in their standard form contract conditions at the expense of the consumer. Liability for the quality of products or services is therefore largely determined by the scope of exemption clauses included in standard form contract conditions. It is not a question of what statutory rights the consumer has, but rather what rights he has left due to the unilateral enforcement of contractual exemptions by companies whose economic position is stronger. The legislators try to master this development through measures having very different objectives:

— Laws are enacted which limit the possibility of exemption from liability in standard form contract conditions and/or individual contracts.

— Special laws regulate in a mandatory way the contents of certain types of contract which have proved to be of particular importance to the consumer (correspondence course contract, travel contract).

— In Denmark and the Netherlands, the attempts made at regulating in a mandatory way the entire area of consumer purchases by a comprehensive act have reached a very advanced stage.

123 II THE CONTROL OF PRODUCTS

There is no state control of the quality of products. There are neither general nor specific acts which have for their purpose the control of quality. The further development of importance in the Danish Food Act and the Dutch Bill Amending the Warenwet has already been mentioned (see Chapter 5). There is control on a small scale inasmuch as the products subject to safety control are simultaneously tested for their quality if safety and quality are inseparably linked, which should often be the case in drugs and foodstuffs. Quality control in such acts is but a by-product which must not obscure the fact that it was and is the relative legislator's prime objective to improve safety and the protection of health, respectively, although in those countries in which proof of the effectiveness of the drug is required, the boundaries are beginning to become blurred (France, Denmark, Federal Republic of Germany). It is not to be expected in the near future that the legislators will intervene in the production process in a regulatory way on a broad scale, i.e. beyond the unintended side results achieved by the aforementioned acts. The reasons why this will not be the case lie in the fact that in this respect all EC countries have the same economic system in which the manufacturer himself is responsible for the quality of a product. If the view held by the advocates of liberal economic theory is followed, control beyond that is unnecessary, for, control is effected by the market in which the consumer will not buy the inferior product and will thus force the manufacturer concerned to manufacture products of better quality. It remains to be seen to what extent competition will fulfil the tasks assigned to it. After all, current

scientific and political discussion centres increasingly on the question whether products keep deteriorating. The starting point for the discussion is what is known as planned obsolescence. The question is whether big corporations pursue a special product and marketing strategy which has for its object the manufacture of goods not having the optimum useful life and thereby prompts early substitute purchases. Approaches to possibilities of control are not as yet discernible in the discussion of these problems. It is still a point at issue *whether* there is planned obsolescence.

State control of quality is not achieved either by the fact that in all EC countries the commencement of operations for the manufacture of consumer goods is often contingent upon the proof of the manufacturer's qualification. While the contents and scope of the requirements of admission vary considerably, it may be pointed out without the need for further details that such admission requirements will affect the quality of a product only very indirectly, if at all. For one thing, the proof of qualification does not warrant that the proprietor concerned will make optimum use of his expert knowledge, and, for another, the permit holder does not manufacture the products himself but has them manufactured by his workers and his machines. Finally, it should be doubted in principle whether such admission regulations are of a nature apt to protect the consumer. We are inclined to think that such regulations also suit the entrepreneurs' interest in their goodwill. To evaluate the admission procedure under the aspect of consumer protection, it would, of course, be necessary to know in which cases and for what reasons admission has ever been refused.

III THE CONTROL OF SERVICES

124 1 General possibilities of control

A control system of services must make allowance for the fact that the subject matter of control is not an industrial product but a human activity. Not only the result of work done is to be subjected to quality control, but the work done itself. The quality of a product may at least in theory be controlled before the product is cleared for sale. The quality of a human activity cannot be subjected to a similar control. To control services, a system can only be eligible which takes into account the peculiarities of the service concerned. As far as a contract of service or a contract to manufacture is concerned, control may set in with the training of those concerned or with the permission to trade. Since, contrary to the sale of products, the supplier of services produces his product himself or often has it produced within his scope of control, such admission regulations may have a certain influence on quality. On the other hand, such control system may allow to check vocational qualifications only in a very general way, but cannot ensure that the *specific* service is rendered in an optimum way, for this would necessitate the existence of pertinent regulations laying down in detail how the service is to be rendered. Where services are no longer rendered by individuals but within the frame of large firms, there exist already now job descriptions. Industrialisation of the services sector makes it unavoidable to standardise working processes. Only standardisation enables control.

Industrialisation shifts the values of quality and safety, for only industralisation results in specific consumer-related dangers (see Chapter 5).

125 **2 Statutory control measures**

As far as there are statutory activities at all, two types of measure can be distinguished: acts which have for their purpose the control of quality exist only for a subsection of the services sector; by contrast, somewhat more comprehensive are the possibilities of control resulting from acts which have for their purpose the control of safety, but in actual fact exert an influence on quality.

126 *(a) Generalities*

Such indirect control of quality is achieved under **French** law (Loi sur la protection et l'information des consommateurs de produits et de services) of January 10, 1978. For, in the control of services, the quality aspect is most important even if the legislator permits only the control of safety. The new Act should involve some delimitation problems.

Under **Belgian** and **French** laws, indirect control of quality is possible also in so far as the national standardisation organisations may establish not only rules relating to products but also to the performance of services. Since each standard is subjected to a governmental homologation procedure, the control of services can be imagined.

127 *(b) Correspondence courses*

Direct state control of quality is exercised in the first instance in the field of correspondence courses.

— In **Denmark** and **Great Britain** correspondence courses *may* be submitted to a public authority for control. It is self-explanatory that in this way only participants following courses submitted to such control are protected, not participants in other courses.

— In the **Federal Republic of Germany**, prior control is mandatory under the Correspondence Course Protection Act (Fernunterrichtsschutzgesetz) of 1976.

After less than two years, we can say that the German Act has not been successful in abolishing the unlawful practices of schools offering correspondence courses. The reason for this development lies in the fact that the scope of the Act is very limited. Only correspondence courses 50% of which is held in writing are covered by the Act. The legal rules invite the owners of schools to try to evade the Act. Control is exercised by testing the written material. Books and other means must be suited to enable the student to achieve his objective. At the same time, educational and professional supervision are examined. Furthermore, the organising party must prove that it has provided the student with complete information about the course before the contract was concluded. In this way, the organising party is obligated to disclose its information material and the intended procedure of sales promotion and advertising (see Chapter 3, No. 48).

— **France**. Loi sur l'enseignement à distance, 1971. The Act provides for pedagogic control exercised by 'le ministre sur l'établissement d'enseignement'.

The scope and method is somewhat similar to that applied under German law.

— **Belgium**. Loi du 5 mars 1965. The Act places courses which are organised, subsidised or approved by the state under strict control. Other courses are not subject to any quality control but only subject to regulations governing the formation of the contract, methods of payment and advertising practices (see No. 148).

— **Italy**. A bill is presently under discussion in Parliament.

— In **Ireland, Luxemburg** and the **Netherlands**, there is neither statutory nor voluntary control.

128 (*c*) *Holiday tour operators*

Of late, some sort of quality control has been exercised in the travel industry. Legislative activities were prompted by the fact that many travel agencies have declared themselves bankrupt in recent years. Consumers who had suffered losses as well as the travel industry itself urged a statutory solution to the problems.

— **Belgium** (AR du 30.6.66 modifiée par les AR du 30.4.68 et du 1er février 1975); **France** (loi no. 75 – 627 du 11 juillet 1975); **Great Britain** (Air Travel Reserve Fund Act 1975); and **Italy** (Decree No. 2523 of November 23, 1936; Decree No. 6 of January 14, 1972) have recognised the danger and have introduced pertinent legislation regulating the requirements of establishment, the tour operator's solvency, etc.

— In **Denmark** a Travel Guarantee Fund Act has been enacted 1979. It protects the travellers against the default of the tour operator or travel agency, but does not require authorisation or the like.

— **Ireland, Luxemburg** and the **Netherlands** have not enacted any legislation, even though these countries are faced with the same problem.

France and Belgium issued essentially identical regulations. The permission to set up a travel agency depends on several requirements as to the person of the operator (age, nationality, professional qualification) and as to the enterprise itself (safety of office furniture and fixtures, technical equipment). However, primarily financial guarantees are required, such as a minimum capital and a security. The amounts may vary according to the different types of agencies and to the size of the organisation.

The regulation in **Great Britain** is somewhat different. The body competent to grant a licence is the Civil Aviation Authority. The Authority requires licences to provide a bond to help travellers in the event of an operator's insolvency. The Air Travel Reserve Fund Act was a recognition, brought about by the collapse of certain tourist agencies, that the bond was not necessarily sufficient. The Reserve Fund is financed by a levy on travel organisations collected by the Civil Aviation Authority and was secured primarily by a government loan.

Under **Italian** law, the institution of a travel agency is subject to preventive authorisation by the Provincial Board of Tourism whose control activity conforms to the general directives of the Minister of Tourism. Such authorisation is issued after the requesting agency's technical requirements as well as its capacity to perform the services of a tour operator have been controlled. However, financial guarantees are not required.

129 IV CIVIL LIABILITY FOR THE QUALITY OF PRODUCTS AND SERVICES

This section will deal with contractual liability and not with liability for non-delivery or non-performance. Comparing the different systems of warranty, we must duly consider that only a Continental jurist is used to learning about warranty as a special part of civil law. Under Anglo-American law, warranty is treated together with general obligations, such as the obligation to perform a contract.

1 Statutory regulation of warranty and practical realisation

130 (*a*) *Contracts for the sale of goods*

In Continental law, the buyer's warranty is regulated by law. A slightly different situation prevails in English and Irish laws. To enable appreciation of contractual liability, it is necessary to realise that contractual liability is based on the contracting party's intentions. These intentions and not statutory provisions underlie all contractual obligations. This type of warranty is based on an express or implied condition. That term and its legal basis are still important for the understanding of the English legal system, even if Great Britain in 1973 included in its law provisions similar to the Continental law of warranty.

Statutory regulations concerning warranty exist in:

— **Denmark**, Sale of Goods Act
— **Belgium**, Code Civil
— **France**, Code Civil
— **Luxemburg**, Code Civil
— the **Netherlands**, Burgerlijk Wetboek
— **Federal Republic of Germany**, Civil Code, 1900
— **Great Britain**, Sale of Goods Act 1893, as amended in 1973
— **Ireland**, the Sale of Goods Act of 1893 continues to apply and will soon be extended.
— **Italy**, Codice Civile, 1941

It is not the task of this report to compare statutory warranties in the EC countries. For one thing, this task has been accomplished in a comprehensive way by a competent party (Ernst Rabel, Recht des Warenkaufs), and for another a comparison would be meaningful only if the functioning of such rights in the respective legislation were included. That is why this chapter is confined to a brief account of the basic features of statutory warranties. The following distinction by the origins of the laws can be made:

— The Romance legal system (Belgium, France, the Netherlands, Luxemburg, Italy) as well as the German and Danish legal systems have many things in common as regards the design of the law of warranty: claims accrue to the consumer only if a defect is deemed to exist. The legal remedies then depend upon whether ascertained or unascertained goods are concerned. In the case of ascertained goods, the consumer may demand redhibition (right to demand that the purchase price be refunded in exchange for the return the product), abatement

(right to reduce the purchase price) and sometimes damages; in the case of unascertained goods, there is in addition a right to demand goods in replacement.

— In Denmark the Consumer Sales Act of 1979 has furthermore given the consumer the right to demand repair. A *statutory* right to demand repair of deficiencies does not exist in the other countries.

— **British** law shows a slightly different design. The only remedies available under British law are those of repudiation (e.g. refusal to pay or demand money back) and/or a claim for damages. The right of repudiation may be regarded as a defence or cross action, or as under Continental laws the buyer himself may demand cancellation of the contract and mutual reconveyance of the money and the thing, respectively. It depends on the magnitude of the seller's breach of contract whether the buyer can repudiate the contract or must pay for what he has received or may claim damages for any defect.

— **Ireland**. The buyer's remedies for breach of warranty, otherwise similar to those in Britain, will be amended in a most important way by clause 21 of the Sale of Goods and Supply of Services Bill of 1978. The amendment provides the buyer with a set of entirely new rights. He is entitled to reject the defective goods and to repudiate the contract or to have a defect constituting the breach remedied elsewhere. Furthermore, he may maintain an action against the seller for the cost incurred in this connection.

At a superficial glance at the national civil laws, one may have the impression that the buyer/consumer enjoys a rather strong legal position as compared to the seller. Appearances are deceptive. In Denmark, the Consumer Sales Act of 1979 has made the rights of the consumer in case of defects mandatory — the rules on the consumer's rights may not be departed from to the detriment of the consumer. All other EC countries have in common that the entire body of the law of warranty constitutes in principle non-cogent law that may be contracted away. The national civil laws do not give preference to the consumer's interests, but rather claim to lay down the legal requirements among manufacturer, seller and consumer in the event of a defect of the object of purchase.

Civil laws assume a seller who advises the customer carefully, gives guarantees on account of his expert knowledge for which he shall assume liability. It may be possible that this model reflected real conditions at the time legislative work on the national civil laws was under way. In the actual legal systems of the industrial age that model proves to be obsolescent. The function of the supplier who is the link between the manufacturer and the consumer has undergone fundamental changes: distribution is essentially his function. Personal advice has been replaced by the manufacturer's advertising promise. Economic structures today present a seller who is often on a par with the manufacturer as regards economic power. Sellers use their economic power to dictate contractual conditions to the buyer, availing themselves of the principle of private autonomy underlying civil laws. The buyer's freedom is restricted to the freedom of contract, he has no influence on the design of the contractual relation. As a rule, contracts are shaped to accord with standard form contract conditions which aim at saddling the buyer as far as possible with the risk of liability for inferior quality. If there are no standard form contract conditions, the parties try to achieve the same object through individual agreements to that effect. The question of the

seller's liability has therefore become a question of the effectiveness of exemption clauses as a part of individual agreements or standard form contract conditions. Exemption clauses determine the actual legal system, not the problems of the law of warranty within the frame of civil laws. In view of such changes in the economic structures, the scope of civil law remains small. Only in cash transactions of everyday life, in the purchase of food, cosmetics, textiles, books and magazines does the law of warranty continue to play a part. However, this advantage is destroyed again by the fact that the customer often has difficulty in furnishing evidence, because as a rule verbal contracts are concerned. This does not apply to the purchase of valuable consumer durables, as for example new or second-hand motor-cars, furniture, washing machines, dish-washers and sewing machines, electric stoves, radio sets, TV sets. In this connection the extent of the customer's legal protection is contingent upon the degree of admissibility of exemption clauses and the evolution of 'guaranties' in contracts.

131 *(b) Contracts for the supply of services*

Contracts of service are not regulated in the same manner or to the same extent as contracts for the supply of goods.

— In **Denmark**, the **United Kingdom** and **Ireland**, there are no statutory regulations at all laying down the contents of contracts of service. This is the exclusive responsibility of the courts, which will imply terms of reasonable fitness. In Ireland, the Sale of Goods and Supply of Services Bill is intended to bring about a change in the legal position. Some basic obligations will be laid down which will be similar to those applicable in sales of goods.

— In **Belgium** (Code Civil), **France** (Code Civil), the **Netherlands** (Burgerlijk Wetboek), the **Federal Republic of Germany** (Bürgerliches Gesetzbuch), there are statutory regulations *only* concerning specific types of contract of service. The Acts regulate the rights and obligations of the parties to a contract to manufacture, to an order, and to a loan, to a contract of carriage (not so in the Federal Republic of Germany) and to an insurance contract (in the Federal Republic of Germany and Denmark under a special act).

— In **Italy** (Codice Civile), there are regulations only concerning the contract to manufacture; however, the rules are provided for contracts to manufacture as regards the performance of work and are only partially applicable to contracts of service.

The contract to manufacture is regulated in a relatively uniform way, even if the manufacturer's obligations are designed differently. While under Belgian, French and Dutch laws the manufacturer is only under a relatively general obligation to perform the work properly, **German** and **Italian** laws contain detailed warranty rules which largely coincide with those of the contract of sale. The rights granted to the consumer under warranty do not differ substantially from those of the law governing contracts of sale. What may be of importance is the fact that the consumer is always entitled to demand repair of deficiencies.

Since the entire law of warranty, as far as regulations exist at all, is of a non-cogent nature, conditions in the manufacturing and services sectors could develop along similar lines as in the sector covered by the law of sales contracts. Exemption clauses in standard form contract conditions or in individual

contracts have taken the place of statutory warranties. The fact that the customer was deprived of his rights is attributable also in this sector to the difference in power between the supplier of services and the consumer. Often the supplier of services today is no longer the minor craftsman, trader and industrialist living and working in the same area, but to an ever increasing extent a highly industrialised enterprise. The extent of liability also in this connection is determined by the limits of effectiveness of non-warranty. Only in contracts concerning the repair of articles of everyday use, as for example shoes, clothing and minor electric or plumbing work and painting jobs, does the law of warranty continue to be applicable in its statutory design. Nevertheless, it may be said for all EC countries that exemption clauses in contracts of service have not so far gained the importance they have in contracts of sale.

2 Limits of exemption clauses in contracts of sale

132 (*a*) *Limits under civil law*

The civil laws mentioned include on a modest scale provisions laying down the limits of admissible exclusion of liability.

(i) If the *buyer knows about the defect* of the object of purchase, all Continental laws agree that he is not entitled to any warranties. But, while beyond that Roman laws exclude only defects which are apparent, the German and in principle also the Danish provisions protect the buyer to a greater degree. The buyer must not only have had knowledge of the damaging fact but rather of the unfitness resulting from that fact; only grossly negligent ignorance is put on a par with such knowledge. Hence, no obligation to investigate the object of purchase prior to concluding the contract is placed upon the buyer.

Pursuant to the British Sale of Goods Act, liability is excluded only if the buyer investigated the product, and only for defects which such investigation ought to have revealed — provided the seller has not acted fraudulently.

(ii) The national laws of all EC countries agree that a seller who knows the defect, *conceals it* and contracts away liability because of this defect will be held liable despite exemption (France and Belgium 1643 Cc, Federal Republic of Germany 476 Civil Code, Netherlands 1542 BW). The Federal Republic of Germany, Art. 476 Civil Code, Italy, 1490 CC, require fraudulent concealment, whereas in Denmark and France knowledge is sufficient. In practice it may be assumed that the seller who knows a defect will be considered to act fraudulently.

The burden of proof as to knowledge or fraudulent concealment lies with the consumer. Thus, the consumer who has to prove only knowledge has a better chance of prevailing in litigation. However, this regulation cannot eliminate the fact that the burden of proof is very prejudicial to the consumer's position.

133 (*b*) *Limits under court practice and special legislation*

Since civil laws set hardly any limits in the provisions of warranty, it was incumbent upon the courts to correct the worst abuses in practice. During the last few years, the courts developed a three-stage control system by which the admissibility of exemption clauses was tested (see Chapter 8). Still, the further

development of court practice cannot obscure the fact that the delicate web of rulings is nothing but patchwork. The courts' perception of themselves as well as their constitutional tasks allow them to lay down new laws to a limited extent only. Where this has been done all the same, it has been emphasised specifically. In general, the EC countries have come to realise that the available legal instruments are not suited to master exemption clauses. Therefore, with the exception of Italy and Ireland, all countries either enacted laws which have for their specific object the fight against unfair exemption clauses or have at least prepared the ground for statutory regulation.

134 (*aa*) *Mandatory civil-law provisions.* Civil-law provisions which in themselves are of a non-cogent nature are declared to be mandatory.

— **Great Britain.** The British legislator took this path by passing the Supply of Goods (Implied Terms) Act of 1973 which introduced decisive changes into the Sales of Goods Act. Provisions were included concerning the buyer's right of rescission of contract or of claiming damages which cannot be contracted away in consumer transactions. In this respect, the Sale of Goods Act now includes special provisions on consumer sales contracts. These provisions were re-enacted in the Unfair Contract Terms Act, 1977.

— **Ireland.** A regulation which is identical in substance to the UK 1973 Act is to be achieved in Ireland through the Sale of Goods and Supply of Services Bill.

— **Denmark.** A Consumer Sales Act has been enacted, 1979. Like the British and Irish Acts, the Act gives the consumer some basic rights which cannot be contracted away. It comprises a broad, mandatory definition of defect according to which the product sold is defective even if not the seller but an earlier link in the chain of production and supply has given incorrect or misleading information which may be assumed to have influenced the buyer's opinion of the commodity.

— **Belgium, France, Luxemburg.** While there are no acts or bills in these countries, the courts have acted along the afore-mentioned lines as far as the professional seller's liability for hidden defects (vices cachés) is concerned.

— The **German** courts have taken a decision of similar importance according to which it is inadmissible to exclude all statutory rights of redhibition or abatement in standard form contract conditions. The buyer should at least be granted a right (not provided for by law, though) to demand repair of deficiencies; if that fails he may refer to the right of abatement or redhibition.

135 (*bb*) *Acts on unfair contract terms.* Currently, the most common way to cope with unfair exemption clauses seems to be the enactment of laws which, inter alia, deal *specifically* with exemption clauses (see Chapter 8).

— Federal Republic of Germany — Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Standard Term Contract Act, 1976)
— Great Britain — Unfair Contract Terms Act, 1977
— France — loi sur la protection et l'information des consommateurs de produits et de services, 1978

— Denmark — Marketing Practices Act, 1974, Contracts Act (as amended in 1975)
— In Belgium, Luxemburg and the Netherlands, there are drafts which are currently under discussion in Parliament. Whether and, if so, when enactment of these drafts may be expected cannot be predicted at present.

Although all acts and drafts have for their object the fight against unfair exemption clauses, they differ considerably as regards their procedure in their person-related scope (only consumer sales contracts, all types of contract of sale, etc.) and in their object-related scope (exemption clauses only in standard form contract conditions and/or in individual contracts). The problems resulting therefrom are dealt with in detail in Chapter 8.

To enable further study, we should like to anticipate that consumer sales are always subject to pertinent acts and that, with the exception of the German Standard Form Contract Act, exemption clauses in standard form contract conditions as well as in individual contracts come under the scope of the acts or drafts.

136 (*cc*) *Acts on consumer sales contracts.* A third possibility would be to regulate in a comprehensive way the entire law of consumer sales by a new act limited to consumer sales contracts. There are, except for the acts mentioned under 134, no acts in any of the EC countries. Attempts at reforms to that effect can be reported from the **Netherlands**. There is already a Bill on Consumer Sales. The structure of the Act is as follows: first, the parties' rights and obligations are regulated; subsequently, a special provision lays down that the seller may not exempt himself from certain obligations.

To enable better appreciation of the Bill, it should be realised that Dutch civil law in force is based on the Code Civil. The seller's liability is currently still determined by the hidden-defect regulation (vice caché). Already the Bill Amending the New Civil Law provided for the abolition of that regulation. The Consumer Sales Bill now achieves an important improvement of the buyer's legal position, for the period allowed for notifying the seller of the existence of a defect shall begin to run from the actual time of detection. If these requirements are deemed to exist, the buyer has certain rights that cannot be contracted away. The claim for damages does not comprise in principle consequential damage resulting from defects, unless (i) non-conformity concerns facts which the seller knows or should have known, (ii) the seller has manufactured the commodity himself or has imported it into the Netherlands, (iii) the commodity lacks a quality which it should have according to the seller, (iv) the object of sale was a second-hand commodity or an animal. The party to be held liable by the buyer on account of the rights granted to him is the seller in the first place. In addition, the buyer also may have recourse to the manufacturer. As far as that goes, the Bill contains a notable expansion of the buyer's rights. Apart from the claim for damages outlined above, the buyer may claim from the manufacturer (i) repair of the commodity on condition that the manufacturer is able reasonably to meet that demand, (ii) replacement of the commodity or reimbursement of the price paid, unless non-conformity is not grave enough to justify this or the commodity has perished or deteriorated through a cause for which the buyer is

to blame. In the final analysis, the Bill includes provisions concerning the seller's recourse.

137 3 Limits of exemption clauses in contracts of service

The provisions of civil law outlined above which limit the possibilities of excluding liability apply analogously to contracts of service, at least insofar as the type of service admits of such analogy.

Court practice and legislation to fight unfair exemption clauses have developed along slightly different lines in contracts of service. Existing tendencies lack uniformity which we think is attributable to the variety of and difference in contracts of service. Nevertheless, four methods of procedure are obvious:

— As was already explained in the law of sales contracts, one possibility is to declare civil-law provisions which are of a non-cogent nature to be mandatory. Approaches to that effect exist only in court practice. Thus, in contracts to manufacture German courts deny the supplier the possibility of complete exclusion of liability in standard form contract conditions; the orderer must at least be granted a right to demand repair of deficiencies. French courts extended the rules governing the professional seller's liability only to include contracts for repair, while comparable Belgian court practice is limited to the law of sales contracts.

— As far as acts or drafts exist which deal specifically with the effectiveness of exemption clauses, the rules laid down apply to all types of contracts of service.

— The third possibility of coping with exemption clauses consists in regulating in a mandatory way the contracting parties' rights and obligations through special laws governing certain types of contracts. Some countries availed themselves of that possibility in travel contracts and in correspondence course protection contracts which impair specifically the consumer's rights (see No. 147).

— Comprehensive amendment of the entire law governing contracts of service by way of a Consumer Services Act is not under discussion in any of the EC countries except **Denmark,** where a Consumer Service Committee was set up in 1976. It is working on a proposal for a comprehensive Consumer Services Act.

138 4 Typical exemption clauses in sales contracts

Exemption clauses are tailored to the type of purchase transactions involved. At the same time they are related to the type of object of purchase. Often these two facts are linked with each other if, for instance, certain products are sold in a specific way only. The following statements try to take up these differences. The most important exemption clauses in typical purchase transactions will be described.

139 (*a*) *Contracts of sale concerning new products*

Exemption clauses especially in standard form contract conditions are always

found in contracts of sale concerning consumer durables, such as motor-cars, furniture, electrical appliances. Exemption clauses have for their object the shift of the risk of inferior quality to the buyer. This is often effected in such a way that statutory rights (as far as they exist, especially the right of redhibition or abatement) are completely contracted away and are replaced by the right to demand repair of deficiencies which is not provided by law. Thus, the seller is in a position to make up subsequently for lack of quality without having to reckon with the loss of or reduction in the purchase price. From the seller's point of view, the right to demand repair of deficiencies is the lesser evil. The buyer is not released from the contract, has to see to it that the deficiencies are repaired and despite all the trouble is obliged to pay the purchase price. Subsequent to the regulation of warranties left to the buyer, there are always provisions which limit or even exclude the seller's obligation to pay damages. The two types of exemption clauses may be regarded as model clauses and as being of equal importance to all EC countries.

