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Consumer sales guarantees in the European Union

Consumer Sales Guarantees in the European Union

Garanties bij consumentenkoop in de Europese Unie
(met een samenvatting in het Nederlands)

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*This guarantee does not cover shark bite, bear attack or children under 5.
Peli guarantee.*

Chapter I: Introduction

1. General introduction

I believe that every researcher starting his or her work tries to find some confirmation that the problem he or she is going to deal with is indeed difficult, sophisticated and requires new challenging solutions. When I began work on consumer sales guarantees in the EU, the subject of my research was, to put it nicely, not in the centre of anyone's attention, apart perhaps from Christian Twigg-Flesner who published an extremely interesting book on guarantees in 2003.¹

At first, guarantees at the European level were perceived from the competition point of view. The guarantee was seen mainly as a tool that, on the one hand grants a competitive advantage to the companies that use it, and on the other poses a danger of partitioning the emerging common market. This attitude was first presented in the mid-1970s and continued until the mid-1990s. The initial attempt to tackle consumer sales guarantees from the consumer/private law angle was made together with the Green Paper on Guarantees for Consumer Goods and After-Sales Services² published by the European Commission in 1993. It contained a thorough analysis of the guarantee on national and European levels, and put forward rather ambitious legislative proposals. The ideas of the Green Paper resulted in the Consumer Sales Directive³ being adopted; unfortunately, the initial proposals of the Green Paper were severely limited. The next years brought about a slight change in the approach – at least in the world of academic writing. It would be an overstatement to say that the consumer sales guarantees have made it to the front pages, but they definitely made their mark on the European discussion on the future of the European consumer law. In 2007, the European Commission published the Green Paper on the Review of the Consumer Acquis,⁴ which posed a number of questions regarding guarantees. No doubt this development was influenced by the Principles of European Law on Sales prepared by the Study Group on a European Civil Code,⁵ which created a basis for the Draft Common Frame of Reference⁶ delivered to the European Commission by the end of 2007. Both of them deal extensively with consumer sales guarantees. The year 2008 was marked by another development, i.e. publishing the Draft Consumer Rights Directive.⁷ Sadly the story repeated itself - as the initial Draft Directive to a

¹ Twigg-Flesner, 2003.

² Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM (93) 509 final.

³ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 07/07/1999.

⁴ Green Paper on the Review of the Consumer Acquis (presented by the European Commission), Brussels 08.02.2007, COM (2006) 744 final.

⁵ PELS 2008.

⁶ DCFR 2009.

⁷ Proposal for a Directive of the European Parliament and of the Council on consumer rights, Brussels, 8.10.2008 COM(2008) 614 final, 2008/0196 (COD).

large extent used the solutions of the Consumer Sales Directive. Finally the Directive was adopted in a very reduced form, not including rules on guarantees.⁸ In addition, the draft prepared by the group of experts established by the European Commission, published as a part of “A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback”⁹ does not contain any reference to consumers sales guarantees, apart from an obligation to mention the availability of the guarantee as a part of the pre-contractual information in some types of consumer contracts.

The consumer sales guarantee was recognised by the legal systems of the Member States well before the introduction of the Consumer Sales Directive. According to the data presented in the Green Paper of 1993, only Belgium, Germany and the Netherlands did not have any specific legislation on guarantees at that time. However, with the exception of certain legislation, like Ireland with its Sale of Goods and Supply of Services Act of 1980, Poland with Articles 577 to 581 of the Civil Code, or the Danish Code of Conduct Concerning Commercial Guarantees, which is not a legislation strictly speaking, but has a “quasi –legal” effect,¹⁰ regulation of the consumer sales guarantees in the national legal systems was far from comprehensive. Howells and Bryant¹¹ put it this way: “there is surprisingly little legal regulation of (guarantees). Several codes of practice deal with guarantees and include some enlightened provisions, but their coverage is patchy and often worded in very general terms.” Similarly, according to Cranston, with a few honourable exceptions, Member States’ laws with regard to consumer guarantees were sadly deficient.¹²

The lack of interest in guarantees was shared by legal writing where even the introduction of the guarantee to the European market regulation did not provoke a wide discussion on the subject.¹³ Almost all legal writing published before and after the enactment of the Consumer Sales Directive, as well as the publications that accompanied the national implementation of the Directive concentrated on conformity and did not give much attention to the guarantee.