140 (*aa*) *Limits of excluding liability.* **Federal Republic of Germany.** Art. 11, No. 10 of the Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen von 1976 (Standard Form Contract Act) reads:

'In standard form contract conditions a term is ineffective through which in contracts for the supply of new products and services

(a) (exclusion and reference to third parties)
warranty claims against the party applying standard form contract conditions inclusive of claims for repair of deficiencies and substitute delivery, if any, are excluded in whole or in part, are limited to the granting of claims against third parties, or are made contingent upon prior legal proceedings against third parties;

(b) (restriction to repair of deficiencies)
all or some of the warranty claims against the party applying standard form contract conditions are restricted to a right to repair of deficiencies or substitute delivery if the other contracting party in the event of failure of such repair of deficiencies or substitute delivery had not expressly reserved the right to reduce payment or, unless constructional work is the subject matter of payment, to demand at his option rescission of the contract.'

Art. 11, Nos. 10a and b prohibit the complete exclusion of warranty in standard form contracts. The seller has at least to repair the defective product at his own cost. If repair is impossible, the buyer can reduce the price or withdraw from the contract.

— Under **British** law, the limits of exclusion of warranty are now defined by Section 6 of the Unfair Contract Terms Act which runs as follows in the sections relating to consumer sales:

'6. (1) ...

(2) As against a person dealing as consumer, liability for breach of the obligations arising from —

(a) Sections 13, 14 or 15 of the 1893 Act (seller's implied undertakings as to conformity of goods with description or sample, or

as to their quality or fitness for a particular purpose);
(b) Sections 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase), cannot be excluded or restricted by reference to any contract term.'

This provision is largely self-explanatory. Section 6 thus only repeats the legal position which had already been achieved by the Supply of Goods (Implied Terms) Act of 1973 including the Amendment of Section 55 of the Sale of Goods Act.

— **Ireland**. The afore-mentioned bill contains a provision similar to that of Section 6 of the British Unfair Contract Terms Act.

— In this connection, **French** law in Art. 2 and 4 of the Order of March 24, 1978 amending the Loi sur la protection et l'information des consommateurs de produits et de services, 1978, lays down the following:

Art. 2: 'Dans les contrats de vente conclus entre professionels, d'une part, et, d'autre part, des non-professionnels ou des consommateurs, est interdite, comme abusive au sens de l'aliéna 1 er de l'article 35 de la loi susvisée la clause ayant pour objet ou pour effet de supprimer ou de réduire le droit à réparation du non-professionnel ou consommateur en cas de manquement par le professionnel à l'une quelconque de ses obligations.'

Art. 4: 'Dans les contrats conclus entre des professionnels, d'une part, et, d'autre part, des non professionnels ou des consommateurs, le professionnel ne peut garantir la chose à livrer ou le service à rendre sans mentionner clairement que s'applique, en tout ètat de cause, la garantie légale qui oblige le vendeur professionnel à garantir l'acheteur contre toutes les conséquences des défauts ou vices cachés de la chose vendue ou de service rendu.

Sera puni d'une amende de 1000 F à 2000 F tout professionnel qui aura inséré dans un contrat conclu avec un non-professionnel ou consommateur une clause établie en contravention aux dispositions de l'alinéa précedent.'

Art. 2 of the Order thus establishes court practice in the past concerning the professional seller's liability for hidden defects (vice caché). Art. 4 requires of all professional sellers to mention clearly his legal obligation to compensate for loss and injury under a warranty.

— **Belgium**. The pre-draft (loi modifiant la loi du 14 juillet 1971 sur les pratiques du commerce) provides for the prohibition of exclusion or limitation of legal guarantee.

Art. 53 novem reads:

'Considered unfair to the consumer are:
— clauses reducing legal guarantee in the field of hidden defects (vice caché)

The draft goes beyond present court practice, for currently the professional seller may exclude his liability for hidden defects (vice caché) at least with respect to defects which he was in no position to know (development defects).

— In **Luxemburg**, there exists a pre-draft of an act (projet de loi No. 2217) pursuant to which Art. 1645 of the Code Civil is to be amended in view of the court practice regarding the vice-caché rule. It is being endeavoured to prohibit

all clauses which aim at limiting or excluding the professional seller's legal guarantee vis-à-vis private ultimate consumers (consommateur final privé).

— In the **Netherlands**, the Consumer Sales Bill brings about a notable change in the legal position. If the product is defective the buyer enjoys certain rights that cannot be contracted away.

— In **Denmark** the buyer's rights in case of defects, cf. No. 130, cannot be contracted away.

— There is no special legislation in **Italy** either. However, of some importance for the limitation of contractual liability is Art. 1341 §2 Codice Civile which runs as follows:

> 'In any case the following terms are ineffective, unless they have been specifically approved in writing: terms which in favour of the party who drafted them lay down an exemption of his liability, the power to withdraw from the contract or to stay its execution, or expiration dates which are prejudicial to the other party, limitations as to his power to raise means of defence, limitations in his freedom of contract with third parties, tacit prolongation or renewal of the contract, arbitration clauses or clauses which derogate from the competence of the judicial authorities.'

The provision which, by the way, applies only to exemption clauses in standard form contract conditions declares the clauses mentioned to be ineffective only if they were not duly confirmed in writing. Contrary to the acts mentioned above, control is exercised indirectly, if at all. The application of the provision was throughout characterised by intense construction activity on the part of the courts, which has resulted in a situation of great uncertainty presently rendering such control system at least partially ineffective.

A comparison of the provisions mentioned shows that under **British** and **Danish** law the consumer is protected most effectively. British law is more comprehensive than French law because the seller's liability is not limited to hidden defects. It also is more comprehensive than German law because in the event of a defect it concedes the buyer all rights granted to him, while under German law the buyer has to wait first whether the seller is able to remedy the defect by way of repair, before further rights accrue to him (redhibition, abatement). However, both Acts should lead to the same conclusion.

141 (*bb*) *Exemption clauses aiming at restricting the seller's liability for damages.* Art. 11, No. 7 of the **German** Standard Form Contract Act includes the following provision:

> 'Ineffective in standard form contract conditions are: any exclusion or restriction of liability for any damage attributable to a grossly negligent violation of contract by the party applying standard form contract conditions or to a wilful or grossly negligent violation of contract by any of his legal representatives or agents; this also applies to damage resulting from the violation of duties in the contract negotiations;'

— The **British** Unfair Contract Terms Act stipulates:

> '2. (1) A person cannot by reference to any contract term or to a notice

given to persons generally or to particular persons exclude or restrict his liability for death and personal injury resulting from negligence.

(2) In the case of other loss or damage a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.'

The provision declares void exemption clauses if they form part of a contract. This is surprising since under British law contractual liability exists independent of fault. However, contractual liability relates only to the result owed under the contract. Thus, this contractual liability does not cover all types of loss or injury which may occur to the contracting consumer. As far as the buyer sustains loss or injury outside that framework, he may also under British law claim damages only if he can prove fault on the part of the seller. The Act now clearly lays down that the seller must not limit his liability in this respect. What is striking is that the Act prohibits also exemption clauses which are made in the form of a notice to third parties. That is why exemption from liability on packings and in instructions for use is inadmissible, without this requiring the previous conclusion of a contract between the party giving the notice and the party having sustained the damage. Finally, it should be pointed out that the seller just as any other person is liable in like manner for his own fault as for fault on the part of his employees (Section 1(4)).

— In **Italy**, Art. 1229 I, Codice Civile, applies, which prohibits the exemption from liability for intent and gross negligence. It is not yet clear whether the provision covers vicarious liability as well.

— **Denmark**. Generally speaking, liability for warranty and negligence cannot be excluded, cf. the Sale of Goods Act, Art. 80 (contractual losses) and Art. 36 of the Contracts Act (product damage).

— The **Belgian** draft makes allowance for all terms prejudicial to the consumer whereby the supplier exempts himself from any liability arising from negligence of his employee or agent. It is not quite clear what exactly is meant by 'any liability'. The interpretation allowing the exclusion of liability for slight negligence appears to be within the legislator's intention.

— All the other countries have neither special provisions in civil law nor specific legislation on exemption clauses. Thus, control may be exercised by the courts in line with the general rules of civil law, as for instance public policy and good faith.

Under **French, Belgian** and **Dutch** laws, liability for intent and gross negligence cannot be excluded or restricted. Although the Belgian Supreme Court (Cour de Cassation) admits the exclusion of liability for gross negligence, that court practice does not play an important part because the lower courts have found other possibilities of eliminating such clauses. Another restrictive feature is that the limits of liability apply only to an act by the contracting party himself but not to his agents.

Also in the field of exemption clauses concerning fault, the protection

provided under British and Danish law proves to be the most comprehensive. At least in the area of personal injury, the seller is held liable irrespective of the magnitude of negligence, whereas in all other countries liability for slight negligence can also be excluded. In the final analysis, these are the very cases resulting in damage.

142 (*b*) *Contracts of sale concerning second-hand products*

The purchase of second-hand products plays an important part in the case of consumer durables. For second-hand motor-cars even a market of its own has developed. In fact, second-hand products are not faultless, a fact the buyer is well aware of. After all, he has to pay less for a second-hand product than for a new one. Sellers of second-hand products try to take advantage of this situation by exempting themselves from any liability. This is understandable in view of the fact that in the case of second-hand products ultimately nobody is able to reliably predict their service life or usefulness. On the other hand, allowance must be made for the interest of the buyer who plans to use the product. In view of the prevailing circumstances, it is to be expected that the legislator and the courts will admit exclusion of liability to a greater extent than in the case of new products.

— **Federal Republic of Germany**. Art. 11, No. 10 of the German Standard Form Contract Act is not applicable to second-hand products. *In principle*, the seller may exempt himself from any contractual liability. A certain measure of control of standard form contract conditions can, however, be exercised by means of the general clause (Art. 9 Standard Form Contract Act, re additionally Chapter 8). Of greater importance, though, is the fact that pursuant to Art. 11, No. 11 of the Standard Form Contract Act, the seller is liable for warranted qualities even if he excluded contractual liability in his standard form contract conditions. The purpose of this provision is that the seller shall be liable at any rate for statements relating to the properties of a product.

— The **British** UCTA applies to new products as well as to used ones. By Section 6, the seller cannot in a consumer sale exclude his liability pursuant to Section 14, para 2 of the Sale of Goods Act. This does not, of course, mean that the buyer of second-hand products may expect the same quality standards as in the case of new products. The difference in the products must be taken into account in conjunction with the term 'merchantable quality'.

— According to Article 77 of the **Danish** Sales of Goods Act a second-hand product is defective even if sold 'as is' or the like when it does not fulfil its description, when misleading statements as to quality have been given, when the seller has negligently retained information from the consumer, or when the product is in an essentially poorer condition than the consumer — having regard to the price and the circumstances — had reason to expect.

— In **Belgium**, **Luxemburg** and **France**, the legal guarantee (vice caché) rule applies in like manner to new as to used products. Similarly to the practice followed in Great Britain, distinctions are made with respect to the concept of defect.

— The **Netherlands**. Second-hand goods come within the scope of the Bill on Consumer Sales, i.e. unlike the practice under German law, no distinction is

made between new and used products.

— **Ireland.** Under the Sale of Goods and Supply of Services Bill, broadly the same statutory provisions on liability as in Great Britain are introduced in Ireland. The Bill also includes a special regulation concerning liability for defects in motor vehicles. Clause 13 implies a warranty in every contract for the sale of motor vehicles for ordinary trade use to the effect that the vehicle is fit for such use. The warranty is enforceable by any person who uses the vehicle and suffers a loss as a result of a breach of such warranty — a most important departure from the narrow principles of the privity of contract. It is to be a condition of the contract that the seller shall certify the fitness of the vehicle in writing unless the buyer states in writing that he does not intend to use the vehicle without adaption or repair. Exclusion of this condition is void in a consumer sale. The Minister may prescribe minimum requirements for a certificate of road worthiness.

— **Italy.** The Codice Civile does not provide for any specific rules on sales contracts involving second-hand products, which is why the rules on general warranty apply. Under Art. 1497, the seller will be liable for lack of quality if the conditions of use of the product sold are worse than those actually known by the buyer. In that respect, Italian law shows a certain proximity to British, Irish, French, Belgian and Luxemburg laws.

— Generally speaking, the seller will be liable at any rate in all EC countries if he fraudulently concealed the defect. The burden of proof is always on the consumer, which in practice makes it very difficult to the consumer. It is a controversial question to what extent the seller of a second-hand product is obliged to inspect it before selling it. There seems to be a general trend toward higher requirements in the case of the professional seller. The extent of the obligation of inspection gains importance specifically in second-hand car transactions. The survey explains the considerable differences within the EC. The spectrum ranges from the admissibility in principle of the exclusion of warranty, to the equal treatment of new and used products, to the reform movements in Ireland in line with which the consumer is to be granted certain statutory rights.

143 5 Exemption clauses in contracts of service

It cannot be the task of this study to investigate exemption clauses in all types of contracts of service. We would therefore like to restrict the investigation to contracts to manufacture. For one thing, such restriction of the subject is favoured by the fact that contracts to manufacture are regulated in those countries which have provisions concerning contracts of service. And for another, in contracts to manufacture just as in contracts of sale, the supply of a product which is flawless as to quality is most important, so that there is a certain proximity to the subject (of quality). In contracts of sale as in contracts to manufacture, it is the main concern of the consumer's contracting party to shift the risk for the defectiveness of the thing to the consumer. The limits of exclusion of warranty are laid down in the various EC countries as follows:

— **Great Britain,** Section 7 of the Unfair Contract Terms Act applies provisions similar to those in Section 6 to goods which are hired or provided under service contracts, e.g. repairs. The only difference between Section 6 and 7 is

that under Section 7 the supplier is permitted to avoid liability for defective title, again subject to the requirement of reasonableness.

— **Ireland**. The basic obligations of a supplier of services — as distinct from goods — as laid down in the Sale of Goods and Supply of Services Bill may be excluded or varied by agreement or usage if it is fair and reasonable to allow exclusion or variation. A provision comparable to that in Section 7 of the Unfair Contract Terms Act does not exist under Irish law.

— The **German** Act, Art. 11, No. 10, Standard Form Contract Act, applies to contracts to manufacture as well as to contracts of service.

— The **Belgian** Draft to Amend the Marketing Practices Act puts non-warranty (restriction of liability for hidden defects) in contracts of sale on a par with that in contracts of service. As against present court practice, this would constitute an important change, for the courts have not extended vice-caché liability to include the supplier in contracts to manufacture. In contracts to manufacture, Belgian law differentiates according to the contents of the obligations undertaken by the manufacturer: obligation de moyen (the businessman promises only to perform the contract with utmost care), obligation de résultat (the businessman *guarantees* performance). The difference is of importance in the event of non-performance: if the businessman guaranteed performance, he will be liable as soon as the orderer proves that the product does not comply with the order, while in the case of obligation de moyen the orderer has to prove that the businessman is at fault. In the area of contracts for repairs, court practice, depending on the subject matter of the contract, has resulted in non-uniform liability on the part of the repairer.

— In **France**, there exists no general rule that the supplier of services must not contract away his legal guarantee. Art. 2 of the Order issued to amend the Act of 1978 only refers to contracts of sale. So it is still the task of the courts to limit exclusion clauses in contracts of services. Art. 4 of the Order, however, requires the supplier of services to *mention* his obligation as to legal guarantee. But, contrary to contracts of sale, the scope of his legal guarantee is not quite clear. Generally speaking, French law resembles Belgian law.

— **Luxemburg**. The draft applies both to contracts of sale and to contracts of service. As under Belgian law, liability on the part of the supplier of the service is tightened. In addition, special provisions apply to the sphere of contracts for repair (Arts. 11 and 12). The statutory seller's contractual liability is extended to the services of the party performing repairs which are specified in the invoice. Furthermore, the party performing repairs is prohibited from limiting or excluding liability for its obligation to duly keep the object and return it after the job is done.

— In **Denmark** and the **Netherlands** (draft), control of exemption clauses is possible only under the general clause.

The survey shows the lack of uniformity in the EC countries regarding specifically contracts of service. Statutory regulations as well as bills suffer from the fact that development in the law governing contracts of service is not taken into account. Instead of defining the rights and obligations of the parties to a contract of service in order to work out from there where the limits of exemption should be, the legislator declares the act tailored for contracts of sale to be applicable as a whole to contracts of service. It is then for the courts to establish

whether or not the act is applicable to the contract of service concerned in each case.

144 **6 The obligation to perform additional services**

The subject matter of the presentation are all obligations on the part of the consumer's contracting party or the supplier of services which exceed redhibition, abatement, damages and repair of deficiencies.

145 *(a) Incidental expenses incurred in the repair of deficiencies*

Another variety of drawing up clauses to the detriment of the consumer which is often encountered consists in the fact that, while the seller grants the consumer a right to repair of deficiencies, at the same time he orders him to bear the cost of implementation (transport charges, travelling expenses, wages/salaries and cost of material). In this way, the legal position is changed very much at the consumer's expense. The right to repair of deficiencies may prove to be a boomerang, if, for example, incidental costs exceed the actual damage to the product bought or the service ordered.

— The **German** Standard Form Contract Act brings about a decisive improvement of the consumer's legal position.

Pursuant to Art. 11, No. 10c, a term in standard form contract conditions is ineffective 'through which in contracts for the supply of new products and services the obligation under warranty of the party applying standard form contract conditions to defray the expenses incidental to the repair of deficiencies, specifically transport charges, travelling expenses, wages/salaries and cost of material, is excluded or restricted'.

The regulation applies in like manner to standard form contract conditions in contracts of sale as in contracts of service. A regulation almost of the same tenor has also been included in the German Civil Code, Art. 476a, so that, properly speaking, clauses to that effect are prohibited also in individual contracts. However, as the regulation in the Civil Code is of a non-cogent nature, it should be of minor importance.

— **Great Britain**. Under Section 6 of the Unfair Contract Terms Act, the seller is prohibited from excluding or limiting his liability for the quality of the product bought. If the seller passes the cost of repair on to the consumer, he limits his liability. As far as that is concerned, such clauses are inadmissible.

— **Ireland**. The same interpretation of the legal rule will apply to Ireland if the Bill of 1978, which is similar in this respect, becomes law; Section 22(6).

— **France**. The courts basing their decision on Art. 1641 of the Code Civil oblige the seller to bear incidental costs.

— **Denmark**. The Sale of Goods Act, Art. 78 gives the consumer the right to demand repair of defects at the full expense of the seller. This right cannot be contracted out or limited in any way. Hence, the consumer does not have to pay anything in case of repair.

— Under the **Dutch** Consumer Sales Bill, the seller is prohibited from ordering the consumer to bear the cost of repairs. It is unclear which costs are included.

— In all the other countries, there are neither statutory regulations nor are there any efforts being made to remedy grievances.

146 (*b*) *Guarantee*

In many areas, specifically electrical appliances and cars, guarantee is handled through certificates of guarantee. Firstly, a distinction must be made between supplier's and manufacturer's guarantee. The supplier's guarantee merely relates to the legal relationship between customer and supplier. By means of a guarantee in the contract of sale, the supplier excludes statutory warranty and instead concedes what is mentioned in the certificate of guarantee. The admissibility of such rules is contingent upon which minimum rights are granted to the consumer under national law. This body of subjects has already been dealt with. No mention was made, though, of those cases in which the manufacturer promises the consumer warranties (manufacturer's guarantee). Such guarantee is deemed to exist if the manufacturer of a product guarantees certain maintenance work and repair of deficiencies in the product which are not performed by the seller but by the manufacturer's service department. This type of manufacturer's guarantee, which is becoming more and more common, reflects the change in the supplier's functions mentioned before. As a mere intermediary person he is not largely in a position to guarantee. Moreover, the system of certificates of guarantee is in line with the manufacturer's interest in advertising for branded goods. The image of a product to be sold is also shaped by the pertinent after-sales service which the manufacturer organises independently of the supplier. This type of guarantee need not entail disadvantages to the consumer. The legislators in the EC countries concern themselves increasingly with manufacturer's guarantee. Three sets of questions come into play in the discussion of a regulation favourable to the consumer: (1) whether or not the consumer is granted an enforceable claim against the manufacturer through a certificate of guarantee or any other form of manufacturer's guarantee; (2) to ward off attempts by manufacturers at limiting statutory minimum rights through 'guarantee' (3) to regulate the coexistence of manufacturer's guarantee and supplier's guarantee.

— The **German** Standard Form Contract Act intervenes only if the supplier in his standard form contract conditions excludes liability and instead refers to manufacturer's liability under a guarantee. Such regulation, which in many cases reflects present practice, has been prohibited under Art. 11, No. 10a, Standard Form Contract Act. Pursuant thereto, it is inadmissible to restrict contractual liability to the granting of claims against third parties. However, in his standard form contract conditions, the supplier may demand of the buyer that he first should have recourse to the manufacturer, which does not mean that the supplier may demand that the buyer should institute action against the manufacturer.

— A regulation tailored for manufacturer's guarantee is to be found in the **British** UCTA, Section 5. The legislator was concerned here primarily with the problem of exemption clauses imposed by manufacturer and wholesaler in guarantees. The new Act prohibits exclusion of liability for loss or damage caused by negligent manufacture of consumer goods. The rule thus prevents the producer

from relying on clauses which in return for the repair of defective parts at the same time purport to exclude all liability for consequential loss even if the defect was due to his own negligence. By contrast, the consumer's *rights* in the case of manufacturer's guarantee are not regulated. Questions of manufacturer's liability are also dealt with in the codes of practice as to motor vehicles, car manufacturer's warranties (see Introduction, No. 8) prepared by the Director General of Fair Trading.

— **Denmark**. The Marketing Practices Act applies to guarantees given by a manufacturer/importer. The term guarantee may only be used if, through what is called guarantee, the consumer enjoys an essentially improved legal position (Art. 4). In this respect, the legal position in Denmark is similar to that in Great Britain. After all, clauses which do not comply with regulations may be set aside pursuant to Art. 36 of the Contracts Act (see Chapter 8, No. 178). When negotiating with trade associations the Consumer Ombudsman takes the view that the consumer should be granted the right to enforce his claim against the manufacturer or even the importer.

— **Ireland**. The Irish bill includes two provisions connected with guarantees. Clause 12 enables the Minister of Industry, Commerce and Energy to issue orders applicable to particular classes of goods under which an advertisement by the seller concerning spare parts and after-sales service would become an implied warranty in a contract for the sale of such goods. Clauses 15 – 19 directly concern manufacturers' guarantees. Guarantees are defined as documents, notices or other statements indicating that a manufacturer or supplier other than a retailer will service, repair or otherwise deal with the goods after purchase. Guarantees must be clearly legible, define the goods in question, state the name and address of the person offering the guarantee, its duration and terms and any costs to the buyer, and the procedure for claiming under it — which must not be more difficult than normal commercial procedures. If a seller delivers a manufacturer's guarantee to a buyer, he is liable as if he were the guarantor unless he tells the buyer he is not liable or gives his own guarantee. Rights under a guarantee must not exclude or limit the buyer's legal rights and any provisions in it imposing additional obligations on the buyer or making the guarantor or his agent sole judge of the buyer's rights are void. Clause 19 states that the buyer may maintain an action against a manufacturer or other supplier who fails to observe any of the terms of the guarantee as if that manufacturer or supplier had sold the goods to the buyer and had committed a breach of warranty.

— The **Dutch** Consumer Sales Bill comprises two regulations which are of importance in the present context: for one thing, it prohibits in like manner to the German Standard Form Contract Act the clause that the buyer may duly sue the seller when he has first, to no avail, sued a third party. What we consider to be of greater importance, though, is the fact that the new Act provides — in addition to the claims for redhibition or abatement against the seller — for a direct action against the manufacturer (see No. 136).

— In **France, Belgium** and **Luxemburg**, the legal position must be seen on the background of legal guarantee (vice caché). The seller is liable for guarantees given by the manufacturer even if in substance they go beyond the scope of the obligations assumed by the seller. Conversely, the manufacturer is not liable

(action directe, see Chapter 5) for statements made by the seller which go beyond the manufacturer's guarantee. These principles were developed by the courts.

147 7 Special-law regulations concerning certain services

In the area of contracts of service, two types of contract have emerged which are of particular importance to the consumer — the correspondence course contract and the travel contract. The contract terms unilaterally dictated by the consumer's contracting party put the consumer at such disadvantage that the legislator was compelled to intervene in a regulatory way. The enacted laws have for their object the mandatory regulation of the contracting parties' rights and obligations.

148 (*a*) *Correspondence courses*

So far, the correspondence course protection contract has been regulated in the Federal Republic of Germany, France and Belgium.

— **Federal Republic of Germany**, Correspondence Course Protection Act (Fernunterrichtsschutzgesetz) of August 24, 1976.

The contents of the Act is essentially as follows. The contract to be submitted to the participant under German law *must* contain provisions concerning (1) the name and address of the parties, (2) the subject, goal, commencement and term as well as the type and/or recognition of the final examination of the course, (3) total fees, (4) typographically clear information about the right of revocation, (5) termination clauses. Violations of the mandatory contents result in ineffectiveness. The participant has a right of revocation to be exercised within two weeks.

— **France**. La loi No. 56 du 12 juillet 1971; décret No. 1218 et 1219 du 22 décembre 1972. The structure of the French Act resembles that of the German Act. The following provisions *must* be included: terms concerning the service, work, correction, curriculum, expected level of previous experience, level of the course, term and goal. Unlike German law, the French Act strives to ensure protection by providing that the contract may be executed at the earliest six days after receipt.

— **Belgium**. Loi du 5 mars 1965 sur l'enseignement par correspondence. While a written contract is required, there are no mandatory provisions concerning the programme, term of the course, periodicity of correspondence lessons, mode of correction and costs. Expressly forbidden are clauses which obligate the student to participate in the course for more than one year and to effect an advance payment for more than three months.

— As to **Denmark**, see No. 127.

— In all the **other countries** there are neither acts nor bills.

149 (*b*) *Travel contracts*

In the area of travel contracts, a survey of the situation is much more complicated. Statutory regulations laying down the contents of the contract exist only

in France, Belgium and the Federal Republic of Germany, reform is being considered in Denmark and the Netherlands. England merely enacted a bill which is expected to have a rather indirect effect on the travel contract.

We would like to mention the following developments:

— **French** legislation (loi sur les Agences de Voyages 1975) regulates mainly the setting up of a travel agency. But the statute also contains provisions on liability and safety.

— The most detailed regulation exists in **Belgium**. In 1970, Belgium ratified the 'Convention Internationale Relative au Contrat de Voyage' and confirmed it by a pertinent Act of March 30, 1973. Liability on the part of the agencies varies depending on the type of service to be rendered.

Where the travel agency acts as an intermediary between the travellers and individual hotels, it is not liable for performance or bad performance of services to be rendered by hotels, etc. The legal consequence is different if the travel agency acts as a tour operator and 'sells' a package tour to the consumer. In such case, the operator is fully liable for proper performance of the contract. In principle, he is liable as soon as the promised result is not achieved; however, the operator can rebut the presumption of fault by proving that he acted with the necessary professional care (comportement professionnel diligent). However, the courts advance stringent requirements concerning this proof of exoneration. The operator must not deviate from the provisions of the convention to the traveller's detriment. Even in those cases in which the convention allows restriction of liability, it is ineffective if the damage is attributable to intent or gross negligence.

— In the **Federal Republic of Germany**, there is an Act to Amend the Civil Code (Travel Contract Act) of May 4, 1979, which came into force on October 1, 1979. Under the Act, special provisions concerning travel contracts are included in the regulations governing the law of contract to manufacture. Unlike the Belgian Act, it merely regulates the contract between the tour operator and the consumer. As regards its contents, the Act is very much shaped to accord with the principles developed in court practice. The tour operator 'selling' a package tour is responsible for proper performance of the contract. In that respect the Act adopts the warranty rules under a sales contract. The most important advantage to the consumer lies in the fact that there is no deviating to his detriment from the rules laid down by the legislator. However, the Act shows some deficiencies. We fail to see new solutions in cases of doubt which have not yet been decided by the courts. Imperfections must be reported regarding the regulation of liability, though.

In two cases the tour operator may limit his liability to three times the travel price: firstly, if he or his agents acted with slight negligence; and, secondly, if he is responsible for a damage sustained by a traveller solely on account of negligence of a third party (hotel, airline, shipping company). Limitation of liability on no account satisfies the consumer's interests. In particular, objections are raised to the possibility of passing liability on to such third parties. Here the principle of unlimited liability for any damage resulting from intent or negligence as laid down in the Standard Form Contract Act is restricted to the detriment of the consumer for no conceivable reason. It remains to be seen how the courts will react. Only if the courts interpret the tour operator's responsibility in

a broad sense can a solution in the interest of the consumer that is anything like acceptable be found.

— The **Netherlands**. A Bill has been in existence since 1972 which shows numerous deficiencies. The Bill is not shaped to accord with the difference between the two types of contract, but gives its own definition of the travel contract which raises many questions.

— **Denmark**. An Act on a Guarantee Fund was enacted in 1979.

— In **Great Britain**, there is the Development of Tourism Act of 1969, which should exert an indirect influence on the travel contract. The Act gives the Department of Industry the power to introduce a scheme of registration of approved tourist accommodation. It also permits regulations to be made requiring hotels to display accommodation charges. So far, the Department has issued but one regulation relating to pricing. Reference should also be made to the Codes of Conduct agreed between the Association of British Travel Agencies and the Office of Fair Trading.

— In **Ireland, Luxemburg,** and **Italy**, reform is not, so far as is known, under consideration.

150 8 Evaluation and critical analysis

The analysis of exemption clauses has shown the extent to which the consumer's protection may vary in the individual countries. A variety of causes is responsible for this situation. For one thing, it is due to the fact that some countries have statutory regulations while others have not. For another, the special-law regulations are tailored to the national pecularities of the laws and economic conditions involved and consequently find different solutions to the problems mentioned. As a common trend it can merely be underlined that we think all countries have come to realise that it is necessary to check the abuse of power by the seller/supplier of services through new laws. If this very general statement is left out of account, it is clear that approximation of consumer protection is still a long way off.

Proposals for improvement make it necessary to distinguish between contracts of sale and contracts of service because they are advanced to various degrees in their development.

Compared with the law governing contracts of service, the law governing contracts of sale shows a relatively high degree of uniformity. As far as acts exist, their provisions are tailored to the problems involved in the law of sales contracts. However, the consumer is guaranteed only a certain minimum protection, because the solution to the problem lies in the fact that certain clauses are prohibited instead of the contents of the contract being determined. In long-range terms, it would be desirable to provide for mandatory regulation of the rights and obligations of the parties to a contract of sale. In this way alone, the disequilibrium between the seller and the consumer may, if not balanced, at least be changed effectively to the consumer's benefit. In short-range terms, especially two areas must be mentioned in which, strictly speaking, there are loopholes in the law in all countries. For one thing, this is the after-sales service which is insufficiently regulated by present acts. For another, this is the area of second-hand product sales (we could almost say second-hand car sales). Maybe

the much more far-reaching provisions existing in New Zealand, Canada and Australia may serve as a basis of discussion. In Canada, certain provinces require the dealer to give a certificate of fitness before sale, Australia and New Zealand obligate the dealer to carry either express warranties or a notice of declared defects. The regulation in the countries mentioned last may also have influenced the considerations concerning a reform of the Irish Bill.

The situation in the law governing contracts of service is much more complicated. Here, it would be imperative to define first of all the contracting parties' rights and obligations by means of pertinent acts. For, in the services sector contracts have developed in all EC countries to which either no or insufficient statutory regulations apply. Thus, the supplier of services determines his obligations himself, which leads to considerable uncertainties as to what the law is, as there are no criteria in the acts to guide the courts. So far, no approaches to these problems are discernible. Instead, the acts which have for their object the fight against exemption clauses are declared to be applicable to contracts of service, which leads to the grotesque result that the Acts prohibit the use of specific clauses, without the contents of the contract having been laid down by law in the first place.

CHAPTER 7

Consumer Credit

151 I PRELIMINARY REMARKS

Consumer credit has developed quite rapidly in all EC countries since the founding of the European Community. Consumers have found it helpful to accomplish their purchase decisions by using wide varieties of consumer credit offered to them by business, especially banking and other credit agencies. The use of credit seems to offer obvious advantages to the European consumer: he may use a merchandise or enjoy a service before he himself has saved the money. But we should not forget the great disadvantages of consumer credit: the consumer may incur debts exceeding his resources. He may bind himself for a long time and restrict his freedom of using other goods or other services. The consumer, particularly the lower-class consumer, may run specific risks in case of unemployment, wage reductions, sickness, if he has to cope with a high debt rate. Grave social problems may arise. That is why consumer credit has social aspects, especially in times of economic crisis. There are other, more specific problems of consumer credit: protecting the consumer against unfair contract clauses within the frame of consumer credit, for instance penalty clauses, helping him in case of usury, shielding him from deceptive advertising, unfair marketing, untrue promises, fighting against the black sheep of credit business, for instance in credit brokerage and debt collection. We will see what solutions European legislation offers the consumer in that regard.

Talking about consumer credit, we should not, of course, forget those who promote and grant credit. In market economies credit is not granted for reasons of benevolence but as part of the business. Industry and trade have realised perfectly well that many goods and services of higher value, such as cars, holiday tours, correspondence courses, cannot be marketed successfully unless there is a well functioning credit system available to the consumer. Providing credit for a sale or a service has become part of the marketing process itself. A double profit may be derived from these transactions: firstly, from the sale of goods or the supply of services; and, secondly, from the granting of credit.

Finally, we should not forget that many institutions, especially banks, but also many other institutions, such as credit brokers, credit card agencies, leasing institutions, make money by granting credit to consumers. They have discovered that granting credit to consumers may be just as profitable and perhaps less risky than granting it to business. These institutions are developing new forms of credit. The consumer, especially the middle-class consumer, will be

faced with a variety of possibilities but will have difficulty in comparing the offers. On the other hand, the socially disadvantaged or discriminated consumer may encounter severe problems in obtaining credit.

152 II GENERAL TRENDS IN LEGISLATION

Since the existence of consumer credit, the need has always been felt for legislation and for the courts to intervene in its regulation. Intervention was mostly forced by reasons of monetary policy but also tried to serve the consumer's economic, social and legal interests. As to consumer protection, usually intervention occurs after specific forms of credit have developed and the legislator has been notified of abuses. Law seems to be lacking in social reality. This explains the many loopholes in the law which we will find in the legislation of most EC countries.

Legislative intervention covers a wide variety of legal aspects of consumer credit which cannot all be mentioned here in detail. We will have to exclude from the very purpose of our study all aspects of real property and loans being secured by mortgages, etc.

Legislative intervention in matters of consumer credit presents a legal mixture of different principles of civil, administrative and penal law which, as we know, differ quite considerably in the EC countries. These reasons make it complicated to describe and analyse from a comparative point of view the functioning of the law of consumer credit, since in such comparison, if depicted correctly, all details of the law would have to be considered. We cannot make such an approach here. We will use a different method of analysis. Looking at the history of consumer credit law, we can distinguish between two types of legislative intervention, one concerning specific types of consumer credit to be regulated by law referring non-regulated agreements to the scope of the general principles of freedom of contract, and the other comprising all the different forms of consumer credit and establishing a sort of 'numerus clausus' of consumer credit.

1 The piecemeal approach in legislation

153 The classical approach to consumer credit concerns only regulation of contract conditions in instalment sales and hire-purchase agreements. These regulations may be extended step by step to include modern forms of consumer credit but will always be based on a legal connection between the sale/purchase of goods and the supply of services, respectively, and the raising of a credit. On the Continent, instalment sales (Abzahlungsgeschäfte, ventes à crédit, ventes à tempérament) are regulated, the purchaser's right of title being presupposed. The common law system was developed on the basis of a hire agreement under which the consumer would acquire title only after having made use of an option to acquire the product.

Historically, legal intervention developed in three stages:

(i) The first stage concerned regulation of the seller's *security interest*, the rights of the buyer and third parties to whom the merchandise was passed in

good faith. This aspect is to be found especially in French legislation and court practice at the beginning of the century and in the First British Hire-Purchase Act. Since no consumer aspect is involved, we will not go into details here.

(ii) In the second stage, the legislator tried to protect the consumer in case of *default*. This is especially true for the German Abzahlungsgesetz of 1894 (No. 156) which has served as a model for similar legislation in many countries ever since.

(iii) A third and more modern approach to consumer protection tries to regulate the *entry into a contract*. It contains provisions on the form of the contract, the information that has to be furnished to the consumer by the seller or the credit institute provisions on a possible cooling-off period allowed the consumer before the contract may be executed. A radical departure from the traditional principles of contract law is apparent here. This legislation is of great interest to our study and will be considered in detail later.

(iv) Other forms of consumer credit, especially *personal credits* and *loans*, are not usually specifically regulated by law under the above-mentioned system. They are subject to provisions under administrative law, for instance on licensing banking business, and under penal law, for instance on usury.

2 Modern comprehensive approaches

154 A completely different system of legislation and regulation exists in Great Britain and in France and is being drafted in Belgium and Denmark. Having caught a glimpse of the relevant acts, we would like to mention the following principles of the new acts:

(i) In **Great Britain**, the Consumer Credit Act of 1974 tries to cover all forms of consumer credit. There are some exemptions from the scope of application of the Act, namely

- — agreements with companies;
- — agreements exceeding £5000 (they are only subject to the provisions of extortionate dealings, No. 169); this sum is calculated on the basis of the money borrowed free of costs and interest;
- — agreements below £30; hire-purchase and conditional sale agreements are covered by the Act notwithstanding the amount of money involved;
- — mortgage loans;
- — debtor-creditor-supplier agreements requiring not more than 4 repayments;
- — agreements with low interest charges (up to 13% or minimum interest rates of the Bank of England plus 1%);
- — hire of telephone or meter equipment.

Under the Act, a *licensing* system was established for all forms of consumer credit. The Office of Fair Trading (No. 8) is in charge of operating that system. Because of the amount of administrative work involved, the licensing system will be put into effect step by step only. The CCA contains provisions of an administrative, civil and penal nature. Its administrative provisions, besides governing the licensing system, also provide for regulatory powers, for instance concerning the type and amount of information which a credit institution has

to give to the consumer. The civil law rules concern mostly what are called *regulated agreements* as mentioned above. The Act distinguishes between consumer credit agreements, Section 8 of the CCA, and consumer hire agreements, Section 15. We will go into further details in the comparative analysis of the Act later.

(ii) In **France**, an Act of January 10, 1978 'Relative à l'information et la protection des consommateurs dans le domaine de certaines opérations de crédit' has put consumer credit on a new basis but does not break completely with the old legislation on instalment sales. It offers a new approach in its detailed provisions on personal credits and creditor-supplier-debtor agreements (prêts liés). It is also applicable to certain forms of leasing contracts (crédit bail) and credit cards. It tries to take up most of the demands of modern consumer policy, such as providing information to the consumer, especially on the actual cost of a credit, and granting the consumer a cooling-off period, etc. Its provisions on administrative law and advertising are not as far-reaching as those of the British CCA.

(iii) In **Belgium**, where there is detailed legislation on most forms of consumer credit (Nos. 156 and 163), a comprehensive draft was introduced in Parliament in 1977. It is trying to cover all forms of credit subdividing them into instalment sales, hire transactions and personal loans. There will also be provisions on credit cards, credit brokerage, information, consumer protection in case of default, regulation of interest rates and licensing.

(iv) In **Denmark**, a reform of consumer credit law is under way. A Credit Sales Committee was formed in 1973 and in its report of 1978 proposed a rather comprehensive regulation of credit buying. A Credit Sales Bill will probably be submitted by the government at the end of 1979.

(v) Legislation in the other European countries, as far as we know, does not include comprehensive consumer credit acts, nor is a general reform of the respective laws being attempted. This may change if work on the EC draft directive on consumer credit is completed successfully; we will not study this aspect here. Most European countries would have to change their laws considerably through legislation to comply with the draft proposals of the above-mentioned directive.

III REGULATED AGREEMENTS

155 1 Instalment sales

As we have mentioned above, legislation on instalment sales has been the starting point for consumer protection in credit transactions. We have mentioned the different notions of instalment sales and the various steps the legislator has taken to regulate them. The basic problem the consumer is faced with in instalment sales seems to be alike in the legislation of all EC countries: the very technique of the sales contract under which he gets the merchandise immediately and pays for it later may induce him to overestimate his financial capacity and may work hardship on him in case of default. The legislator is trying to protect the consumer against 'himself' and against marketing practices

used by the professional seller. This protection occurs at two stages: at the point of sale and in case of default. Before comparing the relevant rules, we should say something about the scope of application of the relevant acts.

156 (*a*) *Scope of application*

Legislation in the different European countries applies its protective provisions *only to certain forms of instalment sales*. The underlying idea of the respective national legislation is that there should be a sales contract, that the purchase price should not be paid cash but in instalments, and that business is transacted not between merchants but between a professional seller and a private purchaser. The scope of application of the individual provisions varies to a great extent. We would like to mention the following legislation:

— In the **Federal Republic of Germany**, Art. 1 of the Abzahlungsgesetz of 1894 only concerns sales contracts for movables under which the buyer has to pay the price at least in two instalments. Cash-down agreements are not covered by law. A cash-down agreement is deemed to exist if the purchaser makes a down payment and pays the rest in one instalment. The seller does not have to reserve ownership. If the buyer is a registered merchant, he is not protected by the regulation. If he acts as a merchant without being registered, he will be protected, an obvious misunderstanding of the Act. The buyer will also be protected if the seller is a private person, obviously not a sensible criterion. Art. 6 of the above-mentioned Act extends the scope of application of what are known as 'circumventing agreements' (Umgehungsgeschäfte), for instance agreements on a hire-purchase basis (Mietkauf) and third-party financing (No. 159).

— In **Denmark**, the Act of 1918 still regulates instalment sales. The scope of the Act is not limited to consumer sales, it applies to any instalment sale provided that the seller has reserved ownership before or upon delivery, and that the price shall be paid in two or more instalments, at least one after delivery. A down payment of 20% is required as a condition of valid ownership retention.

— In the **Netherlands**, Arts. 1576 to 1576x of the Burgerlijk Wetboek, introduced in 1936, contain detailed regulations on instalment sales. The Act covers only movables but is not necessarily restricted to consumer credit transactions. There are provisions concerning all types of instalment sales and other provisions concerning only hire-purchase agreements.

— In **Italy**, Art. 1523 of the Codice Civile applies only to sales under reservation of ownership. This provision has been criticised by legal writers because it does not cover agreements which are essentially instalment sales but in which the seller has not expressly reserved ownership. The Italian Act on Consumer Credit of September 15, 1964 was abolished at the end of 1973. It was not really meant to be a consumer protection act but was supposed to curb inflation and demand for credit. Specific consumer goods — since 1965 with the exception of furniture, cars and home appliances — could be sold on credit only if a certain down payment was made. The contract had to be in writing and was limited to a certain term. The Act was of little practical importance.

— In **France**, the Decree of May 20, 1955 is still in force. It covers credit sales (ventes à crédit). It excludes transactions between merchants and private

persons. It does not apply to contracts for equipment and not to transactions involving real property either.

— In **Belgium**, the Act of July 9, 1957 (Loi sur les ventes à tempérament) provides for comprehensive regulation of instalment sales. The Act covers sales contracts. Hire-purchase contracts (location-ventes) and option agreements (location avec option d'achat) are submitted to the Act by court interpretation if they are disguised instalment sales. By Royal decree application of the Act may be extended to include certain services. This has been done by a Regulation of March 9, 1978 pursuant to which holiday tours, car repairs, correspondence courses, and home-learning come under the Act. The Act will only apply if the purchase price is paid in four instalments or by way of a down payment and three instalments. The Act exempts commercial transactions, small transactions (less than Bfr 5500) and large transactions (more than Bfr 300 000).

— In **Luxemburg**, there is an Act of May 19, 1961 on ventes à tempérament similar to the Belgian Act. It is applicable to contracts of transfer of property in movables on an instalment basis made by professional sellers.

— In **Great Britain**, the Hire-Purchase Act of 1965 is still in force but will be superseded by the Consumer Credit Act of 1974. Section 189 of the Consumer Credit Act defines three types of instalment sales: hire-purchase agreements, conditional sale agreements, credit sale agreements. The hire-purchase agreement contains an option for acquisition of the property, while the other agreements are regarded as sales contracts. They are all regarded as regulated agreements in the sense mentioned above, even if they are small agreements. They all come within the scope of the CCA unless exceeding £5000.

— In **Ireland**, the Hire-Purchase Acts of 1946 and 1960 are basically the same fragmentary piece of legislation that existed before the British Act of 1974 was adopted. The Irish Acts apply without restriction on the value of the subject matter. The Acts will be changed by Part III of the Sale of Goods and Supply of Services Bill of 1978 (Chapter 6, No. 130) mostly concerning the quality aspect of the agreement.

157 (*b*) *Form, entry into contract, disclosure, cooling-off period*

As we mentioned above, new consumer legislation is concerned especially with protecting the consumer at the time of entering into a credit agreement in the form of an instalment sale. Very detailed and complex rules have been worked out in the legislation of some countries, while in other countries the problem does not even seem to exist in legislation. The first regulations have been the French Decree of 1955 and the Belgian Act of 1957. Other countries have followed this approach.

— The **French** Decree of 1955, specified by an Order of July 8, 1955, demands the disclosure of credit costs. Failure to disclose such costs will void the contract. The Decree also provides for regulations on down payment, on the period of credit, and the amount of credit in accordance with the policy of the Conseil national de crédit (No. 170). Nowadays, the Act of 1978 applies to instalment sales (No. 163): there has to be a foregoing offer (offre prealable) and there will be a cooling-off period. The Act also covers leasing agreements (location-vente) and grants a purchase option in favour of the consumer.

— **Belgian** law provides that a written contract be signed by and delivered to the consumer. All credit costs have to be disclosed to the consumer as well as the cash price, the instalment price and the instalments to be paid.

The specific regulation under Belgian law concerns the need for a *down payment*. In Art. 5 §1 of the Act of 1957 it has been fixed at 15% and may be increased by the King. It serves mostly as a means of economic stability and not so much as a means of consumer protection. A down payment is a prerequisite for the formation of the contract. Circumventions, such as allowing a discount for down payment, using bills of exchange, are thwarted by the courts.

An amendment of July 8, 1970 provided for a right of withdrawal by the consumer, that is a cooling-off period of 7 days, if the agreement was concluded outside the seller's regular premises. The consumer must be informed about his rights. Failure to inform him will void the contract. The cooling-off period begins to run as soon as the down payment required by law has been made.

— The Act of **Luxemburg** provides that the contract has to be in writing. If credit is granted to married couples, both spouses have to sign it. There is a two-day cooling-off period for all instalment sales, not only for those which have been concluded outside the seller's regular premises. No penalty clauses may be attached to a withdrawal. The Act requires a down payment of 20% but will not attach civil sanctions to the failure to effect such payment.

— In the **Netherlands**, under the above-mentioned Articles of the Burgerlijk Wetboek, a written contract is demanded, to be signed by both spouses if credit is given to a married couple. The consumer is given the right to some basic information, for instance on the cash price, the credit price, instalments to be paid, the retention of ownership clause; however, the disclosure of effective credit costs is not required. A draft reform is trying to change the present Act. Art. 25 of the Dutch Colportagewet (Chapter 4, No. 69) provides for a cooling-off period of 7 days if the agreement was made at the doorstep. There is no cooling-off period for other instalment sales.

— In the **Federal Republic of Germany**, Reform Acts of 1969 and 1974 amending the Abzahlungsgesetz greatly extended the consumer's protection at the point of sale. The contract has to be in writing. The seller has to disclose the cash price, the credit price, the instalments to be paid, and since 1974 the effective credit costs. Since 1974 the consumer has the right to withdraw (Widerrufsrecht). The contract has to include written information about this right. The cooling-off period of 7 days only starts to run if the consumer received a copy of the contract informing him about his rights. Unlike the practice followed in Belgium and in the Netherlands, the cooling-off period does not presuppose a contract at the doorstep. The right to withdraw has been extended to agreements of continuous delivery of goods, especially book and newspaper subscriptions.

— The new **British** CCA subjects instalment sales as defined in Section 189 to the same regulations as other regulated agreements, especially as regards form, disclosure and cooling-off period, which will be studied later (Section IV).

— The **Irish** Act requires service of a copy of the agreement on the hirer within 14 days of signature. There is no cooling-off period. It is an offence for the owner not to state the cash price or furnish clear evidence of the credit agreement; however, no statement of the overall cost of obtaining credit or of the rate of interest is required. The Bill of 1978 does not provide for a cooling-off period

but only enables the Minister to issue orders affecting hire-purchase agreements which have not been made at a place of business.

— Under **Italian** law similar provisions are not known. There is a special Act concerning the Leasing of Machine Tools of November 28, 1965 which includes some provisions on form and disclosure but does not usually apply to consumer contracts.

— In **Denmark**, the seller may take his goods back in expedite execution proceedings in case the buyer defaults, provided the instalment sales contract is in writing, which is why in practice an instalment sales contract is always in writing.

158 (c) *The protection of the consumer in case of default*

National legislation and court practice mostly provide for rules protecting the consumer to various degrees in case he fails to pay the instalments in time. There is a general trend in legislation towards preventing the seller from recovering his goods while at the same time obligating the buyer to pay the purchase price including interest rates. There are also provisions on penalty clauses trying to restrict the use of such clauses and to lessen hardship upon the consumer. Clauses governing automatic rescission of contract are limited if the buyer has already paid some of the instalments, details varying to a great extent. We would like to mention the following regulations:

— In **Great Britain** and **France**, the problems caused by default on the part of the buyer/hirer and the rules of restriction of penalty clauses are subject to the comprehensive approach of the new Acts and will be studied later (No. 163).

— In the **Federal Republic of Germany**, the problems are subject to detailed regulation in the Abzahlungsgesetz. The Act will allow clauses about immediate rescission of contract in case of default (Verfallklausel) only if the buyer is in default (Verzug) with two consecutive instalments and if the amount due is more than one tenth of the purchase price. Penalty clauses may be mitigated by court decision. The seller has to pay the money back to the buyer if he repossesses the goods sold but is entitled to an indemnity, which in practice is always higher than his obligation to pay the money back.

— In **Denmark** and the **Netherlands**, a clause about automatic rescission of contract may only be stipulated if the buyer is in default with one instalment at the rate of 10% of the purchase price or with more than one instalment at the rate of 5%. Penalty clauses may be reduced by judicial action (matiningsrecht). The consequences of taking the goods back are the same as in German law.

— In **Belgium**, the clause about automatic rescission (clause de résolution expresse) is allowed only within certain limits: two consecutive instalments or 20% of the cash price must be due. The clause takes effect only one month after a registered letter has been mailed to the buyer. Penal clauses are subject to judicial reduction.

— The Act of **Luxemburg** adopts the Belgian regulation.

— In **Italy**, the consumer is much less protected in case of default. Art. 1525 Codice Civile allows the clause about automatic rescission if the instalments due amount to more than one eighth of the purchase price. Penalty clauses are not

specifically regulated and are only subject to the general principles of unfair contract terms (Chapter 8, No. 181).

159 2 Consumer protection in debtor-creditor-supplier agreements

A special problem of consumer policy arises when there is *third-party financing* of a sales contract. Different schemes are used in the EC countries. We would like to mention two common forms: firstly, the credit agency, especially the bank, may finance the seller. He will be obliged by a special loan contract with the bank. In order to get the credit, he will assign to the bank his rights under the sales contract with the buyer. The seller may force the buyer not to raise objections to the bank for non-performance. With the exception of Denmark, this form of third-party financing seems to be used in commercial transactions and very seldom in consumer credit transactions. Hence, we will not cover it. In another form of third-party financing the sales contract is separated from the credit contract. The buyer will apply for a loan directly with a bank and will have to pay it back regardless of what happens to the sales contract. Usually, the bank has the seller act as agent in the conclusion of the credit contract and pays the value of the loan directly to the seller. This type of financing is still being used on a large scale in the EC countries, although it is losing significance. In the following we will call it debtor-creditor-supplier agreement.

In consumer legislation, two main problems have arisen out of these debtor-creditor-supplier agreements. Firstly, the question as to whether the transaction is an instalment sale or whether it is to be regarded as a cash agreement and hence is not covered by the specific acts on instalment sales. The second problem arises out of the legal link between the credit contract and the sales contract: in what way will non-performance, breach of contract, delivery of defective goods affect the credit transaction? Can the consumer withhold repayment of the loan for reasons orginating in the sales contract? Can the financing institute exclude such right of the consumer in its contract terms?

Both problems have to a substantial degree been considered by the legislator and in court practice but have been solved in extremely different ways in the EC members states. We would like to mention the following legislation.

— The problems mentioned above were treated comprehensively for the first time under the **Belgian** Act of 1957. Art. 1 §2 clearly provides that the Act applies also to debtor-creditor-supplier agreements (prêts à tempérament). The Act is not concerned specifically with the buyer's position in case of non-performance or bad performance of the sales contract. In such a case the buyer does not enjoy any specific protection. On the other hand, the Act takes care to extend its provisions on entry into a contract, disclosure, down payment and granting of a cooling-off period to prêts à tempérament. The Act considers as prêts à tempérament any credit employed in the financing of a movable repayable in no less than three instalments. The buyer-debtor has to make a down payment of 15%. If this requirement is not met, his obligations will be mitigated to the amount of the credit asked for. The contract has to be in writing and must disclose the matters mentioned above (No. 157). If the contract has been concluded outside regular premises, the consumer will enjoy a cooling-off period.

The legislator's regulation shows a concern for making economic policy possible not only in simple instalment sales but also in cases of third-party financing.

— The law of the **Federal Republic of Germany** does not give a definite answer to the questions of consumer protection in debtor-creditor-supplier agreements. The provisions of Art. 6 of the Abzahlungsgesetz are applicable to what are known as circumventing agreements which, in line with court practice, are classed among debtor-creditor-supplier agreements. There must be some economic connection between the sales contract and the credit transaction. The buyer-debtor enjoys also the protection offered to him under the Abzahlungsgesetz, especially with respect to the form of the contract, the information to be furnished and the cooling-off period. The Abzahlungsgesetz does not cover the second problem in debtor-creditor-supplier agreements, namely, the buyer's right against the bank in case of non-performance, delivery of defective or faulty goods, etc. The courts are very reluctant to allow the buyer to assert his rights under a sales contract against the bank. The courts will allow this under one of the following conditions: the bank has failed to inform the buyer about the risk of the transaction in bold face; the seller has gone bankrupt; the seller is unwilling or unable to fulfill the claim of the buyer. There is a reform bill under discussion in German law to extend court practice; a new Art. 607a of the Bürgerliches Gesetzbuch is supposed to extend the consumer's rights against the bank under a sales contract.

— In the **Netherlands**, these agreements offer consumer protection only in so far as the basic principles of instalment sales law are also applicable here. The contract has to be in writing and must disclose the cash price and the instalment plan but not the effective credit costs. The problems caused by the interrelation between the sales contract and the credit agreement are subject to case law which does not offer a satisfactory solution to the problem of the consumer's interests. The new draft civil code, if adopted, will not improve the consumer's position.

— In **Denmark**, there are no express provisions to cover the above-mentioned problems. Some cut-off clauses will be restricted by the Marketing Practices Act of 1974. They may be contrary to good marketing practices and may be set aside in the individual contract in accordance with the general clause of Art. 36 of the Contracts Act.

— Continuing specific legal tradition, **British law** under the Consumer Credit Act offers a completely different solution to the problem. Hire-purchase agreements involving a financing institution are regarded by law as agreements between the consumer and the financing institution. The Act presupposes that the creditor knows that the loan will be used to hire a certain commodity. Under the British law of hire-purchase, the finance house will be liable in case of breach of contract or non-fulfilment of implied warranties. The dealer or seller will not usually be liable as such. He is regarded as the creditor's agent, Section 56 CCA. He does not incur liability himself unless he makes an express promise or possibly in tort. On the other hand, the financing institution may not restrict its own liability. The rules of British law have been criticised as being artificial. Especially in the case of defective goods, the consumer will try to have recourse to the 'seller', to which he is not entitled by law. British law does not recognise a joint and several liability of both the financing institute and the seller.

Debtor-supplier agreements are subject to all other provisions on consumer protection laid down in the Act of 1974. The form of the agreement, the information to be furnished and the procedure of entering into a contract including the cooling-off period (only if negotiated outside regular premises) are the same as in other regulated agreements.

— In **Ireland**, it is the finance house rather than the dealer which is responsible for defects in the goods and no contract of agency will be presumed. This principle was put in line with consumer policy aspects regarding quality (Chapter 6, No. 130) in the Bill of 1978.

— Interesting new steps in protecting the consumer have been taken under the **French** Act of 1978. A new concept of 'prêts liés' was developed aiming at forming a legal link between the credit contract and the sales contract. Prêts liés according to Art. 9 of the Act will be deemed to exist only if the foregoing offer (offre préalable) of the contract mentioned that the merchandise or service is to be financed by a third party. The Act does not seem to recognize covert or tacit debtor-creditor-supplier agreements.

In order to protect the consumer, the Act neatly distinguishes between problems arising from the sales contract and affecting the credit transaction, and problems involved in the credit transaction influencing the sales contract. The former case is deemed to exist if the seller fails to deliver the goods. Art. 9 of the Act provides that the buyer-debtor does not have to pay any money back to the creditor. If there are disputes about the good fulfilment of the sales contract, for instance defective or shoddy goods, the court may void the credit contract together with the sales contract, Art. 9 §2 of the Act. It should be mentioned that this is not an automatic legal consequence but that prior judicial order is required. If the creditor paid the credit to the seller he may recover it from the debtor even if the seller has gone bankrupt and the debtor will lose his money. This regulation is certainly not in the interest of the consumer. On the other hand, if the credit contract is not executed, this will also affect the sales contract. Since the consumer did not want to pay cash but to use a credit, the sales contract is void automatically if the credit contract ceases to exist. Art. 11 of the Act provides that a sales contract is established only after the creditor has accepted the debtor's offer. The debtor is not allowed to make a down payment. Upon acceptance of the offer by the creditor, the sales contract may be concluded but will be in suspense during the cooling-off period. The seller is now allowed to receive payment and is under no obligation to effect delivery, Art. 12. If the consumer has made a payment contrary to the above-mentioned provisions, he may get his money back or exercise an option for the goods on a cash-price basis within seven days.

The Act seems to constitute remarkable progress in consumer protection in debtor-creditor-supplier agreements and seems to amount to a considerable improvement of the buyer's position. Yet we do not know how the Act is going to work in day-to-day practice.

— In the legislation of other EC countries, such as **Luxemburg** and **Italy**, there is no regulation whatsoever of the above-mentioned problems. **Italian** courts have denied the application of Art. 1525 concerning default (No. 158) to debtor-creditor-supplier agreements.

160 3 The supply of services on an instalment basis

A credit transaction may not only be linked to a sales contract but also to a contract for services, such as correspondence courses, holiday tours, car repairs, home removal, home learning. Only recently has this problem been considered by the legislator or in court practice, and so far no solution that is anything like uniform and satisfactory has been found. There are only very few countries that have adopted regulations broad enough to cover services. We would like to mention the following.

— The new Acts in **Great Britain** and **France** break with the traditional concept of instalment sales or hire-purchase agreements and hence cover third-party financing of services if the other conditions required by law are met.

— In **Belgium**, a Royal decree may extend the scope of application of the Act of 1957 to specific services, as we have mentioned above. These orders exist for holiday tours, correspondence courses, car repairs and home learning.

— In the law of the **Federal Republic of Germany**, the Act of 1976 concerning Correspondence Courses (Chapter 6, No. 148) includes a specific provision similar to Art. 6 of the Abzahlungsgesetz. The consumer will not lose his rights under the Correspondence Course Act if third-party financing was involved. In all other cases there is great uncertainty about the law, for instance with respect to marriage agencies. The reform bill (No. 159) will apply also to the supply of services financed by a bank.

— To our knowledge, the problem is not covered by legislation in other EC countries.

IV PERSONAL CREDITS TO THE CONSUMER

161 1 Generalities

The most important and extended form of consumer credit today is the credit a bank or any other financing institution offers the consumer. The banking business has actively pushed this type of credit, which is frequently connected with a running account used for the payment of wages, salaries, etc. Usually, the consumer is free to use the credit for whatever purpose he wants, be it to buy a car, to visit a nightclub or to pay his taxes. Hence, the problems presented by the prior existence of a sales contract do not exist here. Nowadays, there are many forms of personal credit available to the consumer, at least in theory. The consumer may simply overdraw his running account. The bank may facilitate this procedure by handing out to him cheques, perhaps combined with a cheque card. He may apply for a personal credit with his bank. He may visit an agent or credit broker who will promise to help him.

162 2 Credits and loans

The most extended and important form of consumer credit today is the credit a bank or any other institution specialising in financing offers the consumer. This credit agreement is not linked to a specific sales contract or service. From

an economic point of view, we may distinguish between two basic types of credit: firstly, a specific contractual agreement between the consumer and the bank providing the consumer with a loan of a certain amount inclusive of specific interest rates, costs, etc; secondly, a credit granted on a running account — the consumer has a right to overdraw his running account simply by signing a cheque or any other instrument of payment. Consumer legislation in the EC countries has concentrated on the first form of consumer credit. Therefore, it will be the main object of the following remarks.

63 (*a*) *Modern comprehensive approaches*

The law governing credit contracts is subject to specific regulation only in some countries with the exception of interest rates and securities, which we will mention later. As we have already explained above, only few EC countries have comprehensive legislation on all forms of consumer credits including loans. We would like to mention the following legislation:

— In **Great Britain**, the Consumer Credit Act contains detailed regulations on all consumer credit agreements which are classified by law into agreements on fixed sums and running account credits, and credits for restrictive or unrestrictive use. The Act regulates in detail the form of the contract, the procedure of entering into a contract, the information to be given to the consumer and the right to withdraw from the contract in certain cases. The contract must be *in writing*. Section 60 provides for the form and contents of documents to be regulated by the Secretary of State. Section 55 provides for the *disclosure* of specified information which may be made by regulation, especially concerning interest rates and credit costs which have to indicate the effective credit costs (No. 168). Section 61 contains detailed rules about the procedure of concluding the contract. It is the main objective of these rules to enable the consumer to have all the terms (except those implied by law) put clearly before him in writing before signing the document. If the transaction is to be secured on land (Section 58), the creditor must allow the debtor a period of seven days for consideration. Only then may he send him a copy for signature. The second copy has to be sent to the debtor after the creditor has signed the contract.

Section 67 provides for a *cooling-off* period in the case of certain types of regulated agreement if previous negotiations included oral representations and the agreement is signed by the consumer outside the creditor's regular premises. The agreements in question are called cancellable agreements: and they have the following characteristics: the creditor must inform the consumer about his rights in a second copy, to be sent within 7 days after the agreement is made. Five days after receipt of a second copy, the debtor may withdraw from the agreement in writing. The credit contract is annulled thereby. The consumer is under no obligation if he has annulled the contract, except paying back free of charge what he has received. If in an emergency he received goods on credit or had work performed on credit, he must pay for such goods/work but no credit charge may be asked. If the consumer made a down payment before cancellation, he may get his money back. These rules do not apply to small agreements (less than £30, excluding hire-purchase and conditional sales), to agreements with less than four payments or to agreements of low interest rates.

In the same way as instalment sales and hire-purchase agreements, the Act also regulates the consequences of default. In case of *default*, the creditor has to send the debtor a specified note (default notice) asking him to pay the rates due within seven days and has to inform him in detail about the consequences if he fails to pay. The consumer is entitled to avoid the consequences of default if he pays the money due within seven days. If the consumer paid more than one third of the credit, the creditor can recover the goods only on court order. Section 129 enables the court to issue a 'time order' in case of hardship. Sections 87 – 89 restrict *penalty clauses* in case of default.

— The **French** Act of 1978 has introduced a very modern approach to consumer credit. It provides that these transactions must be in *writing* and have to follow one of the nine *modèles types* provided for by special regulation. On March 24, 1978 the Conseil d'Etat after consultation with the Comité National des Consommateurs issued these modèles types. There are different duties of *disclosure* to the debtor, especially concerning terms of repayment, effective interest rates, consequences of default, etc. The Act provides for detailed regulation of the formation of the contract. The creditor's offer is valid for 15 days. If the consumer definitely applies for a credit, the application must be confirmed within one week. Even after acceptance of the offer and confirmation of the contract, the consumer has a *cooling-off* period of seven days regardless of the place in which the contract was concluded. The consumer may exercise his right of withdrawal on a special form attached to the contract. The debtor shall not make any payments while the cooling-off period is running.

The Act also regulates the consequences of *default*. *Penalty clauses* are limited by a Decree of March 17, 1978 imposing a rate ceiling. Art. 8 in connection with Art. 1244 Code Civil provides for a 'délai de grâce' of one year to the consumer who is unable to pay back his debts. A court order is necessary for that délai de grâce. All litigation arising from consumer credits must commence within two years, so that the consumer will not face court proceedings long after default has arisen.

The scope of application of the Act is limited to consumer credits. Agreements under which credit is granted for a period of less than three months or in excess of 100 000 Francs are not covered by law.

— In **Belgium**, the Act of March 5, 1965 on Prêts personels à tempérament attempts to apply the main principles of the Act of 1957 also to personal credits. The contract must be in *writing* and has to *disclose* the repayment instalments and the effective credit costs to the consumer. If there is no such disclosure, the consumer is not obliged to pay interest rates. There are no provisions on a cooling-off period. The main difference between the Act on Personal Credits and the Act on Instalment Sales lies in the fact that the consumer does not have to effect any down payment to make the agreement valid. In order to prevent circumventions, the Act requires that loans should not be used for a specific purpose.

The Act also prohibits unfair clauses in case of default, especially penal clauses, clauses governing immediate repayment.

The Act applies only to consumer transactions with four or more repayment instalments. There are similar exceptions as in the Act on Instalment Sales. Small credit agreements are covered by law.

Legislation in other European countries does not regulate in detail the entering into a consumer credit agreement and the consequences of default. There are only a few scarce provisions on some aspects of the contract which to some extent relate to the law of unfair contract terms, especially penal clauses (see Chapter 8, No. 182) and to certain restrictions on door-to-door sales (see Chapter 4, No. 69). Without striving for completeness, we would like to mention the following aspects of law:

— In the **Netherlands**, neither the Civil Code nor the bill of the new Code contain any special provisions covering consumer credit. The Act on Consumer Credit of July 5, 1972 (Wet op het consumptief geldkredit), which is basically an administrative regulation, under Art. 27 demands that the credit contract be in writing and that the number and amount of instalments be mentioned.

— The **Italian** Codice Civile offers no consumer protection in consumer credit agreements. There are provisions neither on entering into the contract, nor on the legal consequences of default. Some legal writers want to apply Art. 1525, Codice Civile also to credit agreements. In that case clauses governing immediate repayment in the event of default would be void if the consumer had already paid one eighth of the credit. Court adjudication does not seem to take that view.

— In the **Federal Republic of Germany**, the law of consumer credit through loans is only to some extent covered by the new Act on Standard Form Contracts (Chapter 8). Rules of disclosure do not exist in the law of contract but only in administrative law (Chapter 1, No. 21). If effective credit costs are not disclosed to the consumer in the contract, the legal consequences as regards execution of the contract are very controversial among the courts.

165 3 Credit brokerage

Credit brokerage has become a topic of consumer policy in most EC countries. The procedure seems to be quite simple: the credit agreement is not made directly by the consumer and the bank but by a credit broker acting as agent. Sometimes the agent acts as if he makes available the credit himself; this will be regarded as misleading or false advertising and hence is covered by the truthfulness doctrine in the law of advertising (Chapter 3, No. 43). Usually, the consumer will have to pay much higher interest rates if he uses the services of a credit broker, since the commission payable to the broker by the bank forms part of the credit agreement. There is a special need for protection of the consumer against usury in these cases (No. 169).

As far as special legislation exists, we would like to mention the following:

— The **British** Consumer Credit Act includes credit brokerage as well as debt adjustment and debt collection in its licensing system. If business is done without licensing, the agreement may be unenforceable. By using the services of an agent or credit broker, the consumer does not forfeit the protection offered to him by law.

— In the law of the **Federal Republic of Germany**, a licensing system was

introduced in 1974 through an amendment of the Industrial Code (Gewerbeordnung). A credit broker must obtain a licence to do business. That licence may only be refused on grounds of unreliability. He need not be qualified to carry on a business. These rules are not very useful to the consumer, since they do not influence the contract. The reform bill (No. 159) will improve the position of the consumer in the contract. The bill will demand similar disclosure duties as in instalment sales (No. 157).

— The **Belgian** and **French** Acts do not contain any specific regulations on credit brokerage. These legal systems regard the credit broker as the creditor's agent. The consumer will not lose his protection by using the services of an agent. The Belgian draft reform will be applicable also to credit brokerage.

166 4 Credit cards

Credit cards are in use now throughout Europe. There are different types of credit cards. Cards which are handed out by enterprises, for instance, gasoline stations, facilitate sales. Other credit cards may be offered by specialised institutions, such as Diners Club or American Express, and may be employed as instruments of payment vis-à-vis those traders who accept these cards. The consumer gets a monthly bill from the credit agency and pays the agency the balance due. Then there are credit cards handed out by banks (Eurocard). Finally, there is the system of cheque cards (Euroscheck, etc.) which are not by law an instrument of credit, but are designed to facilitate the handling of cheque accounts.

Except for the general principles of civil law on negotiable instruments, there are no specific regulations. A notable exception is the *Consumer Credit Act* in **Great Britain**. Token agreements are covered by law (excluding cheque cards). The Act contains rules about the entry into such an agreement. The consumer shall not be forced to accept a credit card. There are also provisions concerning loss or forgery of credit cards. The consumer's liability is limited to £30, which he may avoid by giving written notice to the credit card institution.

The **Belgian** draft reform on Consumer Credit of 1977 will contain provisions on credit cards and cards for sale. They cover the entering into the contract, the restriction of certain clauses, such as penal clauses, the consumer's right to be informed about his balance and the maximum credit that may be given to the consumer.

To our knowledge, legislation in all other European countries provides that the consumer may be held liable if he loses the credit card or if there has been forgery. Credit card institutions will help the consumer either by employing insurance or by withdrawing the card. These are regulations on a voluntary basis.

167 V REGULATION OF INTEREST RATES

The problem of regulating and limiting interest rates in the interest of the consumer cannot be seen only under the aspect of consumer protection but also under the aspect of social welfare and general economic policy. The scope of regulation differs very much, depending on how the legislator defines the

relationship of state and law to market economy. If the state tends to follow a policy of intervention, it will try to impose specific interest rates. If it has a more liberal attitude towards market forces, it will not care about regulating interest rates. These aspects have been studied in greater detail in Chapter 1. We will mention here the means employed by law to regulate interest rates. We would like to distinguish between four types of regulation:

168 **1 Disclosure**

Firstly, a quite commonly accepted device of consumer policy is the disclosure to the debtor of the terms of the credit agreement, especially down payment, instalments payable, interest rates, costs, insurance and other factors. A new trend in legislation aims at giving the consumer specific information about what are known as *effective interest rates*, including not only monthly or yearly interest charges but also all costs involved in calculating the gradual decrease of the amount of credit due to repayments by the consumer. Schemes for calculating effective credit costs have been developed in many EC countries or are in process of development.

From a legal point of view, we would like to mention the following Acts:

— The **Belgian** Acts of 1957 and 1965 make it an obligation under law to disclose to the consumer effective credit costs.

— A **French** provision of December 28, 1966 defines the notion of effective credit costs and enables development of such schemes. The Act of 1978 makes it an obligation to disclose these effective credit costs in all consumer credit agreements.

— In the **Netherlands**, there are two Acts covering disclosure: the above-mentioned Act of 1972 concerning Loans provides that the contract shall disclose credit costs as well as dates and amounts of repayment. So far, there is no legal obligation to disclose actual credit costs. A voluntary scheme has been worked out by the Dutch Postal Office in cooperation with banks and is employed in consumer credits.

The Act of 1961 concerning Instalment Sales (Wet of het afbetalingsstelsel) in connection with a Decree of 1963 makes it an obligation to disclose interest rates, costs, repayment, etc., but not effective interest rates. Administrative costs are limited by regulation. There are no civil sanctions if credit costs are not disclosed.

— In the **Federal Republic of Germany**, there are two different starting points for law. Insofar as instalment sales and other agreements under the Abzahlungsgesetz are concerned, the creditor has to disclose the effective credit costs. If he fails to do so, the consumer will get the credit without having to pay interest rates. For all other forms of credit, such as loans, the Preisauszeichnungsverordnung of 1973 (Chapter 1, No. 21) requires the disclosure of effective credit costs, but contains only a criminal not a civil sanction.

— In **Great Britain**, Section 20 of the Consumer Credit Act enables regulations on disclosure that will now be found in the Consumer Credit (total charge for credit) Regulation of 1977. Effective credit costs must be disclosed.

— In **Ireland**, only hire-purchase agreements are subject to disclosure. It is an offence for the owner not to state the cash price or provide clear evidence of

the terms of a credit agreement, but no statement is required either of the overall cost of obtaining credit or of the rate of interest.

— In **Denmark**, Art. 2 of the Price Marking and Display Act of 1977 contains an obligation to disclose credit terms, but not effective credit costs. A report drawn up by a Commission on the Reform of Consumer Credit Law suggests appropriate changes in the Act.

169 2 Usuary

Secondly, another quite common sphere of intervention is provided for by the general rules on *usury and extortionate dealings*. These concepts have a long tradition in both codified and common law and apply to all sorts of contracts, for instance landlord and tenant contract, long-term sale or service contract. They are of special importance to consumer credit in protecting the debtor against interest rates considerably exceeding average rates in the market and abusing the consumer's need for credit, his inexperience or social status.

In our comparative report we will not go into all the details of usury law. We would just like to mention modern trends in the protection of the consumer against extortionate dealings. These trends manifest themselves in the adoption of *new principles* according to which the rules of usury should be applied by the courts. The first new principle states that in determining usury not only interest rates as such, but *effective credit costs* should be considered. The law of disclosure and the law of extortionate dealings are united in the concept of effective credit costs. There is a second modern trend towards *defining more specifically when usury is deemed to exist*. The law may use objective standards, subjective standards, or both. An objective standard simply compares the average interest rates on the market with the effective credit costs of the undertaking which is challenged by the debtor. The subjective approach takes into account the special position of the consumer asking for a credit, specifically the consumer's social status, debt rate, economic capacity, etc. Usually, these criteria are combined by law. They have been applied more strictly in modern legislation in order to guarantee effective protection of the consumer. The third trend may be considered to manifest itself in the fact that the law will not simply void an extortionate dealing, but allow a *reduction* of the effective credit costs. The notion of usury is not only used as a means of consumer protection but also as a means of economic intervention.

Taking account of these modern developments, we would like to mention the following new legislation.

— The **French** Act of December 28, 1966 stated that effective credit costs should be taken as a basis for determining usury. That Act uses mainly an objective approach to determine usury. The actual credit costs will be compared with the average costs of credit in a specific market, the specific risk of the undertaking and the interest rate ceilings issued by the National Credit Council. In case of excessive credit costs, the interest rates may be limited by the court according to the schedules fixed by the above-mentioned organisation. The Act does not cover leasing or hire-purchase contracts.

— In **Belgium**, Art. 1907 ter of the Civil Code has been applicable since 1934. The Code allows an action of reduction if the creditor charged excessive interest

rates. The law uses both objective and subjective criteria. The effective credit costs must manifestly have been exceeded as compared with normal rates. Moreover, the debtor's ignorance, feableness, etc., must likewise have been abused.

— In **Great Britain**, Sections 137 and 138 of the Consumer Credit Act provide for detailed rules on reopening extortinate dealings. These provisions apply to all sorts of credit agreements, not only to consumer credit agreements which are regulated by law. Section 138 defines grossly exorbitant payments, taking into account all circumstances on both the objective and the subjective side. The courts will have to consider the interest rates, the risks of the undertaking, the debtor's age, experience and capacity. To make these provisions effective, Section 171 requires the creditor to prove that the undertaking was not extortionate. Section 139 authorises the courts to change the terms of contract, especially to reduce the interest rates to a level acceptable to the contracting parties.

— In the **Federal Republic of Germany**, Art. 138 §2 of the German Civil Code was amended in 1976 to provide for subtler handling of usury. On the objective side, there must be an obvious disproportion between the creditor's and the debtor's obligations. The courts will regard effective interest rates of 30% and more as falling under the law. On the subjective side, the creditor must be guilty of abuse of the consumer's need, inexperience, lack of capacity or feableness. These criteria are very vague. It must be admitted that in recent times the courts have become more sensitive in curbing extortionate dealings. The Federal High Court will hold a consumer credit transaction to be void if it is against good morals, for instance if the bank charged excessive interest rates and did not take into consideration the economic position of the consumer. A reform bill has been introduced before Parliament aiming at a definition of usury only by objective criteria. The consumer will have to prove that there was usury in his case. If the courts accept the charge of usury, yet they are not allowed to reduce the interest rates to the normal platform. The consumer will get the credit free of costs and will have to redeem the credit without interest rates according to the scheme he agreed to.

170 3 Regulation of interest rates, down payments, term of credit

The law may intervene in the credit contract by stipulating maximum interest rates and minimum down payments as well as the maximum term of the credit and the number of repayments. These rules do not so much serve the consumer's interests, but are a means of economic policy employed by the government, especially in fighting inflation. In some respects, these rules may even be detrimental to the consumer in so far as he will not get a credit in order to effect his purchase decisions.

We would like to mention the following regulations.

— The **French** Act of 1955 concerning Instalment Sales provides for rate ceilings, minimum down payments and maximum periods of credit, mostly combined with each other. They depend on the type of merchandise the consumer wants to acquire. These provisions have not proved to be very effective and have not been extended to other forms of consumer credit by the Act of 1978.

— The **Belgian** Act of 1957 requires that in the case of instalment sales a minimum of 15% of the cash price be paid down. Under Art. 16 of the Act, these provisions are applicable to third-party financing, but not to personal loans. The Act also contains regulations on interest rates and maximum periods. The King's powers are confined by law to specific regulatory powers. There are Decrees of December 23, 1957 and December 15, 1978. By these Decrees maximum interest charges were put into effect. There are maximum periods of credit of 6 months in the case of holidays and 30 months in the case of agreements for the sale of cars. Art. 19 provides for a maximum period in the case of personal credits.

— In **Luxemburg**, a down payment of 20% in instalment sales is required by law. Sanctions only relate to penal and administrative law.

— In the **Netherlands**, the government may order maximum rates of interest and costs. Art. 45 of the Act of 1972 transfers regulative powers to the Ministry of Culture and Social Works. By a Regulation of 1977, these rate ceilings were fixed so as to cover the range from 11.3% to 21.6%, depending on the type of credit.

The Act of 1961 on Instalment Sales and the Act of 1972 on Consumer Credit also provide for minimum down payments or maximum periods to be ordered by the government. Down payment in instalment sales has been fixed at 20%.

— In **Great Britain**, the Orders of 1976 and 1977, which are based on the Consumer Credit Act, require that a down payment be made in the case of hire-purchase and similar agreements. The down payment for a TV set has been fixed at 20%, for motor vehicles at 33⅓%. There is no regulation of interest rates as such, except the above-mentioned provisions on extortionate dealings.

— In the **Federal Republic of Germany**, Art. 23 of the Banking Act (Gesetz über das Kreditwesen) enables the government to issue regulations on interest rates. There used to be regulations, but they were abolished in 1967 due to a liberalisation of the credit market. Art. 247 of the Civil Code contains a specific provision enabling any debtor (who need not be a consumer) to cancel a credit agreement subject to 6 months' notice if it exceeds 6%. This provision has been much debated lately. It may be changed so as to cover only consumer credit agreements.

— In **Italian** law, Art. 1284 of the Codice Civile provides that the maximum legal interest rate should be 5%. Higher interest rates may only be agreed upon by written undertaking. This is usually the case if a consumer applies for a credit with a bank.

— In **Denmark**, a 20% down payment is requested.

171 4 Repayment

A new consumer problem has arisen from the practice of banks to calculate the interest rates for the entire life of the credit agreement, notwithstanding prepayment by the consumer. Hence, the consumer may lose money if he redeems the loan before maturity. He will be asked to pay interest rates on a portion of the credit he never used. He may even have to pay a penalty or damages if he effects prepayment.

Legislative intervention in that problem is still in its infancy. We will mention the following rules.

— The **Belgian** Act of 1957 including amendments thereto provides for the consumer's right to effect prepayment (droit de remboursement anticipé). The consumer must be reimbursed for the interest rates on the portion of the credit he did not use. Art. 18 contains a similar provision on creditor-debtor-supplier agreements, Art. 19 sexies on personal loans.

— In **Great Britain**, the Consumer Credit Act has adopted Sections 94 and 95 allowing prepayment. The consumer may claim rebates. There are special rules for hire-purchase agreements since the law does not want to change contractual obligations.

— In **France**, the Act of 1978 and a Decree of March 17, 1978 provide for a special 'plafond' in case of prepayment. Damages asked for must not exceed 4% and must not be higher than the interest rates already due. The creditor may not demand interest rates on unused capital.

— In the **Federal Republic of Germany**, there is no legislative provision but only very divergent court practice. It seems to be emerging as a principle of law that the creditor may not ask for interest rates if the consumer effected prepayment of the capital and that he may not claim penalties or damages for unused capital.

172 VI SECURITY

Usually, security for consumer credit is regulated within the general framework of codified or common law. We will not go into details here. Legislative intervention has concentrated on two aspects: assignment of wages and bills of exchange.

Legislation in all EC countries tries to restrict either in whole or in part *advance assignment of wages* for the purpose of securing credits. We should remember that these acts do not stem only from consumer policy but from social policy in general: law wants to guarantee the debtor minimum earnings to subsist and wants to prevent him from becoming a burden on social security.

Specific regulations in the interest of the consumer exist concerning *bills of exchange*, promissory notes and similar papers transferable on order. The law of negotiable instruments is very strict, making every signer liable without giving him the benefit of the exceptions provided by law. If, for instance, in the case of debtor-creditor-supplier agreements, the consumer were allowed to sign a negotiable instrument, he would lose his rights under the sales contract or hire-purchase agreement against the banking institute to whom the instrument is assigned. In this field legislative intervention is still in its infancy because it is contrary to the general principles of negotiable instruments. Usually, these provisions are limited to the legal relationship between the consumer and the financing institute which knows about the existence of a consumer credit, but not to third parties being holders in due course.

We would like to mention the following regulations.

— In **Belgium**, the law forbids bills of exchange only in personal credits but allows them in instalment sales and in debtor-creditor-supplier agreements. The

law may be changed if the Belgian draft reform of 1977 will be adopted (No. 154). This draft would forbid all bills of exchange in consumer credit transactions.

Assignment of wages is allowed within certain limits set by the law of execution (Code judiciaire, Art. 1409 ff). The Acts on Instalment Sales and on Consumer Credit Agreements add to this protection insofar as minors may not assign their wages even by parental permission and that no employee may be fired if he has assigned his wages to a credit institute.

— In **Luxemburg**, there is no restriction on bills of exchange. The Bill on Legal Consumer Protection of 1978 (Chapter 9, No. 203) will forbid them. Assignment of wages is allowed.

— In the **Netherlands**, the Act of 1972 forbids bills of exchange, promissory notes, IOUs, etc. Assignment of wages for the future are forbidden if they are not revocable. They are only enforceable in case of default exceeding one instalment.

— The **British** CCA forbids the use of negotiable instruments in securing a consumer credit. There is no specific regulation on the assignment of wages outside the general principles of labour law.

— The **French** Act of 1978 takes a similar approach to the British Act. Bills of exchange are not enforceable against the creditor, but only against the holder in due course. Asking for a bill of exchange is regarded as a criminal offence.

— The law of the **Federal Republic of Germany** allows unlimited use of negotiable instruments. Under case law, the creditor in debtor-creditor-supplier agreements is not regarded as holder in due course. The consumer will not lose his rights against the financing institution. The law of assignment of wages is determined by the Code of Civil Procedure, Art. 850a ff. Assignment of wages for the future is allowed insofar as it exceeds the minimum income provided for by law (unpfändbares Einkommen).

In conclusion we may say that law is extremely divergent on that specific issue. The scope varies from countries with very strict regulation, such as the Netherlands, to countries with very liberal rules, such as the Federal Republic of Germany, Italy and Ireland.

172a VII GOVERNMENTAL CONTROL

Governmental control of banking is known in all EC countries. Usually, such control is not concerned specifically with consumer credit. It serves to secure banking transactions and protect the depositor of banking accounts. We will not go into details here.

Governmental control directed specifically at consumer credit is emerging at a slow pace. We will mention the following principles of law.

— Art. 23 of the **Belgian** Act of 1957 provides that all financial institutions and dealers engaging in transactions covered by law shall be registered and licensed. The Act provides for a detailed licensing system. If an unlicensed creditor concludes consumer credit agreements, he may not recover interest rates, Art. 27.

— In the **Netherlands**, there are two different Acts applicable in this context

which are administered by different departments. The Act of 1961 administered by the Ministry of Economics concerns instalment agreements. It also includes third-party financing, service credit, etc. Leasing contracts are only submitted to the Act if provided for by specific order, for instance in the case of motorcycles, television sets, washing machines. A creditor who wants to do business must be registered, but does not need a licence. If his conduct gives cause for complaint, the Ministry may issue a warning and cancel his registration. The system has not proved to be very effective.

The Act of 1972, administered by the Ministry of Culture and Social Works, provides for a licensing system of consumer credits not exceeding 10 000 Dutch Guilders. It was put into force in 1976.

Debt collection and cancellation of debts are not regulated. There are no rules on credit reference but a new Privacy Act has been proposed by a Royal Commission.

— In **Great Britain**, the Consumer Credit Act provides for a very detailed licensing system. Everybody doing business in consumer credit must have a licence. The licensing system is also extended to what is known as ancillary credit business.

Sections 22 – 26 provide for two types of licences: standard licences which are given to individuals and group licences. The applicant must be a fit and proper person and must specify his business conduct. Sections 27 – 44 list the reasons for refusal or revocation of the licence. The system aims at preventing unreliable persons from doing business in consumer credit. Agreements made by persons not having a licence are enforceable only by order of the court. A special division of the Office of Fair Trading is in charge of implementing the licensing system. Reportedly, about 100 000 licences will have to be issued by the division. It is questioned whether the amount of administrative work involved is really necessary to protect the consumer.

Sections 145 – 160 relate to *ancillary credit business*. The Act extends the licensing system to credit brokerage, debt adjustment, cancellation of debts, debt collection and credit reference. If there is no licence, contracts made are not enforceable unless the Director rules otherwise. There are interesting provisions on credit reference trying to allow the consumer access to information. Pursuant to Section 157, the consumer may ask for information if a credit reference was made. He is entitled to amend or correct the reference. Under a specific Regulation of 1977 the reference agency is under an obligation to send corrections of his records to banks. The law of credit reference has come under attack since the consumer must take action to receive information and to be able to exercise his rights. It would be better if he were informed directly by the reference agency about the references given to third parties.

— In the **Federal Republic of Germany**, the Banking Act (Gesetz über das Kreditwesen) applies to all credit business. Instalment sales, hire-purchase agreements and leasing contracts are not subject to registration or licensing. Under an amendment of the Gewerbeordnung, credit brokerage was put under a very loose licensing system. A credit broker must register and ask for a licence. The licence will only be refused on grounds of unreliability or criminal offence committed by the broker. Debt collection requires special permission pursuant to the Rechtsberatungsgesetz. Credit reference has been regulated in an interest-

ing way in the Datenschutzgesetz, which came into force on January 1, 1978. A credit reference institution may gather information about debtors. The first time such information is disclosed to third parties, the consumer must be informed about the fact that his data are collected. The consumer has a right of information, but has to pay for it. If the data are false, he may ask for correction. If the correctness is disputed, he may ask for the data to be withheld.

— In **Denmark**, pursuant to Article 18 of the Instalment Sales Act, any person who as part of his business is engaged in instalment sales may be forced judicially not to engage in instalment sales if in this part of his business he has acted against good marketing practices. The credit reporting business is regulated by the Act on Private Registers of 1978. A credit reference firm shall be registered at the Register Authority. It may only register and report information of relevance when assessing credit worthiness. Thus, generally speaking, it may not report information on race and religion, political, criminal and private behaviour, health, misuse of drugs, or the like. The firm shall at any time within four weeks after a request by a registered person disclose what has been reported on him during the past six months and what is his current record. This person may ask for correction. When a person is registered for the first time, the credit reference firm shall notify such person accordingly within four weeks.

173 VIII ADVERTISING AND MARKETING OF CREDITS

The laws of the EC member states do not usually contain specific provisions on advertising and marketing of consumer credits. The general principles of advertising and marketing which we mentioned in Chapters 3 and 4 will also apply to the credit business. In some countries the legislator deemed it necessary to issue more stringent and more detailed rules concerning the marketing of consumer credits. It is hard to find any common denominators, so we will list the most important provisions.

— The most comprehensive approach to the marketing of credits will be found in the above-mentioned **British** Act on Consumer Credit. Sections 43 – 47, 53 of the Consumer Credit Act repeat the principle of truthfulness in advertising and require the creditor to furnish a certain minimum of information in his claims. Especially, he has to indicate effective credit costs. Some specific methods of marketing are forbidden, for instance canvassing; hire-purchase agreements are an exception. Door-to-door credit agreements are allowed, but the consumer will have a right to withdraw under the above-mentioned rules of door-to-door contracts. It is forbidden to send a credit token to the consumer without written request.

— In **Belgium**, Art. 11 of the Act of 1957 provides that advertisements for credit costs must contain some specific information, especially as regards the cash price, the instalment price, down payment, instalments, but not effective credit costs. In addition, reference is made to Art. 4 of the Act of 1970 which provides for a cooling-off period in consumer credit agreements.

— The **Luxemburg** Act on Instalment Sales includes similar provisions.

— In the **Netherlands**, Art. 6 of the Colportagewet (Chapter 4, No. 69) forbids credit transactions outside regular premises. The agreement is void upon

simple announcement by the consumer, Art. 23. Hire-purchase agreements must be registered if made on a door-to-door basis and may be cancelled within 8 days. Art. 43 of the Act of 1972 requires that a prospectus should be offered to the consumer. A Regulation of 1976 requires the bank to disclose the credit terms, the instalment plan and the consequences of default.

— In the **Federal Republic of Germany**, advertising for credit must indicate effective credit costs. Similar obligations apply to the credit broker. On the other hand, Art. 56 of the Gewerbeordnung forbids credit contracts at the door-step, but allows credit contracts which are linked to sales contracts. As to the civil sanctions, see Chapter 4, No. 69.

— In **Denmark**, Arts. 2 and 5 of the Price Marking and Display Act of 1977 contain regulations on advertisements for instalment plans. The advertisements must indicate the cash price, the total purchase price including interest and all other additional charges, the amount of down payment and of each instalment, the number of instalments and the period allowed for payment of the instalments. There is no obligation to indicate effective credit costs.

— Art. 4 of the **French** Act of 1978 requires that the advertising should mention effective credit costs so as to enable the consumer to compare different offers. This does not apply to leasing contracts. If the advertising does not comply with the Act, this is not only punishable but subject to corrective advertising by order of the court, Art. 24.

IX CRITICAL EVALUATION

174 1 The starting point: Extreme differences in consumer law in the EC countries

As is obvious from our comparative study, consumer credit law within the EC is extremely divergent. There are very few common trends which seem to be generally accepted, such as some regulations on instalment sales, some provisions to protect the consumer in case of default, some requirements for the disclosure of information to the consumer, some requirements for administrative control. As regards the more important aspects of consumer credit, there are great dissimilarities of legislation in consumer-oriented countries, such as France, Great Britain and to some extent Belgium, in countries which regard consumer credit as a problem in some cases only, and in countries which are engaged in law reform. If we go into details, the situation is even more complicated and only specialists will find their way through the jungle of law.

Oddly enough, the very intention of protecting the consumer has led to grave differences in the law of consumer credit within the EC. There is an urgent need for the approximation and reform of consumer credit law within the EC.

175 2 Taking up modern trends in the law of consumer credit

If approximation and law reform with respect to consumer credit is to be accomplished on a European basis, the EC draft directive on consumer credit would be a good starting point. The national legislators should try to take up modern trends which we might define as follows:

— Any approximation and reform of the law should be put on a *broad* footing and should include all forms of consumer credit, for instance instalment sales, hire-purchase agreements, debtor-creditor-supplier agreements, personal loans, credit brokerage and credit tokens, with the possible exception of running accounts.

— It should be made clear that the law will apply only to *consumer credits* in the strict sense of the word. Business transactions, credits given to state organisations, credits in international trade, etc., should not, of course, be subject to specific regulation. It is a problem of appreciation whether the field of application is defined rather on a subjective basis (who is a consumer, who is a professional creditor?) than on an objective basis attaching importance to the amount of credit given (see No. 11). This is both a technical *and* a political problem that has to be solved through analysis of the different systems functioning at present.

— The legislator should pay attention rather to the *formation* of the contract than to the problem of default as he did in the past. Hasty credit transactions should be avoided. The consumer must have time to consider his decision to enter into a contract and perhaps to cancel it without running the risk of having to pay interest rates, damages, penalties, etc.

— Certain *minimum information and disclosure* requirements should be met in advertisements and contractual offers of consumer credit. As is obvious from our comparative approach, the central idea is to inform the consumer about *effective credit costs*. Schemes for determining effective credit costs enabling the consumer to compare if he so desires different offers from various countries should be worked out on a European basis.

— It is very questionable whether *administrative rulings* that are too detailed are apt to strengthen the consumer's position. Administrative provisions may not only result in much red tape but restrict the enjoyment of credit to certain groups of consumers. On the other hand, it might be worth considering whether credit to specific groups of poor consumers, foreigners, young couples, etc., should be procured by state agencies or by consumer cooperatives. This is a basic question of economic policy and social welfare, not of law, which can be mentioned here but not studied in detail.

— Attempts at governmental regulation of *interest rates* have hardly been successful. Such regulations would be impossible of achievement on a European basis. On the other hand, a more modern approach to the problem of usury as we have developed above might very well serve the consumer's interests.

— *Ancillary credit* business, such as brokerage, debt reference, debt collection, should be considered more carefully by the legislator.

CHAPTER 8

Unfair Contract Terms

176 I GENERAL REMARKS

This chapter will deal with unfair contract terms, irrespective of whether they appear in individual contracts or in standard form contracts. The reasons behind the different forms of standard form contracts have repeatedly been reviewed by way of scientific investigation. We can state that existing law does not suffice to ensure effective control. That is why the main emphasis of this presentation will be put less on outlining existing deficiencies than on describing the legislators' attempts to find solutions to the problem by pertinent special legislation. Legislators have established or intend to establish primarily two-tier systems. On the one hand, control would be exercised by entitling the courts to examine by means of a general clause whether the terms of the contract involved are reasonable. Sometimes these general clauses are supplemented by what are known as blacklists, i.e. lists of clauses which are regularly considered ineffective. On the other hand, some countries introduced a sort of administrative control which, however, varies very much in scope and intensity.

177 II CONTROL BY CONTRACT LAW

In Chapter 6, we already gave a survey of special acts and bills which have for their object the fight against unfair terms. In Chapter 7, we analysed the law of consumer credit and the legislator's efforts to regulate the contents of credit contracts and to forbid penal clauses. However, the importance of the acts was investigated only as far as quality or credit aspects were concerned. Questions regarding the scope of application as well as legislative procedure were left out of consideration.

178 1 General clause

We have just explained the meaning of general clauses. Such general clauses have been enacted in Denmark and the Federal Republic of Germany, while in the Netherlands, Belgium and Luxemburg pertinent drafts are under preparation. Great Britain and France have not provided for such possibilities of control in their recently enacted laws concerning unfair contract terms. With the exception of Denmark and the Federal Republic of Germany, general

control of contract terms as to their contents can be exercised only if national civil laws authorise the courts to do so. Such terms in civil laws, inasmuch as they are codified in the first place, relate in a very general way only to the principles to be observed by the parties in laying down their obligations (i.e. good morals, good faith). The courts in the various countries have handled this instrument of control to very different degrees.

(i) As far as statutory regulations exist or are being aimed at, the following picture emerges:

— **Denmark**. In 1975, a new Section 36 containing a universal general clause was incorporated in the Contracts Act:

> 'A contract can be cancelled wholly or in part if it would be unreasonable or contrary to honest conduct to maintain it. The same applies to other legal acts.
>
> In defining pursuant to Subsection (1) the particulars of concluding a contract, the contents of the contract and subsequent circumstances should be taken into consideration.'

— **Federal Republic of Germany**. Art. 9 of the Standard Form Contract Act contains a general clause to the following effect:

> 1. Provisions in standardised form are deemed ineffective if they, contrary to the principle of good faith, are unfairly prejudicial to the party with whom the user concludes the contract.
>
> 2. The unfair prejudice prevails in case of doubt, to be presumed if a provision
>
> 1 is not in accordance with the fundamental principles of legislation from which it deviates; 2 restricts rights or duties which arise from the nature of the contract in such a way as to endanger the achievement of the objective of the contract.

— **Luxemburg** (Draft Reform on Consumer Protection of 1978).

> A contract concluded between professional suppliers of goods or services and private final consumers... shall maintain a fair balance of the contracting parties' interests. It must not contain any clause allowing the professional seller an advantage which is not justified by honest trade practices... by limiting, without a valid reason, the rights the consumer has by law. Such unfair terms will be considered null and void.

— **Belgium**. Pre-draft to Amend the Belgian Law of Commerce (art 14 de l'avant-projet de la loi modifiant la loi du 14 juillet 1971 sur les pratiques de commerce, see Chapter 2).

> Art. 53 octavo. For the purposes of this Act, an onerous term is considered to be any contractual term which brings about an excessive imbalance between the contracting parties' rights and obligations to the detriment of the consumer.

— **Netherlands** (Report (CCA Advisory Report) on Standardised Terms)

> Generally speaking, a clause or combination of clauses must not be unreasonably prejudicial to the consumer, also from the point of view of a fair balance between the rights and obligations of supplier and consumer. In the assessment of a clause or combination of clauses, the whole contract should be taken into account, inclusive of the legal provisions concerned, and due consideration should be given to the prevailing circumstances.

The essential elements of control resemble each other. While Luxemburg, Belgian and Danish laws require a fair balance, German law requires the observance of the principle of good faith. When evaluating a clause, the German, Danish, Dutch and Luxemburg courts have to take into account the legal provisions which have been excluded or prejudiced by the clause. As regards German law, it should be noted that unreasonableness is presumed if clauses are contrary to legal provisions. Under Danish law, a contract term departing from non-cogent law to the detriment of the consumer will be set aside unless the departure is reasonable and justified. General clauses were introduced only a short while ago. Thus, it is quite impossible to evaluate their effect in practice.

(ii) Since the control of unfair terms by specified general clauses is not yet very common, we consider it necessary to say a few words on the methods applied by the courts to fight unfair terms specifically in standard form contract conditions. The subject matter of this presentation will be restricted to open control of standard form contract conditions as to their contents. We will not go into questions of incorporation, form and construction of standards (see No. 198).

— In **Great Britain**, the **Netherlands** and the **Federal Republic of Germany** (already prior to the coming into force of the Standard Form Contract Act), the courts exercise open control of standard form contract conditions as to their contents. The German and Dutch courts base their control on the principles of good faith and good morals which are generally accepted by civil law. We will not go into details here. The basis of English court practice that is perhaps most important is the fundamental breach doctrine. Open control as to contents has become possible only since a general principle has been developed from present law enhancing such law. In the event of inequality of bargaining power on the part of the contracting parties, there is now a legal remedy against grossly unfair contract terms or a marked imbalance of contractual obligations. But the rule permitting interference in such circumstances is a novelty at common law, so it is still doubtful to what extent the rule is applied by the courts.

— In **Ireland**, the common law situation is much the same as in Great Britain.

— In **Italy**, present court practice has not yet developed any method of open control as to contents.

— Also in **Belgium**, **Luxemburg** and **France**, the courts have not developed any *general* open control as to the contents of standard form contract conditions. However, they at least protect the customer on a large scale regarding exemption clauses which are of particular importance in practice. In France, court practice in this conjunction is based on a prohibition pursuant to which certain essential contractual obligations cannot be contracted away (prohibition de l'anéantissement de l'essence du contrat). In Belgium, exemption clauses are

inadmissible if they would deprive the contract of its essence (see also Chapter 6, No. 132 ff).

2 Blacklists

179 (*a*) *The existence of blacklists*

Some of the acts or drafts mentioned include lists of prohibited clauses (blacklists). If the essential facts of these clauses are deemed to exist, the listed clauses are ineffective in principle.

— **Federal Republic of Germany**, Arts. 10 and 11 of the Standard Form Contract Act contain a list of prohibited clauses.

— **Great Britain**, the Unfair Contract Terms Act does not include lists, but in like manner to the German Act prohibits exemption clauses.

— **France**, the Act of 1978 has now been amended by the Order of March 24, 1978, prohibiting likewise the application of certain clauses, which constitutes the beginning of a blacklist.

— In their drafts, **Belgium** and **Luxemburg** largely adopted the German approach.

— In the **Netherlands** (Report), the Dutch Consumer Council is divided in its views on the question as to whether the general clause should be supplemented by a list of clauses which are presumed to be unfair. At any rate, unlike the blacklists in the German Standard Form Contract Act, the Dutch blacklist would not contain an absolute prohibition of the clauses concerned, but rather a reversal of the burden of proof; it would be up to the supplier to justify that under the given circumstances the clause is *not* unreasonable.

The blacklists largely contain the same type of prohibited clauses. They deal with clauses excluding contractual liability and fault as well as specific problems involved in certain types of contracts. Apart from that, they are tailored to the grievances encountered in the country concerned. We will not go into details here. Nevertheless, we wish to point out a common feature of the British and the German Acts. Both Acts make a distinction between clauses that are ineffective in any event and clauses with respect to which the courts have to ascertain on the basis of further circumstances whether the clause is reasonable. Under the German Act, 'reasonableness' may be assumed within the framework of the general clause. Unlike the German Act, the British Act contains some explanatory provisions on the test for reasonableness in Section 11 of the UCTA. But it should be taken into account that the British courts — unlike the German courts — may not use parliamentary records for constructing acts.

180 (*b*) *Additional requirements*

The **Italian** Codice Civile, Arts. 1341.2 and 1342.2 (see No. 140) and the **Luxemburg** Bill Amending the Civil Code — the provision involved is modeled on the Italian articles mentioned — do not state prohibited clauses. However, a certain limitation of clauses may be achieved by the requirement that the consumer should approve some dangerous clauses in writing. Arts. 1341.2 and 1342, para 2, list a number of clauses. That list may be completed by extensive

interpretation. The catalogue covers all clauses trying to achieve the same effect. The courts have largely rendered the legislative approach valueless by advocating specific approval, even if the consumer neither read nor understood the clause in question. If practical experience in Italy is taken as a basis, there is little hope that such provision will be suited to provide consumer protection in Luxemburg.

181 (*c*) *Penal clauses*

Special reference may be made to penal clauses (for penal clauses in consumer credit transactions see Chapter 7, No. 158). These are clauses which obligate the consumer to pay a conventional penalty or excessive lump-sum damages in the event that he fails to accept or accepts too late the performance previously agreed upon or wants to withdraw from the contract. They are a popular means used by business people to make a contract binding on the consumer by way of obligations. Through penalties and similar clauses the consumer is prevented from asserting his rights.

(i) Special statutory regulations on the admissibility of penal clauses exist in Belgium, France, Luxemburg and in the Federal Republic of Germany.

— **Belgium.** The starting point is Article 1152 Code Civil, which forbids the judge to reduce the conventional penalty agreed upon. Only by way of exception may the judge change the penalty if pursuant to Art. 1231 the contract is deemed to have been performed only in part, or if the legislator expressly authorised the judges to do so. These statutory means are of little use. The coming into force of the pre-draft would improve the legal position, for the blacklist prohibits terms which deny the consumer the right to withdraw from the contract without paying damages in case of force majeure.

— **Luxemburg.** On the basis of the pre-draft, Art. 1152 Code Civil now provides for the possibility of reducing conventional penalties. The pre-draft adopts the French statutory regulation.

— **France.** As in Belgium, the legal position results from Arts. 1152 and 1231 Code Civil. Unlike Belgian law, the judge has been permitted since 1975 (réforme des articles 1152 et 1231 du Code Civil datant du 9 juillet, 1975) to reduce excessive conventional penalties. Art. 1152, Section 2 reads: 'Neanmoins, le juge peut modérer ou augmenter la peine qui avait été convenue si elle est manifestement excessive ou dérisoire. Toute stipulation sera réputé non écrite'. A similar rule applies in case of partial non-performance. Accordingly, excessive conventional penalties are ineffective. The Act of January 10, 1978 provides for the additional possibility of prohibiting conventional penalties in general or in specific factual connections. So far, the legislator has not acted upon this power.

— **Federal Republic of Germany.** The Standard Form Contract Act includes a special provision concerning the admissibility of conventional penalties. Art. 11, No. 6 reads:

'Ineffective in standard form contract conditions is

6. any provision under which the user is promised payment of a conventional penalty in the event of non-acceptance or late acceptance of a perfor-

mance, delay of payment, or in the event the other party to the contract withdraws from the contract.'

The legal position which is favourable to the consumer is complicated by the fact, though, that the Standard Form Contract Act *permits* lump-sum damages if they do not exceed the damage to be expected in the ordinary course of events and if the consumer is not denied proof that the damage is less than the lump-sum. Therefore, problems arise from the differentiation between admissible lump-sum arrangements and inadmissible conventional penalties. Court practice has not so far produced satisfactory results. In so far as conventional penalties do *not* form part of standard form contract conditions, their lawfulness is determined by the Civil Code. Similar to French law, also the German judge may reduce excessively high penalties, Art. 340, Civil Code. In addition, the control of lump-sum damages in standard form contract conditions is provided for (Art. 11, No. 5, Standard Form Contract Act).

(ii) In all EC countries, in some cases in addition to the afore-mentioned means of control, control in line with the general principles developed for the control of unfair terms (No. 178) is possible.

— **Belgium**. The Belgian courts take drastic action against penal clauses. They have declared mere penal clauses to be inadmissible in general, while clauses aiming at providing cover for the damage to be expected are admissible. In this respect the legal position is similar to that under the German Standard Form Contract Act, with identical problems of delimitation.

— In **Italy**, the **Netherlands**, **Great Britain** and **Ireland**, penal clauses do not seem to play the role they play in the countries mentioned above.

182 3 Scope of application

The scope of application of the acts and bills in terms of persons and matters covered is very different. Depending on the type of the Acts, the legislators have set up various obstacles which must be overcome before the Act can achieve its full effect.

183 (*a*) *Standard form contract conditions or individual agreements*

Of special importance to the contracting parties is the fact whether clauses which at the same time form part of standard form contract conditions or also clauses from individual agreements come within the scope of application of the law.

— The most comprehensive approach is included in the **Danish** Contracts Act, the **British** Unfair Contract Terms Act and the drafts drawn up in **Belgium** and **Luxemburg** (Draft on Consumer Protection) which in general permit the control of unfair terms.

— As regards the **Dutch** report, the situation is not clear. The Dutch Consumer Council is divided in its opinion on the question of whether or not the above-mentioned general clause should be introduced in civil law and thus deal with unfair terms.

— By contrast, the **German** Standard Form Contract Act as well as the

specific provisions of the **Italian** Codice Civile 1342 are applicable only to standard form contract conditions. The same applies to the **Luxemburg** Draft (No. 180), which corresponds largely to the Italian regulation and is to bring about an amendment of civil law. The limitation of the control of unfair terms to unfair terms in standard form contract conditions results in a variety of problems. The acts or the courts must define what standard form contract conditions are, when they are deemed to exist, and whether and, if so, how they become elements of a contract.

Of the acts or bills mentioned, only the German Act contains a definition of what is meant by standard form contract conditions (Art. 1, Standard Form Contract Act). To be sure, this is not the proper place for discussing the requirements in detail. Nevertheless, we would like to deal with some doubts, because they are of considerable practical importance for consumer protection. Art. 1, §1 gives a definition of standardised terms. If the requirements to that effect are deemed to exist, the Standard Form Contract Act *does not* apply if the standard form contract conditions were *negotiated in detail*. Even before the Act came into force, it was a controversial question how to define negotiated 'in detail'. Whereas some writers accept an individual agreement only if the contracting parties have really negotiated the conditions of the contract — manifestation is required — the courts are inclined towards the opinion that the mere possibility of influencing the negotiations is sufficient. The dispute about the concept of standard form contract conditions decides on the scope of application of the Act. As yet no definite solution is emerging.

All the Acts mentioned (Standard Form Contract Act, Italian Civil Code, and the Luxemburg Draft) by contrast deal with the requirements that must be met in order that standard form contract conditions may be regarded as part of a contract.

— **Italy**. As regards Art. 1341, §1 Codice Civile, standard form contract conditions become part of a contract if the other party had knowledge of them or, using ordinary care, should have had knowledge of them. From the consumer's point of view, the Act does not offer any protection, since the courts consider the requirements met even if the consumer neither knew nor read the standard form contract conditions.

— **Luxemburg**. Under the draft, general contract conditions are not binding on the other party, unless such party has had an opportunity to acquaint himself with them when signing the contract, and if under the circumstances such party can be considered to have accepted them.

— **Federal Republic of Germany**. Art. 2 of the Standard Form Contract Act contains a special provision governing the requirements of incorporation. That provision enhances the consumer's protection. Thus, implied reference to standard form contracts is no longer satisfactory. The same applies to the mere possibility of taking knowledge. We will not go into details here. Still, the German Standard Form Contract Act seems to put the consumer in a more favourable position.

— In this connection, reference should also be made to the **Dutch** Bill, Art. 6.5.1.3 amending the Civil Code, which provides for a special provision governing incorporation of standard form contract conditions. Accordingly, a person who has confirmed, either by his signature or otherwise, that he accepts

the contents of the general conditions will be bound even if it was the other party's understanding at the time the contract was concluded that he did not know the contents thereof. An important limitation was laid down in Section 2 of the provision mentioned. Hence, a condition may be cancelled if the consumer would not have concluded the contract, had he been aware of that provision. Despite that limitation, the Dutch Bill as against the German Act appears to facilitate the possibility of incorporation.

184 *(b) Persons protected*

The scope of application of the law in terms of persons protected reveals to what extent the national legislators are willing to make allowance for the relative weakness of the consumer's economic position by according him special treatment. In addition, we will direct our attention to the question of whether the acts also apply to transactions between consumers as well as transactions between business people.

— The **British** UCTA is not a distinct consumer protection act, since it also contains provisions which independent of the scope in terms of persons protected will apply to all types of transaction. The structure of the Act is as follows: the first ten sections list terms that are prohibited and give a list of persons to whom such prohibitions apply — any person or only a person dealing as a consumer. Under the subheading of 'explanatory provisions' in Section 12, the Act gives a definition of what is meant by a person dealing as a consumer. The provision runs as follows (Section 12 (1)):

'A party to a contract 'deals as a consumer' in relation to another party if
(a) he neither makes the contract in the course of business nor holds himself out as doing so; and
(b) the other party does make the contract in the course of a business; and
(c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by Section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.
...'

The consequence of this definition is that the Act is not applicable to transactions between consumers if the requirements of 'dealing as a consumer' is to be met. The exclusion of warranty in contracts between consumers is not, therefore, prohibited in general, as in the case of contracts between a businessman and a consumer. As between businesses, they are effective if they are reasonable, Section 6, Art. 4, UCTA.

As far as business is transacted between business people, the Act (Section 3) contains a special provision relating to business people. Section 3 applies to contracts between contracting parties in which one of them deals on the other's written standard terms of contract. The section limits the rights of the party who deals with a consumer or on his own written standard terms. It stipulates that the stronger party cannot, by reference to any other contract term, exclude or restrict his own liability for breach of contract or claim entitlement to the performance of the contract in a way substantially different from that reasonably

to be expected, or claim to be entitled not to perform at all the contract or part of it, except in so far as any such term is reasonable in the circumstances. Thus the small businessman is likewise protected against the abuse of negotiating power by larger groups of enterprises upon whom he is dependent.

— The **German** Standard Form Contract Act is not only a consumer protection act. The personal requirements of applicability differ depending on whether general protection is concerned, which applies to all parties affected by standard form contract conditions, or special protection is concerned, which applies to consumers only. Art. 24, Standard Form Contract Act, draws a line between the two scopes of applicability of the Act. Yet, the Act does not lay down who is considered to be a consumer. Rather, it declares its main elements, namely the blacklists in Arts. 10 and 11 as well as the provision on incorporation of contracts, Art. 2, Standard Form Contract Act, to be *inapplicable* if standard form contract conditions are used in relation to a businessman. That is why the control of standard form contract conditions in contracts between business people can be exercised only by means of the general clause. A special protective regulation regarding small businessmen does not exist. By contrast, the Act applies to contracts between consumers also with respect to blacklists.

— **France**, la loi sur la protection et l'information des consommateurs de produits et de services, authorises the government to issue orders prohibiting *only* clauses in contracts between a businessman and a non-businessman or consumer. A definition of the terms is not given.

— The general clause of the **Danish** Contract Act, the provisions of the **Italian** Civil Code (Arts. 1341 paras 1 and 2) and the **Luxemburg** draft are applicable to *all types* of contracts. No distinction is made between the contracting parties.

— Conversely, the afore-mentioned provisions of the drafts prepared in **Luxemburg**, **Belgium** and the **Netherlands** (report) are applicable *only* to consumer contracts, without the concept of 'consumer' being defined.

Overall, the varying scopes of the Acts present a rather confusing picture. Once more the British Act seems to pave the way for further development. Indicative thereof is not only the attempt at defining consumer transactions but also the effort to guarantee the small businessman a certain protection against large-scale enterprises.

185 (*c*) *Exemptions*

The acts and drafts do not apply to all types of contract. We will limit our study to problems raised by unfair terms in insurance contracts, banking contracts and public standardised conditions.

— As regards the applicability of public-law standard form contract conditions, Section 29 of the **British** UCTA declares that the Act does not relate to contract terms authorised or required expressly or implied by statute or made under an international agreement. Likewise, not included are unfair terms in contracts of insurance, while banking contracts come under the Act.

— The **German** Standard Form Contract Act does not apply to public-law standard form contract conditions. Unlike British law, contracts of insurance are included.

— The **French** Act relates to *all* types of contract, but not to public-law standard terms.

— The **Danish** Act (Contract Act) applies to all types of contract.

— **Netherlands.** The question of whether public-law standard contract conditions should be excluded from the scope of an Act on Standard Contracts has not yet been discussed.

The Bill on Consumer Sales excludes the supply of gas and water from its scope of application.

— **Belgium.** The situation covered by the draft is the same as in France.

— **Luxemburg.** The draft applies to all types of contract as well as to public-law standard terms.

186 III MEANS OF CONTROL

Provisions of substantive law, which limit the aspiration for power on the part of the consumer's contracting party, do not guarantee that contracts are actually concluded on the basis of existing law. Mandatory legal provisions do not necessarily result in the fact that legal relationships are established within the limits set by the legislator. Legislators and legislative commissions are well aware of that problem. That is why the question of how unfair terms can be controlled through appropriate procedures was at the centre of discussions. The systems developed or the models still under discussion vary considerably in their approach. The only thing they have in common is the fact that reform considerations focus on unfair terms in standard form contract conditions.

The following systems or models can be distinguished:

— *Official preliminary control.* All standard form contract conditions must be submitted for approval to a special authority (exists in special sectors only).

— *Investigation approach.* Commissions consisting of representatives of consumer organisations, industry and the government investigate whether the clauses which are included in consumer contracts are unfair (France, Luxemburg — draft).

— *Negotiation approach.* The task of the authorities established for this purpose is to initiate negotiations between representatives of the consumers and industry on the establishment of uniform standard form contract conditions. In contrast to the investigation approach, the authority participates in the negotiations only indirectly. Depending on their degree of binding force, standard form contract conditions thus negotiated may be classified in terms cartels and terms recommendations (Denmark, Great Britain, Ireland). (See No. 187.)

— *Collective action* is a control instrument which places responsibility for fair marketing practices in the hands of specific organisations which are entitled to bring an action and thus with the aid of the courts fight unfair terms (Federal Republic of Germany, Netherlands — report, Belgium — draft).

— *Delegation system.* This solution, as it were, advocates the opposite way. Unfair clauses in standard form contract conditions are fought in such a way as specifically authorised public authorities may order the parties to use specific clauses (France, Great Britain, Belgium — draft, Ireland — bill) or may even issue complete standard form contract conditions (Luxemburg — draft and

the Netherlands — report in each case) by way of statutory order.

187 1 General state control

The consumer would be protected best against unfair terms if standard form contract conditions to be submitted for review were checked on the part of the state as to whether they include unfair terms. Measures of preventive control can, if at all, cover only standard form contract conditions, since individual agreements can be investigated for their contents in theory only. Not in any of the countries does *general* administrative control of a preventive nature regarding standard form contract conditions exist. At present, such a comprehensive control system has no chance of being realised. All pertinent efforts and discussions during legislative work on the German Standard Form Contract Act failed, because general control of standard form contract conditions is not allegedly compatible with the German liberal economic and private law systems.

In the EC countries, a special type of standard form contract conditions which offers a certain measure of administrative protection is increasingly attracting attention. These are terms cartels (Konditionenkartelle) — several companies agree by contract the uniform application of standard form contract conditions — and terms recommendations (Konditionenempfehlungen) — the umbrella organisation of an industry or trade recommends to its members the standard form contract conditions prepared by it. In Denmark and in the Federal Republic of Germany, companies or the umbrella organisation are obliged to report standard form contract conditions to the national cartel authorities which check them for compliance with existing law in a relatively global way.

— In the **Federal Republic of Germany** (Gesetz gegen Wettbewerbsbeschränkungen, GWB, 1957 — Law Prohibiting Restraints of Competition), the Federal Cartel Office has a certain control authority (Chapter 1, No. 18). It is primarily a supervisory agency and it is not its business to negotiate more favourable terms with trade associations. This does not mean, though, that the Federal Cartel Office will also negotiate in isolated cases. At any rate, it is the Office's main function to check standard form contract conditions for violations of cogent private law, specifically violations of the Standard Form Contract Act.

— In **Denmark**, standard terms made by trade organisations must be reported to the Monopolies Control Authority pursuant to the Danish Monopolies and Restrictive Practices Control Act of 1955 (Chapter 1, No. 19). If, upon investigation, the Monopolies Control Authority finds out that restraint of competition results in unreasonable standard form contracts, the Authority will attempt to terminate such unreasonable effects through negotiation or, if this cannot be done by way of negotiation, will issue an order to that effect.

— **Great Britain**. Such recommendations must be registered with the Director General of Fair Trading pursuant to restrictive trade practices legislation (Chapter 1, No. 19). The general rule is that all recommendations made by trade associations have to be referred to the Restrictive Practices Court which has jurisdiction to decide whether they are in the public interest and as such may take effect. However, if the Director General of Fair Trading holds that the

restrictions are 'not of such significance as to call for investigation' by the Court, he may make representations to the Secretary of State for Prices and Consumer Protection who may then give directions releasing the Director General from his duty to take the agreement to court. Because of this provision, there is scope for discussion between the Office of Fair Trading and a trade association as to the details of the trade association's recommended standard term contract.

— **Luxemburg**. The Commission des pratiques restrictives may require any document for examination — standardised terms included (loi du 17 janvier 1970, see Chapter 1, No. 19).

— In the other countries, there are no such possibilities of control.

If we compare the three regulations described, we find that in Great Britain and Denmark the supervisory authorities have a much larger scope for negotiation than in the Federal Republic of Germany where supervisory powers are the main element.

188 2 Special state control

Although there is no or only very limited general state control of standard form contract conditions, there are industries with respect to which some legislators saw themselves compelled at a relatively early stage to intervene to the benefit of the weaker contracting party. Without claiming completeness, we would like to limit the presentation to standard form contract conditions used by insurance companies and banks.

189 (*a*) *State control in insurance*

(i) The contents and extent of control of insurance contract conditions vary among the EC countries, but to a much narrower extent than before as most countries have adapted their regulations to the European Directives of 1973. The spectrum ranges from complete control to recognition of the insurance companies' right to design their standard form contract conditions free from any state influence. We would like to mention the following regulations:

— **Federal Republic of Germany**. As the German control system has had a great influence on the development in Europe, we should like to give a brief description of the control of insurance terms in Germany.

The general clause concerning the control of insurance companies has been laid down in Art. 5 of the Act on Supervision of Insurance Companies (Gesetz über die Beaufsichtigung der privaten Versicherungsunternehmen — VAG) of 1901. The relevant section reads as follows:

> For the exercise of their business, insurance companies need the approval of the supervising agency. ... Together with the application for approval, the 'Geschäftsplan' (business programme) should be submitted. As part of the Geschäftsplan should be submitted...
>
> (2) General insurance conditions...

General conditions of insurance require the prior approval of the Federal Supervisory Office for Insurance Companies (Bundesaufsichtsamt für das

Versicherungswesen — BAV). The BAV checks whether the conditions are in the best interest of the insured party. Such interest is usually deemed to be violated if the conditions are not in conformity with cogent law. In some cases, the BAV refused to give its approval if the conditions deviated from permissive law. Pursuant to Art. 13 VAG, changes to general conditions of insurance are likewise subject to prior approval.

Apart from the primary rights of approval, Arts. 81 et seq. authorise the BAV to withdraw its approval or to give instruction to remove abuses which may endanger the insured parties' interest. In reality, the BAV has acted on its authorisation only in very few cases. Differences of opinion between the BAV and insurance companies or their professional associations are usually settled by negotiation.

— In **Belgium**, the control of standard form contract conditions used by insurance companies is regulated in the Act of July 9, 1975. Pursuant thereto, all standard form contract conditions are subject to the approval of the Office de contrôle des assurances. The extent of the right of approval results from the Royal Order of March 12, 1976, which provides that the terms must not comprise clauses impairing the balance between insurer and insured. In theory, the supervisory authority concerned has wide powers of intervention.

— In **France**, standard form contract conditions of insurance companies are likewise subject to state control (loi du 13 juillet 1930). Prior to being used, they must be approved by the Direction des assurances. Unlike Belgian law, control is limited to whether or not the conditions are in conformity with cogent law. Also the object of the law is very different. The control of general conditions of insurance cannot only be used to protect the insured, but may also be employed as an instrument of economic policy. This is reflected by the fact that, unlike the situation in the Federal Republic of Germany, in France control is exercised by a Special Division of the Ministry of Economic Affairs and Finance, the 'Direction des assurances'. The German BAV has a more independent position.

— In **Italy**, the Decree of February 13, 1959, No. 449, which regulates private insurance activities, provides for preventive control in that insurance companies may pursue their activities only if their tariffs and standard conditions have been authorised by the public administration (Art. 22). By the decree of authorisation, the Ministry of Trade and Industry approves of the companies' tariffs and contractual conditions. In this way control is exercised through a double mechanism consisting of ministerial approval and authorisation. Such conditions and tariffs are granted only if at the public administration's discretion they are not contrary to the public interest. Nevertheless, public intervention cannot be extended to include the modification of contract condi tions laid down by private parties. We may note, however, that relevant Italian legislation is now the Act of June 10, 1978.

— **Luxemburg**. Loi du 6 septembre 1968 concernant le contrôle des entreprises d'assurances, modifiée par la loi du 7 avril 1976 et son règlement d'exécution du 21 juillet 1976. To start business, insurance companies require governmental permission. The application must be accompanied by various documents including the business programme (le programme d'activité). As under German law, standard form contract conditions form part of the business programme. They must be approved by the Minister. Any amendment of

standard form contract conditions likewise requires prior permission.

— In **Denmark**, there is no general control of standard form contract conditions used by insurance companies. The Insurance Act only prohibits some specific clauses. The Consumer Ombudsman has not so far drawn up any guidelines.

— In **Ireland**, the **Netherlands** and the **United Kingdom** there is no comprehensive control of insurance contracts. In these countries, self-regulation seems to perform some of the functions of administrative control. Pressure to simplify and keep fair is applied by the OFT.

(ii) The control system is divided into two parts: countries relying on appropriate measures of self-control by industry, and countries in which state control of standard form contract conditions is known. It is open to question whether the required measure of consumer protection is realised in the existing standard form contract conditions. In so far as control exists within the frame of voluntary agreements of industry, scepticism is due to the fact that the consumer matters to the companies only in so far as their interests in generating profits are concerned. Acts enabling control are no consumer protection acts. The introduction of state control always served other aims of economic policy. Certainly, it cannot be denied that the acts also have for their purpose the protection of the insured. Nevertheless, from the consumer's point of view, things are still unsatisfactory.

190 *(b) Control in the banking business*

Unlike insurance, standard form contract conditions of banks seem to be subject to very limited or no control in all countries (for consumer credits see Chapter 7). A certain exception to this can be reported from the Federal Republic of Germany and Italy where, while there is no general control of standard form contract conditions used by banks, there are regulations in special acts relating to certain types of contract.

— **Federal Republic of Germany**. The administrative control of standard form contracts of building societies is established by the Bausparkassengesetz of November 18, 1972. That Act has adopted the legislative structure of the VAG. Its essentials are thus generally applicable also to building societies. Standard conditions of building societies as well as standard insurance conditions require the prior approval of the authority involved (Bundesaufsichtsamt für das Kreditwesen — BAK). It should be noted, though, that the rights of intervention conferred upon this supervisory agency are not as comprehensive as those held by the agency which has to control insurance companies. The latter is entitled to control business operations on a broader scale. Other legislative rules cover mortgage banks, Hypothekenbankengesetz of 1963. In the same way as standard conditions of building societies, standardised conditions of mortgage banks must be approved by the BAK. Contrary to the Building Societies Act, Bausparkassengesetz, the Mortgage Banks Act provides for only few criteria on the contents of standardised conditions. Standardised conditions of investment trusts are controlled in the same way, Act on Investment Companies — Gesetz über Kapitalanlagegesellschaften — of January 14, 1970. However, the Act does not lay down the mandatory contents of standardised terms. It may be

noted, though, that the BAK has issued standards which are not, naturally, obligatory.

— In **Italy**, standard form contract conditions of banks can be subjected to a certain control as far as they relate to savings and credits, Decree of May 12, 1936, No. 375, as amended by two successive acts, namely the Decrees of September 14, 1944, No. 226, and July 17, 1947, No. 691. Thus, banking institutions must pursue their activities in conformity with the instructions published by the Bank of Italy and with the resolutions of the Interministerial Committee (with the Minister of Treasury presiding) concerning credits and savings, with specific regard, inter alia, to the general conditions of banking transactions for current accounts (Art. 32 of the Act of 1936). The Interministerial Committee for Credit and Savings usually devolves its powers through the Bank of Italy to individual banks which agree on the most appropriate structure of general conditions and subsequently submit such agreement for approval to all the other banking institutions. Therefore, savings and credit transactions are usually handled by agreement among banking institutions belonging to the cartel comprising most of the major Italian banks.

— **Denmark**. Banking contracts are governed by the Marketing Practices Act and are thus subject to the Consumer Ombudsman's control.

— **France**. Standard form contract conditions of banks are laid down by the National Credit Council (Conseil national du crédit) following a comment by the professional association of banks. The National Credit Council consists of persons representing the main economic interests. The Finance Minister is chairman of the Council.

— **Great Britain**. Standard form contract conditions are controlled in those contracts which come under the Consumer Credit Act (see Chapter 7). Apart therefrom, there are no general powers of control.

— The **Netherlands**. Limited control is possible under the Wet toe zücht Kredietwezen.

— **Belgium**. There are no general powers of control, however, some regulations in the field of credit, mortgages and savings provide for the possibility of defining the contents of certain clauses. Such definition relates mostly to interest or rates charged by banks.

The survey of the existing Acts clearly shows that there is control of standard form contract conditions of banks only in so far as the monetary and financial aims pursued by the legislators are impaired. In any case, standard form contract conditions are not reviewed for the sake of protecting the consumer against unfair clauses. In this respect standard form contract conditions of banks are not subject to state control, although especially in this area it would certainly be desirable to know more about banking contracts.

3 Tendencies toward preventive control

As we have seen, the EC countries reject comprehensive prior control by the state. Of course, opinions on *how* preventive consumer protection could be achieved are very much divided.

191 (*a*) *The investigation approach*

An investigation approach exists only in **France** and in **Luxemburg** (draft). The Act of January 10, 1978 (Loi sur la protection et l'information des consommateurs de produits et des services) provides for the establishment of a special commission (Commission des clauses abusives). The Commission comprises 15 members: the president, a judge, two further judges or councillors of state (Conseil d'Etat), three representatives of the administration, three qualified jurists, three consumer representatives, and three representatives of the business people. It is the Commission's duty to investigate whether the clauses which are included in contracts between consumers and business people are such as to lead to a manifest imbalance between the rights and obligations of the parties to the detriment of the consumer, Art. 37. The Commission may then recommend the business people to delete the clause in question. After hearing the Council of State, the government may by way of statutory order prohibit individual clauses, the prohibition of which is advocated by the Commission. By contrast, it may not by way of statutory order declare types of contracts (contrat-types) to be legally binding.

A regulation which at first glance seems to be similar to the regulation under French law is provided for by the **Luxemburg** draft pursuant to which, as under French law, a 'Conseil de la consommation' is to be established whose function it is to ascertain whether the suppliers' or manufacturers' terms recommendations include unfair terms (Art. 6). The roads taken by the legislators part where the question arises as to what should be done if the supplier or manufacturer concerned does not comply with the Commission's recommendation that the clauses should be deleted. Under French law, the only remedy in the end is to prohibit the clause by way of statutory regulation. The Luxemburg legislator intends to change the legal position through an appropriate court decision. The public prosecutor (ministère public) is entrusted with handling the proceedings. In the proceedings it is to be examined whether the clause contravenes the general clause or the prohibitions included in the blacklists.

192 (*b*) *The negotiation approach*

The *negotiation approach* exists in Denmark, Great Britain, Ireland and to some extent in Italy.

— **Denmark**. The control system is described in Part V of the Marketing Practices Act. The Consumer Ombudsman's responsibilities have already been mentioned. We recollect that it is his duty to take care that proper marketing practices or any other provisions of the Marketing Practices Act or regulations made in pursuit thereof are not violated (Art. 15, Section 1). On his own initiative or in reaction to complaints or applications made by others, the Consumer Ombudsman will, by way of negotiation, try to make persons engaged in a trade or business act in accordance with the provisions of the Marketing Practices Act. Although the powers of the Ombudsman are not limited to standardised terms, in practice he deals mostly with standard form contract conditions. Single unfair terms are not as interesting.

— **Great Britain**. The Director General of Fair Trading supervises all

commercial activities (see in detail Introduction, No. 8 and Chapter 3, No. 59). Apart from that, it is the Director General's duty to encourage trade associations to prepare and disseminate to their members *codes of practice* for guidance in safeguarding and promoting the interests of the consumer in the United Kingdom.

— In **Ireland**, the situation has been similar to that in Great Britain since the new Act of 1978 came into force. Among other things, it is the duty of the Director of Consumer Affairs to induce consumers and business people to work out *codes of standards* relating mostly to consumer information (No. 8).

— A certain proximity to the negotiation approach is also revealed by the attempts of regional **Italian** legislators to get to grips with the problem of unfair contract terms. Three regional statutes, namely, of Liguria, Tuscany and Lazio, in 1974 provided for the institution of a sort of Ombudsman (Difensore civico). The institution of a Difensore civico must be evaluated from the point of view of his 'supporting' the interest of citizens before the public administration. Thus, his intervention in standard form contract conditions can be requested in cases in which administrative control of general clauses has been provided. Such intervention is justified under the above-mentioned regional acts which individuate the Difensore civico's functions in his assisting complaining citizens in administrative proceedings. However, while the Difensore civico in Tuscany intervenes only on private initiative, in Liguria he can extend his control to files of other citizens who are in the same situation, and at any rate he is empowered to intervene ex officio. There is no direct relationship between the institution of the Difensore civico and the control of unfair contract terms, though. The above-mentioned Acts only provide for the possibility of control.

193 (c) *Collective action*

Collective action as a means of preventive control has been introduced only in the Federal Republic of Germany. Luxemburg, Belgium and the Netherlands are considering to introduce collective action.

— **Federal Republic of Germany**. Collective action is regulated in Art. 13, Standard Form Contract Act:

Cease and desist order and recall order
(Unterlassungs- und Widerrufsanspruch)

(1) Any person who in general conditions uses clauses which in virtue of Arts. 9 to 11 of this Act are ineffective, or who recommends such clauses for legal use, may be sued for a cease and desist order and in case of recommendation also for a recall order.

(2) The claims for a cease and desist order and for a recall order can only be made valid

(1) by legally competent associations, to the statutory aims of which it belongs to safeguard the interests of consumers through information and counselling, when they have associations which are active in this area or at least seventy five natural persons as members,
(2) by legally competent associations for the promotion of trade interests, or
(3) by the Chambers of Commerce.

(3) The associations mentioned in Section (2) No. 1 may not lay any claim as to a cease and desist order or an order to recall, when general conditions are used vis-à-vis a merchant and the contract belongs to the exercise of his trade or when general conditions are recommended for the exclusive use between merchants.

(4) The claim under Section (1) becomes barred by the statute of limitations two years from the date the person entitled to make the claim has learnt of the use or recommendation of the ineffective general conditions, or in the absence of such knowledge, four years from the date of any use or recommendation.

On the basis of the general clause, Art. 9, and the blacklist of clauses, the court has to ascertain whether the clause in question violates existing law.

Claims are brought before the District Court, that is the ordinary court of first instance (Art. 20, Section 1). While the Act was under preparation it was argued that the decision on these 'abstract' conflicts should be assigned to the High Court (court of appeal). The only survival from the concentration idea which persists in the Standard Form Contract Act is the possibility the various state governments (Landesregierungen) have to appoint one District Court from among several to handle actions brought under the first section.

Art. 22 limits the value in litigation established by the courts (which, inter alia, includes the cost of proceedings and lawyer's fees) to an amount of DM 500 000.

— **Luxemburg**. The Luxemburg draft adopts the German regulation. However, the bill covers not only standard form contracts but also unfair terms. Contrary to German law, the Minister of the Interior is authorised to ask a court to declare a contract term unfair.

— **Netherlands**. The Commissie voor Consumentenaangelegenheden (CCA) likewise proposes collective action as a means of control. According to the proposals, a court should be authorised to issue a cease and desist order prohibiting the use by professional suppliers of goods or services of standard terms containing unfair clauses. This power should be given to a single court of appeal. The court should apply a test for reasonableness which is somewhat like the German 'general clause' (see No. 178). A majority of the Commission proposes that the court should be assisted in interpreting the general clause by a blacklist of clauses which are deemed to be unfair, failing proof of the contrary.

Entitled to bring an action shall be consumer organisations, trade and professional organisations and, unlike German law, also individual consumers, but not authorities.

— **Belgium**. Under Act. 55(m) of the draft, the President of the Commercial Court may issue cease and desist orders against acts that are at variance with any decree issued in pursuance of Art. 53 undecim. He may issue such orders at the request of (i) the interested parties, (ii) the Minister, (iii) an interested trade organisation with legal personality, (iv) a consumer organisation with legal personality which is represented in the Consumer Council.

194 (*d*) *The delegation system*

Under the above-mentioned Acts, British and French authorities are entitled

to impose certain obligations on the businessman. A similar power is provided for in the Irish Sale of Goods and Supply of Services Bill (see No. 142, 146). However, the authorities may only act upon their power if the actual practice constitutes an abuse of economic power by the other party resulting in an excessive advantage to the latter. Art. 53 undecim of the Belgian draft provides that the King may rule the application of specific terms with respect to certain branches of industry or certain goods.

More far-reaching still are the powers intended to be granted to the authorities involved under the Luxemburg (Art. 7 of the draft) and Dutch (Art. 6.5.1.2. of the draft civil code) drafts. It is planned to empower these authorities to establish binding standard form contracts or types of contract by way of statutory order. Both drafts have in common that standard form contracts or types of contract may only be established for certain branches which are not specified in the law, though. The Dutch draft has come under heavy attack from trading circles. Accordingly, it remains to be seen whether the bill will be enacted.

195 (*e*) *Comparison of approaches*

The four methods of improving preventive consumer protection against unfair terms which we have pointed out show how much the discussion about this problem is in a state of flux. An ideal solution to the problem has not been found. Rather, each EC country is trying to get to grips with the problem by means of a control system tailored to the national peculiarities of each country. This fact does not facilitate a comparison.

At a superficial glance, to begin with we can distinguish between *two* entirely different methods: the investigation approach, the negotiation approach and the delegation system place control in the hands of *administrative* bodies, whereas collective action constitutes a *judicial* instrument. Regarding the administrative method, the following distinctions can be made: the delegation system as well as the investigation approach more or less imply that standard form contract conditions should be put under state control. The negotiation approach prevailing in Denmark and in Great Britain does not go as far as that. The two countries have in common that they do not *charge* public authorities with the control of standard form contract conditions, but only authorise them to work towards the drawing up of types of contract, codes of practice or standard form contract conditions. The Italian difensore civico and the regions mentioned share but the name. His powers of control are much more limited. There are but a few common features between the Office of Fair Trading and the Consumer Ombudsman. The Office of Fair Trading is essentially a supervisory agency, while it is the Ombudsman's very task to act as a go-between between industry and consumers. There are differences in so far as the Consumer Ombudsman can intervene on behalf of individual citizens and has his own market court for the decision of controversial questions. Finally, the Ombudsman does not participate either in the legislative procedure, which is one of the main functions of the Office of Fair Trading. In that respect there is much likeness rather between the Office of Fair Trading and the Commission on Unfair Terms in France. In the final analysis, the different views on how

changes in society should be coped with become evident here. The general technique used in Denmark is aimed at having the law adopted to changes in society through the Consumer Ombudsman and, if negotiations fail, through court decision — as far as that goes, the Luxemburg draft corresponds to the Danish regulation, while in England and France the law may only be changed through legislation. This brief outline goes to show the degree of interconnection of the various systems and the variety of functions they have to fulfil.

So far, collective action as an instrument of control has been established only in the Federal Republic of Germany. Whether this method will gain acceptance in the Netherlands, Belgium and Luxemburg is currently an open question. It should also be doubted whether collective action will enable preventive control in the first place. Strictly speaking, this would necessitate the admissibility of a cease and desist order against mere specimen standard form contract conditions. For, if standard form contract conditions have been put into circulation, we can speak of preventive protection to a limited extent only. Under present German court practice followed by the lower courts as well as in legal literature, proof is required to the effect that these conditions were used three times in contracts actually concluded. Thus the preventive function intended by the legislator is largely undermined. Furthermore, doubts as to the effectiveness of collective action emerge from the experience gained in the Federal Republic of Germany under the Act Prohibiting Unfair Competition (Gesetz gegen den unlauteren Wettbewerb — UWG) (Chapter 3, No. 60). A recent study commissioned by the Minister of Justice established that collective action under the UWG is used very rarely by consumer organisations. Consumer organisations frequently shun the costs involved in legal proceedings. Moreover, these organisations lack the necessary experts. Thus, actions are usually brought before the courts only if the organisations are convinced that they will prevail. Experience under Belgian and French laws (Art. 46 Loi Royer, see Chapter 9, No. 212) shows the same result.

The scope of the acts varies widely. While in the area of collective action it is a point at issue whether only standard form contract conditions (Federal Republic of Germany) or unfair terms in general (Luxemburg and possibly the Netherlands) may be the subject matter of a cease and desist order, the countries advocating an administrative control system use very different terms: France — types of contracts (contrats-types), Great Britain — codes of practice, Ireland — codes of standards. This goes to show that public authorities may not only negotiate standard form contract conditions but beyond that also entire standard contracts laying down the parties' rights and obligations.

196 4 Collective negotiation of standard form contracts or types of contract

Collective negotiation means that representatives of the consumers and representatives of trade organisations come together in order to develop standard form contracts or types of contracts. Reasonable contract terms from the point of view of the consumer can be achieved only if consumers and industry enjoy roughly the same rights in the negotiations. This aim has not been achieved in any of the EC countries. That is why the success of collective

negotiation will depend on the degree to which it will be possible to strengthen the consumers' organisations.

(i) In **Denmark, Great Britain** and **Ireland** the legislators took up the idea of collective negotiation of types of contracts or standard form contract conditions and instructed public authorities to initiate negotiations.

— In **Great Britain, Denmark** and **Ireland** it is the task of the public authorities created for this purpose to initiate conciliatory talks between consumers and trade organisations. By the end of 1977, 12 codes had been agreed upon between the Office of Fair Trading and a wide range of organisations of suppliers of goods and services. They include the Association of Manufacturers of Domestic Electrical Appliances, the Association of British Travel Agents, the Electricity Council, the Vehicle Builders and Repairers Association, the Society of Motor Manufacturers and the Motor Agents Association, the Association of British Launderers and Dry-Cleaners, the National Association of Shoe Repair Factories, the Footwear Distributors Federation, the Mail Order Publishers' Authority, and the Radio, Electrical and Television Retailers' Association.

In **Denmark**, above all the certificate of guarantee should be mentioned, which was worked out by the Danish Association of Manufacturers and Importers of Household Appliances after consultation with the Consumer Ombudsman and the Danish Monopolies Control Authority.

(ii) Also without legislative pressure, negotiations between consumers and business people in some EC countries have resulted in the formation of standard form contracts or types of contract.

— With regard to **France**, the X-50 contract should be mentioned. The contract was drawn up on the initiative of the 'Consommation' group under the auspices of the AFNOR (Association Française de Normalisation) and with engineers, traders, consumers and public authorities participating. The X-50 contract has for its object the safeguarding of the interests of the consumer buying an apparatus (appareil) by means of provisions concerning useful life, quality and guarantee. It is not the object of the contract, though, to impose on the consumer's contracting party (the businessman) specific obligations. Rather, it is intended that the obligations the businessman has agreed to accept be laid down in writing. The consumer is to be given the opportunity of informing himself about the performance which he may expect. No doubt, the X-50 contract is a step forward. However, the lack of binding force at the same time reduces its importance considerably. In addition to that, consumer organisations and professional associations negotiated so-called contrat-types whose use is recommended to the members of the association in question. All the same, they are not subject to review under antitrust law (see No. 187). But they may be examined by the Commission des clauses abusives.

— In the **Federal Republic of Germany**, there exist a large number of terms recommendations (Konditionenempfehlungen) which were prepared by the professional organisations concerned. In actual fact, consumer organisations did not as a rule participate. A certain exception are perhaps standard form contract conditions governing the sale and repair of motor-cars, if the ADAC (Allgemeiner Deutscher Automobilclub) is regarded as a consumer organisation.

— In the **Netherlands**, the CCA invited the representative organisations of three industries — automobiles, wooden floors and utilities — to negotiate their general conditions with consumer organisations under the auspices of the CCA. So far, the outcome of these negotiations has been somewhat disappointing.

— As regards **Italy**, we can report merely an initiative of the Tenants' Trade Union against landlord and tenant contract forms.

— In **Belgium**, one of the major consumer organisations has drawn up four types of contract (contract for the sale of goods, real contract, agreement for a lease and contract for the repair of motor cars). Only 200 business people are known to have accepted the contract, so that we cannot speak of a broad effect.

— In **Luxemburg**, the National Consumer Organisation is working on standard contracts.

— In **Ireland**, apparently there are no trends toward collective negotiation.

197 5 Interdictions and sanctions

(i) As regards interdictions, we may note that under French and English laws the authorities involved and under German, Danish, and perhaps soon Dutch, Luxemburg and Belgian laws, the courts may prohibit the further use of specific clauses.

The civil law consequences of a prohibition appear to be quite similar. The question is what happens if a professional supplier violates a prohibition. Under **British** law, a violation has no civil-law consequences: the contract will not be void or unenforceable due to such a contravention, Section 26 of the Fair Trading Act. The same applies to **Danish** law. Any contravention of a prohibition issued pursuant to the Marketing Practices Act does not automatically entail civil-law consequences. However, a prohibited clause when used will in general be set aside pursuant to Art. 36 of the Contracts Act.

— The **German** solution takes into account the specific elements of collective action. Thus, a decision which declares a certain clause to be unlawful does not at the same time entail the ineffectiveness of such clauses in other contracts. An individual consumer may only render such clauses ineffective if he — in his own court action — refers to the decision.

(ii) **Criminal sanctions** are available under English, French, and Danish laws.

— In **Great Britain**, the Consumer Transactions (Restrictions on Statements) Order of 1976, as amended in 1978, makes it a criminal offence for anyone in business to use exclusion clauses in the circumstances in which Section 6 of the Unfair Contract Terms Act stipulates that such clauses should be null and void (relates to exclusions of seller's liability, see Chapter 6, No. 140).

— In **France**, the situation is quite complicated. The order of March 24, 1978, forbids the complete exclusion of warranty. Violations are not punished. But the order at the same time provides for an obligation *to mention* legal guarantee. If business people violate this obligation they will be punished (see Chapter 6, No. 140).

— In **Denmark**, a supplier who is guilty of a breach of an injunction may be fined and imprisoned for a period not exceeding six months (Art. 19, Section 1, MFL).

— The situation under **German** law is quite special. First of all, it may be noted that the Standard Form Contract Act does not list any criminal sanctions. However, pursuant to Art. 15 of the Act, the provisions of the Code of Civil Procedure (Zivilprozeßordnung) apply to the procedure described above. The reference includes Art. 889 and 890. This is important, as in those Articles the possibility of civil penalty is laid down (up to DM 500 000). When a prohibited clause is used, such penalty is due to the state.

— **Ireland**. Clause 11 of the Sale of Goods and Supply of Services Bill contains a restatement of the British Consumer Transactions (Restrictions on Statements) Order making it a criminal offence for anyone in the course of business to display or publish a statement that goods will not be exchanged or money refunded or that only credit notes will be given for goods returned.

198 6 The control of standardised terms in individual proceedings

Unfair terms are controlled mainly under individual proceedings if the decision depends on the effectiveness of a clause. Unfortunately, decisions arrived at in individual proceedings are effective only between the parties to the proceedings.

(i) The courts in all countries apply a three-tier system of control: *firstly*, the courts examine whether standardised terms have become part of the contract. In Italy, Art. 1341 of the Codice Civile, in the Federal Republic of Germany, Art. 2 of the Standard Form Contract Act, and perhaps soon also in Luxemburg and the Netherlands, the requirements of incorporation are provided by law. *Secondly*, standardised terms will be interpreted. The courts have commonly accepted the essential of restrictive interpretation. When there is doubt as to the precise contents, standardised conditions will be interpreted in favour of the consumer. The Italian Civil Code, Art. 1370, the German Standard Form Contract Act, Art. 5, as well as the French and Belgian Civil Codes, Art. 1162, have established specific rules. *Thirdly*, there will be open control of the contents, which has been discussed above (No. 178).

(ii) The courts are entitled to declare unfair clauses to be ineffective. The ineffectiveness of some clauses does not entail the ineffectiveness of the entire contract. Whether or not a contract is valid will depend on the relationship between the void clause and the other provisions of the contract. If the ineffectiveness of some clauses changes the nature of the contract, the consumer has the right to refuse to pay or demand redhibition. Art. 6 of the German Standard Form Contract Act and Art. 36 of the Danish Contract Act contain an express provision to that effect. The English breach-of-contract doctrine may lead to the same result if the newly developed doctrine of 'unconscionable dealing' is transferred to a general principle.

199 IV EVALUATION AND CRITICAL ANALYSIS

(i) A solution to the problem of unfair terms which is anything like satisfactory from the consumer's point of view could be found if the EC countries broke away from the principle of freedom of contract in transactions between

consumers and business people and created consumer protection acts laying down binding rules of the contents of contracts. As such regulation is not to be expected for all consumer contracts in the near future, we think that the control of unfair terms will be with us for a long time to come.

(ii) The comparison of control instruments under substantive law has taught us that the EC countries are far from a uniform solution. To be sure, it should be considered a step forward that all EC countries have already enacted laws to fight unfair terms or have drawn up drafts to that effect. However, the individual regulations differ in their legislative procedures: general clause, yes or no, supplemented by blacklists, yes or no, as well as scope in terms of matters and persons covered. In our opinion, unification of the scope of application should be endeavoured in the first place. Control should extend to include unfair terms and should not be limited to standard form contract terms, for any restriction, as provided for under German law, invites the parties applying standard form contract conditions to evade the law. The laws should apply only to the consumer. Small businessmen, craftsmen and industrialists should not be included in the statutory regulation, since their interests can be compared with those of the consumers to a very limited extent only. Nearly all acts and drafts include an important restriction in that unfair terms under public law do not come within their scope of application. However, public enterprises and organisations in the same way as industry tend to use their powers to the detriment of the consumer.

(iii) The control systems under procedural law in the EC countries present a very confusing picture. There are fewer common features than in the area of substantive law. We will refrain from making proposals, since the established systems started to operate only a short while ago and therefore final evaluation should be premature. Still, we should like to mention that the control of unfair terms by way of collective action does not appear to effectively improve the existing legal status, if we base our considerations on the experience gained in Germany. The 'negotiation approach' — Denmark, Great Britain and Ireland — should have the greatest chances of success, since here the consumer's week bargaining position is strengthened by appropriate government support. Of course, this approach must not result in the state negotiating *on behalf* of the consumer, for the state has to perform a variety of partly conflicting functions which may be a handicap in negotiations. That is why it must be a priority task to organise consumers in such a way that they are equal partners of industry. The commonly known difficulties encountered in organisation might perhaps be obviated if the trade unions could be prevailed upon to safeguard the consumer's interests more effectively. At any rate, the state should be allowed to declare collectively negotiated types of contract or standard form contract conditions obligatory. That is the only way of achieving a broad effect.

CHAPTER 9

Consumer Advice and Redress

200 I GENERALITIES

There is agreement among consumer lawyers in all EC countries that improvement of the law will be of no avail to the individual consumer if he cannot assert his rights in any easy, inexpensive and quick procedure. Even if governmental supervisory agencies, institutions of self-control, and consumer representation work perfectly well, the individual consumer will needs ways and means of enforcing his rights and of making law work to his benefit. This necessity will be felt to be even more important in those areas of consumer law that are entirely subject to civil-law sanctions, such as many aspects of safety, quality, unfair contract terms and consumer credit.

In the past, the legislator concerned himself very little with the improvement of the consumer's situation in the enforcement of his rights. Law accorded equal treatment to all its subjects, be they rich or poor, be they a big corporation or a low-income consumer who cannot afford a lawyer. The equal treatment of people in different income brackets, the great principles of legal procedure since the French revolution, have caused great injustice and have not been able to guarantee effective consumer protection. Traditional legal procedure in civil matters treats consumer problems as individual problems, not as collective problems. It takes for granted that every consumer knows his rights or can at least afford a lawyer who will help him to know and enforce his rights. Hence, it is for the individual to decide whether or not to institute proceedings; the same proceedings will apply to all groups of the population irrespective of their social status. The judge, according to the traditional concept, is regarded as a neutral arbiter who does not take an interest in the outcome of the case but simply applies the law to the facts presented to him. He will not be allowed to help one party, for instance a consumer, to state his case more favourably, to apply for additional evidence, etc.

According to the traditional concept of legal procedure, all facts outside the courts do not interest the judge. He does not care about how the individual is informed about his rights. With certain qualifications, contractual relations will allow for procedures out of court which may be detrimental to the consumer or may change the place where the case is normally heard (so-called jurisdiction clauses).

The law is not interested either in the actual handling of the traditional system. The legislator will not be scandalised if the courts are used mostly as

debt collecting agencies and are hardly ever asked for help by the consumer. He will not take care of the actual impact of costs, lawyer's fees and rules of final responsibility for judicial charges. He may in some extreme cases only help the poor man to get his due.

There is growing concern in all EC countries about the actual functioning of the judicial system. This is not, of course, a matter of consumer policy only but of social policy in general. We agree with Art. 32 of the EC Programme of Consumer Protection of 1975 that there is a need for advice and help to the consumer and that effective, inexpensive and speedy procedures in and out of court have to be established to implement his rights. Law and court practice in the EC countries are currently very much in a state of flux. The reform movement has yielded definite results only in some fields which vary widely among the EC countries. We shall proceed so as to cover first questions of advice and help outside legal proceedings, then report on new systems to settle complaints raised by consumers and finally analyse new trends in procedural law aiming at developing for the courts an approach which is more consumer-orientated.

II LEGAL ADVICE AND HELP

201 1 The need for legal advice and information to the consumer

If the legislator formulates new laws to protect the consumer or improves and reforms existing laws, he must take care that the individual will benefit from these changes. There must be information about the impact of new laws on the consumer's legal position.

The need for legal advice is also necessitated by the existing laws. The consumer may enjoy rights by law which he is not aware of. Very often, for instance, in the field of safety and quality of products and services (Chapters 5, 6), law reform may simply be effectuated through better knowledge and application of existing laws. The consumer is not a legal expert and cannot by law be treated as such. He has neither money nor time to seek a lawyer's advice. Frequently, his questions about problems under existing law will be quite easy to answer or will simply demand the writing of a letter to a trader who has deceived him or delivered to him shoddy goods. There is no need to initiate legal proceedings in such cases. If the consumer does not get legal advice, this will simply mean that the law accepts non-compliance due to the consumer's lack of funds.

Many devices and schemes for legal advice have been developed by consumer organisations. In Section 4 (No. 204) we shall mention some of the experience gained in this field. First, we will give an account of the situation prevailing with respect to legal advice.

202 2 The legal basis: Existing restrictions

Most EC countries regard it as the principal object for members of the Bar to give legal advice and help. To our knowledge no EC country, with the exception of the Federal Republic of Germany, will consider it to be a *monopoly* of the Bar to furnish legal advice and to prevent other institutions and persons, even if

learned in the law, from giving legal advice. The lawyers' monopoly is usually restricted to court pleadings and to certain acts of legal work, but not to legal counselling in general and legal advice.

The law of the **Federal Republic of Germany** is unique in the EC countries in that it includes a special act, the Legal Advice Act of December 13, 1935 (Rechtsberatungsgesetz), making it an offence under criminal law for any person not being a registered lawyer or not having a special licence to give legal advice. The concept of the provision of legal services as laid down in Art. 1 of the Act is formulated in very broad terms according to legal precedent. No remunerated activity is necessary to be subject to the ban on the provision of legal advice by way of business (Verbot geschäftsmäßiger Rechtsberatung). All legal advice on a specific case, any assistance in framing a contract, any correspondence in prosecuting legal claims, any reply in a legal question-and-answer column, is subject to the ban under Art. 1 §1 of the Act as soon as it is more than a chance incident.

Exceptions to the ban on legal advice exist in the case of membership-based associations giving advice to their members. Among these number, for instance, the ADAC and the tenants' associations concerning their activities as laid down in their by-laws, but not the main consumer associations, since they are not organised on a membership basis (see Introduction, No. 4). However, the regional consumer associations (Verbraucherzentralen) or their individual employees may be allowed to give advice as has been done in some German Länder. This permission is usually given only for a certain time. The Verbraucherzentrale may not advertise its legal service. These provisions hamper the Verbraucherzentrale's activities.

To our knowledge, there are no acts similar to the above in other EC countries.

203 3 The legal basis: Acts on legal advice

In most EC countries, reforms are under discussion which aim at making legal advice on a no-cost or low-cost basis available to consumers or to all persons with low incomes. Legal advice acts or bills will cover consumer law only incidentally and will extend their scopes to include advice in other fields, such as matrimonial matters, landlord and tenant disputes. We would like to mention the following acts or bills:

— In the **United Kingdom**, a Legal Aid and Advice Act was passed in 1974. There are two schemes for obtaining legal advice from an expert out of court. There is a £25 scheme by which the solicitor decides whether the applicant may get legal advice. The amount of assistance is based on the consumer's income. The Green Form Scheme is applicable if legal advice involves costs exceeding £25. The area committee's approval is required before the advice is given and the costs are charged to the legal advice fund. Under the Legal Aid Act of 1979 this scheme is to be extended to legal representation.

— In the **Federal Republic of Germany**, a Bill on Legal Advice (Beratungshilfegesetz) was put up for public discussion in 1978. The Bill puts legal advice into the hands of lawyers but allows the existence of public legal advice centres in big cities, such as Hamburg, Bremen and West Berlin. There will be two schemes

under the Bill, a DM 50,00 scheme by which the lawyer decides whether the applicant may get legal assistance, and a scheme involving higher costs, a decision relative to which has to be taken by the court of small claims (Amtsgericht). Legal help and advice is available to persons with low or moderate incomes. It is not known whether the bill will become law because of financing problems.

— In **Denmark**, pursuant to Article 135 of the Danish Administration of Justice Act anyone earning less than a certain amount of money (at present about 75% of the population meets this requirement) may initially consult almost free of charge any private practising lawyer who has notified the local court that he is prepared to give legal advice under the scheme. The lawyer gets a salary of £20, £15 of which is paid by the state while the client has to pay £5 himself. A sufficient number of lawyers have joined the scheme. However, until now only a few people (about 3000 a year) have consulted a lawyer under this scheme. Private legal advice institutions have been more successful. Such institutions may get financial support from the state. The advice and help given is free and more comprehensive than under the legal-aid-at-practising-lawyer scheme which the Minister of Justice may rule out in areas where private legal advice institutions exist. Also, the Minister of Justice may establish public legal advice institutions, but so far he has not done so. Legal advice is also given by the Consumer Complaints Board (see Section III), and the Consumer Committee has proposed that local consumer advice centres should be set up. This proposal is now being considered by the Ministry of Commerce.

— In the **Netherlands**, a reform is under discussion aiming at the inclusion in the law of a right to legal advice.

— In **Luxemburg**, an Order by the Minister of Justice of November 16, 1976 established centres of legal advice and help (service d'accueil et d'information juridique).

— In **Italy**, a reform is under intense discussion. A working group of the Ministry of Justice suggested a directive in 1978 whereby legal advice should be given within the framework of social assistance. The group opted for a mixed system of legal advice which is to be given either by public law centres or by private attorneys.

204 4 Practical experience in the EC countries

There have been many experiments out of court to establish schemes of legal advice. We will just mention the most important ones and pay specific attention to those that try to help the consumer.

— The most advanced system seems to exist in the **United Kingdom**. There are different institutions to which a consumer may turn in order to get help, advice and information on legal matters.

Since 1939, there have been Citizens Advice Bureaux helping private persons with respect to legal problems. The bureaux do not only deal with consumer problems but also other problems of law. About one sixth of the cases relates to consumer law. There are now 710 bureaux which are all members of the National Association of Citizen Advice Bureaux. They have about 9000 employees, many of whom are unpaid. The bureaux will explain the law, help in

filling out a form, write a letter and join in arbitration proceedings. Some of the bureaux have agreements with solicitors about legal advice. It is the bureaux' special policy to reach the poor and little educated.

In Great Britain, the Consumer Advice Centres are another organisation the consumer may turn to. There are now about 120 of them which are run by local authorities, citizens' advice bureaux or consumer associations. They will give advice and help to the consumer not only in legal but also in economic matters.

Law centres or neighbourhood law firms have spread considerably since 1970. They met with strong opposition from the legal profession. There are now about 30 of those centres which are funded either by the government, local authorities or by charities. They employ solicitors and work mostly on landlord and tenant cases, but sometimes also on consumer problems.

Experiments have been made in the United Kingdom with legal advice centres on a voluntary basis. They have not won the support that is necessary for their existence.

— In **France**, legal advice is either given by lawyers on a voluntary basis or by local consumer organisations (UROC), though on a small scale only. In 1976, the government started an experiment with complaint handling and consumer information including matters of law called Boîte Postale 5000. The experiment was first made in six departments and was extended in 1978 to cover the entire territory of France. By simply writing a letter to the Departmental Direction of Competition and Consumer Protection, the consumer may gather information on all matters of consumer policy and law.

— In **Belgium**, there is a special magazine published by the Association des Consommateurs, *Test-Droit*, which is devoted exclusively to consumer law problems involved in giving advice to consumers in legal matters. In addition, law shops (Boutiques de droit) have been established. There are about 20 of these law shops in Belgium which are still not enough to help the consumer. There are few information centres run by public services and only in urban areas.

— In the **Netherlands**, the Consumentenbond as a membership organisation may give legal aid and advice to its members. Since 1969 law shops (Wetswinkel) have come into being which try to give legal advice to the consumer.

— In **Denmark**, the Consumer Council (Introduction, 9 No. 4) and local consumer groups will give legal aid.

— In **Luxemburg**, the ULC will give legal advice and help.

— In the **Federal Republic of Germany**, different systems of legal advice have been tried out. We have already mentioned the possibility of the Verbraucherzentralen getting permission under the Legal Advice Act. Other forms of legal advice are not directed specifically at consumer protection but at help to socially deprived classes. There are public services for legal advice in Hamburg, West Berlin and Bremen, and in some other cities. There are voluntary schemes worked out by local bar associations and the courts. There also have been pilot experiments in some Länder. Legal advice will usually be given by lawyers who get their costs refunded by the government. There are different rules of awarding such help. 'Stiftung Warentest' in its journal *test* (Chapter 1, No. 36) has started legal advice by drafting letters of complaint, etc.

— In **Ireland**, legal advices centres have been operated by law students since 1969.

— In **Italy**, some consumer organisations, such as the Comitato Difeso Consumatori as well as trade associations will give legal help to their members.

III COMPLAINTS

205 1 Special complaint procedures provided by the law

Consumer complaints will frequently bear on legal issues and will customarily have to be decided by the courts. As we have seen, these procedures will not usually take into account the consumer's special situation. An attempt has at least been made in the Scandinavian countries to make legal arrangements for simple, inexpensive and effective procedures relative to consumer complaints. So far, **Denmark** is the only EC country which has provided for such procedures by law.

The *Consumer Complaints Board* was established by the Act of June 14, 1974. The Minister of Economics issued jurisdiction and procedure regulations on May 28, 1975.

Art. 1 of the Act reads: 'Complaints by consumers relating to goods, work or services may be brought before the Consumer Complaints Board'. The Act then provides for the organisation and composition of the Consumer Complaints Board. The Board is composed of a president who must be a trained lawyer, and an equal number of representatives of consumers' and traders' organisations who are nominated for three years of membership. If a complaint is filed, legal proceedings will rest until the Board has decided about the complaint. If a case which might be settled by the Board is brought before the courts, the judge shall inform the consumer of this fact and if the consumer so wishes refer the case to the Board for settlement. The decisions by the Board, even if taken unanimously, are not binding by law. A producer or trader against whom a complaint has been lodged, which is considered justified by the Board, is not legally bound to comply with the Board's decision. The Consumer Ombudsman, however, may bring the case before the court if the Board's decision has not been complied with. The law tries to use an indirect way to give effect to the Board's decisions.

The jurisdiction regulations define what type of complaint may be brought before the Board. All complaints concerning goods or services the price of which does not exceed DKr 10 000 may be submitted to the Board. No complaints will be allowed relating to housing, motor vehicles, food, liberal professions. This limitation of the Board's powers was found necessary at the beginning in order to build up the Board in a way which enables the state to control the costs. Commercial transactions do not come under the complaints procedure.

The rules of procedure define the standards which have to be met if a complaint is handled by the Board. Usually, the complaint will be in writing on a special form, and the consumer will have to pay a small fee of DKr 25 to get his case handled. The Secretariat of the Board screens the complaints and sees to it that they are correct from a formal point of view. The procedure within the

Board is usually a written procedure. The Board will try to reach an agreement between the parties. If this is not possible, it will make a decision and give its opinion on the case. It may hear experts on the case which will involve no costs to the consumer. It should be mentioned that the consumer gets the fee of DKr 25 back if the Board considers his claim justified, be it in whole or in part.

There is agreement among legal writers that the Danish Consumer Complaints Board shows very interesting and positive aspects of the handling of consumer complaints. It will be helpful in all cases that are not too complicated and where there is enough good will on both sides to settle the case. To what extent it will help the poor consumer is still subject to debate. The written procedure will deter the little-educated consumer from filing a complaint.

206 **2 Procedures not regulated by law**

As we mentioned before, there is no EC country having an act that establishes a complaints procedure in the same way as the Danish Act of 1974. On the other hand, complaint procedures have developed in most EC countries and are actively supported by the government and consumer organisations if they allow effective complaint handling and if they guarantee a right of representation to the consumer. We will only mention the experience we consider most important in this field.

— In the **Netherlands**, complaint procedures have developed quite rapidly in the past five years. We would like to mention the following schemes:

Stichting Consumentengeschillen is a joint venture by the Consumentenbond and trade organisations. There are now five of these boards in the Netherlands, dealing with interior decoration, dry cleaning, laundry, recreation and travel. The boards apply a written procedure and request the consumer to pay a small sum. There will be no other costs. The board will give binding advice in the matter submitted to it.

Complaint boards have been set up by traders or business organisations in branches, such as holiday travels, dry cleaning, car repairs and furniture. Few of these complaint boards are operated jointly by trade organisations and consumer organisations.

The government actively promotes these boards and issued a regulation on November 26, 1975 pursuant to which it will grant funds to these boards. To receive funds, the boards must meet some basic requirements: there must be impartially of procedure, there must be equal representation of consumer organisations, the president of each board must be independent and trained in the law, and the parties must have the right to be heard.

The decisions taken by these boards are not judgements under law but only arbitral awards containing binding advice. The award does not set aside a court decision but the courts will usually accept it if it is reasonable.

There are other agencies in the Netherlands handling consumer complaints, especially relative to advertising and life assurance.

— In **Belgium**, arbitration schemes have been set up for holiday travels, house construction and dry cleaning, but have not yet achieved the extent of consumer protection prevailing in the Netherlands. A new scheme on an equal-representation basis will be set up in 1980 to deal with tourism.

Some self-control systems, for instance in advertising and mail-order sales, have introduced special complaint procedures. Some big enterprises have set up an internal complaint handling service.

— In **Luxemburg**, the ULC takes part in arbitration schemes.

— In **France**, the above-mentioned experiment of Boîte 5000 takes account of complaints in cases of violation of consumer law and assigns them to the services charged with law enforcement. The Departmental Directions of Competition and Consumer Protection have set up conciliation commissions (Commissions de conciliation) on which consumer organisations and business organisations are represented. These commissions do not have any power of coercion. So far, these commissions have produced positive results.

— In the **United Kingdom**, the handling of complaints has always been regarded as part of the legal advice service rendered by Citizen's Advice Bureaux or Consumer Advice Centres. The Consumer Advice Centres have specialised in dealing with complaints, expecially concerning motor vehicles, furniture and household appliances, and will often reach settlement or secure damages for the consumer.

Further steps in complaint handling have been taken in two directions: under Section 124 of the Fair Trading Act (see Chapter 3, No. 59), the Director General of Fair Trading may sponsor agreement on and monitor codes of practice and conduct. These codes will always contain provisions on complaint handling and will ask for equal representation and some basic procedural requirements. They have been accepted by most suppliers in the following trades and industries: travel, electrical appliances, dry cleaning, laundries, and similar trades.

Arbitration schemes have been set up in Manchester and Westminster (for London). Claims up to £250 may be brought before the Board. It is, of course, not required to submit a claim to the Board or to appear at its hearings. The services of lawyers may not be used in the proceedings. The arbitrator usually is an experienced lawyer.

— In **Ireland**, the state of affairs is not as advanced as in the United Kingdom. This may change if the Director of Consumer Affairs will bring his influence to bear on sponsoring and monitoring codes of practice under Section 9 of the Consumer Information Act of 1978. The Industrial Research and Standards Institute (see Chapter 2, No. 36) takes part in informal conciliation procedures.

— In the **Federal Republic Germany**, different arbitration and conciliation procedures have been set up in recent years and have won government support. Certain trade organisations, for instance in the field of dry cleaning and holiday tours, have established complaint procedures (Schiedsverfahren). Craft corporations, for instance in the field of car repairs, have established conciliation schemes (Schlichtungsverfahren). There is no general rule or practice in the Federal Republic to the effect that complaint boards must comprise an equal number of representatives of business and consumer organisations. On the other hand, many trade organisations or craft corporations have voluntarily asked consumer organisations, such as the Verbraucherzentralen or the Automobile Clubs, to join in their complaint-handling procedures.

The procedures are still known very little to the consumer and do not enjoy great popularity.

The new Bill to Amend the Act Prohibiting Unfair Competition (see Chapter 3, No. 57) will establish an arbitration procedure concerning misleading advertising and unfair methods of salesmanship. The arbitration boards will be composed of an equal number of representatives of traders and consumer organisations.

I V CONSUMER PROCEEDINGS IN COURT

207 1 A general problem: No special proceedings with respect to consumers

If, in asserting his rights against a trader or some other businessman, the consumer is not helped by the extra-judicial means currently under development, he will have to go to court. Even if modern consumer policy tries to take away consumer complaints from legal proceedings in court, there may still be matters regarding which it is unavoidable to bring an action in an ordinary court of civil or criminal jurisdiction. This may be true especially for cases in which the parties quarrel about the interpretation of new laws, in which matters of general interest are decided, or the facts are complicated and need be dealt with more throughly than is possible by the extra-judicial means of consumer protection.

As we mentioned above, the ordinary proceedings in court are hardly apt to encourage consumer actions, for the courts are mostly used as debt-collecting agencies. To our knowledge, legislation in none of the EC countries has been capable of completely overhauling judicial procedure as it is currently functioning and being practiced. On the hand, we may note trends towards reform to varying degrees, which, if completed successfully, will make it easier for the consumer to gain access to the courts. This reform movement originates not in consumerism but in the general social and legal unrest about the court system. Hence, we will not try to describe the entire scope of the reform movement, its successes and failures, but only its importance to consumer protection.

208 2 Legal aid in court

Most EC countries have a system of legal aid in court proceedings. The general principle of these schemes in its traditional approach is largely the same in the various countries. Legal aid is provided for poor people who cannot afford the costs of legal proceedings. There will be a preliminary examination of the applicant's social status and the reasonableness of his cause. The practice of granting legal aid will be rather restrictive and will try to discourage actions in court.

Modern legislation tries to extend legal aid and to abolish some of the restrictions which are imposed by existing schemes.

— In **Great Britian**, the above-mentioned Legal Aid and Advice Act of 1975 tries to take up a more modern approach to legal aid. The applicant must prove that he has reasonable grounds for taking action. The local committee will decide on whether or not to award legal aid: appeals may be lodged with the area

committee. Due to inflation, the scheme may not help those in the lower-middle income bracket. A grave disadvantage of the Act is that the Legal Aid Fund has prior claim on any costs or damages recovered from the other party. This means that legal proceedings under the Legal Aid Act may prove valueless to the consumer.

— In **Italy**, a Decree of December 30, 1923 calls for unpaid aid by lawyers if poor people want to bring an action. This policy practically bars poor people, especially poor consumers, from the courts and pursues social policy at the expense of the lawyer. A reform movement to change that situation is under way. The Bill of 1973 did not pass. Its principal directions were that lawyers giving legal aid should be paid ordinary fees, that the applicant may ask for his own lawyer, and that he must show that his position is reasonable.

— In the **Federal Republic of Germany**, legal aid is provided for by the court of civil procedure (Armenrecht). There is unanimity among politicians and legal scholars that the scheme provided for needs a thorough work-up. The Federal Government submitted for discussion a new Bill on Legal Aid (Verfahrenshilfegesetz) in 1979.

— In **Denmark**, rules on free legal aid to initiate proceedings in court are to be found in the Administration of Justice Act, Chapter 31. People earning a certain income (about 80% of the population meets this requirement) may be granted free legal aid provided they have a reasonable cause of action. If a person is granted free legal aid, he is exempted from paying court fees, and the state will pay the costs of a lawyer assigned to handle the case, the costs of experts witnesses and other witnesses as well as all other costs incurred in the proceedings. However, if he loses the case, he will normally have to pay the costs of his opponent himself.

— In **Luxemburg**, there exists a system of legal aid (assistance judiciare) now improved by the Ministerial Regulation on Legal Advice of November 16, 1976 (No. 203).

209 3 The interdiction of jurisdiction clauses

Most EC countries have reformed their Codes of Civil Procedure in order to ban jurisdiction clauses. These clauses derive from the principle of contractual freedom and usually oblige the consumer to bring his action not at his place of residence but at the entrepreneur's place of business. Jurisdiction clauses deny consumers access to the courts.

We would like to mention the following reform acts:

— In the **Netherlands**, Art. 98a of Wetboek van Burgerlijke Rechtsvordering of 1965 declares null and void any clause stipulating that the Kantongerecht of a district other than the consumer's place of residence shall have jurisdiction.

— In **Belgium**, Art. 1023 of the Code judicière prohibits clauses making access to the courts impossible or unreasonably onerous. Clauses stipulating another competence are allowed. In consumer credit transactions (see Chapter 7), action may be brought only at the consumer's domicile.

— In **France**, an Act of December 5, 1975 changed Arts. 42 – 48 of the Code de procédure civile. Under Art. 46, the place of jurisdiction is the defendant's domicile, the place of delivery of the goods or performance of the service. The

place of conclusion of the contract is not a valid basis of jurisdiction. Art. 48 bans jurisdiction clauses with non-merchants.

— In the **United Kingdom**, different acts apply. The Administration of Justic Act of 1973 allows the consumer to bring his action in the court of the area where the defendant lives or carries on business or where the cause of action arises, which may sometimes be his domicile. The Unfair Contract Terms Act prohibits clauses stipulating that the purchaser will not be allowed to institute proceedings should the goods prove to be defective. The Consumer Credit Act allows proceedings on regulated agreements at the consumer's domicile.

— In the **Federal Republic of Germany**, a Reform Act of 1973 changed Art. 38 of the Code of Civil Procedure. Jurisdiction clauses with non-merchants are banned. Proceedings may be instituted either at the consumer's domicile or at the place of performance of the contract. Cases on instalment sales (Chapter 7, No. 155) will be tried in the court of the consumer's domicile.

— In **Denmark**, jurisdiction clauses may be prohibited pursuant to the Marketing Practices Act and set aside in the individual contract pursuant to Article 36 of the Contracts Act.

— In **Luxemburg**, the Bill on Legal Protection of the Consumer of 1978 forbids jurisdiction clauses and will allow proceedings only at the consumer's domicile (Art. 5).

4 Specific court proceedings involving small claims

A reform movement has tried to ease the procedural handling of small claims. We will not describe the general framework of legal procedures relating to small claims in the EC countries but just mention the most important reform activities.

210 (*a*) *New procedures*

— In the **United Kingdom**, a special procedure exists concerning small claims. Claims up to £2000 may be brought before the county courts, in Scotland before the sheriff courts. No barrister is required for pleading. The cases are tried by the judge in a relatively informal procedure.

The Administration of Justice Act of 1973 has established a special small claims procedure before the registrar of the court. The registrar may refer cases involving up to £200 to arbitration if so requested by one of the parties, and cases involving over £200 if so requested by both parties. The registrar will take active part in the proceedings. The Lord Chancellor has issued a schedule providing for summary proceedings. Experts may be consulted, lawyers are allowed to participate but discouraged from doing so. Each party must bear its own costs and cannot charge the other party even if it wins.

In Scotland, there is no similar small claims procedure.

211 (*b*) *The absence of specific procedures*

— In **France**, a special small claims procedure is not known. The action civile may be used on a broad scale in criminal courts. The Reform Act of 1959 of the

Code of Criminal Procedure made this action more attractive to persons whose rights are infringed by a criminal offence. The consumer may initiate criminal proceedings himself if he has suffered damage in tort. He will incur low costs but must retain a lawyer.

— In the **Netherlands**, the Kantongerecht hears cases up to Dfl 3000 as well as all hire-purchase cases. A report of the Commissie voor Consumentenaangelegenheden calls for a simplification of the procedure.

— **Belgian** law does not provide for a small claims court for consumers but allows simplified proceedings before the justice of the peace in cases involving up to Bfr 25 000.

— In the **Federal Republic of Germany**, the local courts Amtsgericht may hear cases involving up to DM 3000. A lawyer does not have to take part in the proceedings. The judge may participate actively in the trial of the case. On the other hand, there are no special small claims procedures.

— In **Denmark**, the introduction of a special small claims procedure is being considered by the Ministry of Justice, and it is likely that a bill will be proposed in 1980.

— In **Luxemburg**, there is no small claims procedure, which may not be necessary in a small country. The bill on Legal Protection of the Consumer of 1978 provides for the possibility of the judge, in cases of proceedings against a 'private final consumer', to sentence the businessman to pay the costs of the proceedings even if the consumer loses his case. By that means, consumers should be encouraged to assert their right in court notwithstanding the danger of not only losing their case but also of having to bear all costs.

212 5 Special proceedings concerning consumer organisations

As we already mentioned regarding the law of advertising (Chapter 3, No. 60), no EC jurisdiction allows class action by groups of consumers or consumer organisations. Some EC countries are trying to develop collective actions by consumer organisations into an effective means of protecting the individual consumer. In this conjunction we would like to refer to our statements in the foregoing chapters and to summarise the following developments. (For collective action against unfair contract terms, see Chapter 8, No. 193.)

— In **France**, Art. 46 of the Act of December 27, 1973 (Loi Royer) allows action civile by consumer organisations 'relativement au fait portant un préjudice directe ou indirecte à l'interêt collectif des consommateurs'. This action is not only directed against misleading advertising, but also against unfair methods of sales promotion, violation of safety standards and infringements of price description. Art. 45 allows civil actions to be continued if criminal proceedings are discontinued. Consumer organisations may claim damages under these proceedings, but no practical experience has been gained in France as yet concerning the extent to which these damages will take into account the members' interests and will benefit them.

— In **Belgium**, the consumer organisation has no right to act on behalf of its members unless claims are assigned to it. A new decision by the criminal court of Brussels allowed consumer organisations to take part in criminal proceedings and to ask for nominal damages. The judgement was not upheld on appeal.

The 'action en cessation' under the Act of 1971 (see Chapter 3, No. 60) does not allow the award of damages to consumers.

— In the **Federal Republic of Germany**, an interesting new development is taking place regarding the Act Prohibiting Unfair Competition (see Chapter 3, No. 60). A reform bill tries to enable damage suits on account of grossly misleading claims in advertising and unfair salesmanship. Consumer organisations will be entitled by law to act on behalf of their members to recover damages. The consumer organisation will have to pay the damage awards to those who have assigned their claims. It may keep part of the award to offset its costs.

— In **Denmark**, it might be mentioned that the Danish Consumer Council enjoys legal standing in cases concerning marketing practices and restraint of competition if the matter concerns consumer collectively.

— In the **Netherlands**, we would like to mention the initiative by the Commissie voor Consumentenaangelegenheden proposing collective action in the field of unfair contract terms (Chapter 8, No. 193) and misleading advertising (Chapter 3, No. 60).

— In **Luxemburg**, the Act on Unfair Marketing Practices of December 23, 1974 allows two modes of collective action to the Union luxembourgeoise de consommateurs: the right to take part in criminal proceedings (droit de se constituer partie civile à l'action publique) and the right to bring an action for injunction, both concerning fair trading practices and advertising. The ULC made use of these rights several times.

213 V CRITICAL EVALUATION

As we have seen in our analysis, there is growing concern for the improvement of extra-judicial and judicial means of consumer protection. These attempts at reform should be encouraged and shaped into an effective instrument of consumer policy. Existing restrictions, such as the German Legal Advice Act (No. 202), should be abolished.

Due to the national sovereignty of the EC countries, it will be impossible to approximate consumer advice and redress systems on an EC basis. The following steps might be taken on a Common Market basis:

— If acts on legal advice are adopted in one country, it should be made possible for all consumers living with the EC to make use of the schemes provided for by the acts if the legal problem comes under the jurisdiction of the country in which advice is asked for (e.g. travel contracts).

— Complaint procedures should be encouraged on an EC basis for certain industries and trades that have a strong Common Market impact (e.g. car sales).

— Procedures should be thought up to enable complaint settling out of court if the consumer comes under the jurisdiction of several EC countries. So far, approximation and reform have only concerned cases tried in court.

Conclusion

214 Our study should have shown that meanwhile the majority of the EC countries have their own consumer law. In this area there has been considerable reform activity over the past ten years or is currently in preparation. On the other hand, there is no doubt that still further activity is required to achieve the objectives of the EC Programme of 1975 in *all* EC countries. In the course of this study we kept pointing out loopholes and deficiencies.

For future reform activity at an EC level we consider the following strategies to be of prime importance:

(i) It is imperative that consumer law in the EC countries be harmonised with regard both to substance and to enforcement. The national reform acts with their different objectives, factual problems and possibilities of enforcement have resulted in a dangerous drifting apart of the laws within the EC. Here, the EC Commission will in future be faced with important tasks regarding law approximation.

(ii) The extensive reform legislation should not obscure the fact that execution and enforcement still show numerous deficiencies. In our study we were able only to touch on these points since consumer law has not yet been evaluated from the viewpoint of social science (apart from a few exceptions). It does not seem to be very sensible to keep calling for new reform acts if the existing acts are not applied or are applied insufficiently. Here, jurists are called upon to collaborate with social scientists to make up for the enforcement deficit in consumer law.

(iii) Under consumer law in force — also and specifically in reform legislation — 'consumers' and consumers are treated alike, with inadequate allowance being made for the social differences in the persons involved in each case. The equality forced on all consumers by law may lead to the unequal treatment of those groups that are unable to use the instruments of modern consumer policy, such as information and law enforcement. This results in objectives conflicting with those of the EC Treaty which aims at improving the living conditions of *all* citizens in the Common Market and not only of the middle classes. Also in this area further sociological studies are needed which can only be demanded but not accomplished within the framework of this study.

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