The general absence of a legal framework, according to the Green Paper of 1993 is the fundamental problem that consumers have to face in relation to guarantees.¹⁴ The Green Paper claimed that the absence of a legal framework also means that gaps in guarantee documents cannot be filled, which diminishes their real value. Moreover, this legal vacuum leaves commercial guarantees at the mercy of unconstrained economic liberty and invites abuse and fraud on the part of less scrupulous operators, to the detriment of consumers and healthy competition.¹⁵

It must, however, be made clear that there is a certain misconception in claiming that the lack of legislation is the main source of problems the consumers have to face with regards to guarantees, as the Commission has in the Green Paper of 1993.¹⁶ The initial source of the

⁸ The text of the Directive is still not published.

⁹ http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf.

¹⁰ Fogt 2009, p. 238.

¹¹ Howells & Bryant 1993, p. 6.

¹² Cranston 1995, p. 111.

¹³ Twigg-Flesner 2003, p. 2.

¹⁴ Green Paper of 1993, p. 79.

¹⁵ Ibidem, p. 79.

¹⁶ Ibidem, p. 15.

problem is the behaviour of the market players – if it were fair, there would be no need for legislative intervention. The lack of legislation therefore is harmful only in light of the abusive behaviour of the market players.

According to the Green Paper of 1993, diverging national legislation on consumer guarantees “could stymie the establishment of a truly European industrial strategy and could well prove a headache for the business community, who would have to fine-tune their guarantee conditions to the various national laws”. Likewise, the distortion of inter-firm competition could occur whenever the national legal systems adopt widely different approaches.”¹⁷ The need to enact a pan-European regulation is, however, not universally accepted. Cranston, for example, answers to this that “the European-wide manufacturer or distributor is not likely to face great difficulty in coping with various national laws relating to the commercial guarantee; diversity in technical standards, a far more important barrier, seems to be fairly readily overcome in practice.”¹⁸

2. The guarantee paradox – the main problem fields

2.1 Lack of legislation

Naturally the question arises (quite devastating for somebody who has spent a couple of years researching guarantees) as to whether the guarantee is so unimportant and irrelevant for the market as the lack of legislation and scholarly discussion seems to suggest?

In my opinion, the truth is somehow different. The current position of the guarantee in EU law could be called a guarantee paradox. This paradox can be found on several different levels. It is created by the discrepancy that exists between the widespread presence of the guarantee on the market, and – on the one hand: knowledge among consumers regarding the guarantee as a legal scheme, and on the other: the lack of legislative recognition and support for the institution.¹⁹ The lack of knowledge amongst consumers concerning the guarantee could probably be explained by the general low level of knowledge regarding entitlements presented by consumers as a group. The intriguing question is why the EU legislator never fully recognised the practical importance of the guarantee on and for the EU market. The Green Paper of 1993 seriously presented the main problems in the area of the guarantee. It could be argued that the guarantee was given almost as much attention as the statutory regime of liability. At the end, however, the stress was placed on conformity. The declared functions of the guarantee on the EU market, and well as the dangers it creates, were trivialised. The legislative solutions proposed by the Consumer Sales Directive only addressed a fraction of the problems existing on the market, and it is highly questionable whether the manner in which it was done was optimal.

The decision to concentrate on conformity is clearly understandable from a political point of view, as the seller’s liability was already comprehensively regulated on the national and international level. The political success achieved by the Vienna Sales Convention on the International Sale of Goods created an optimal base for introducing EU-wide rules. Regulating guarantees was much more risky from this perspective. Moreover, conformity is a mandatory regime for consumer relations, which means that it applies every time the sales contract is concluded between a businessman and a consumer. When it comes to the

¹⁷ Ibidem, p. 80.

¹⁸ Cranston 1995, p. 114.

¹⁹ Green Paper of 1993, p. 15.

guarantee, the situation is completely different. Firstly, there was scarcely a regulation at the national level, and no regulation at a pan-national level. As such, it should not be an obstacle for adopting rules on the European level; on the contrary, it should have made the negotiations easier, particularly in the Council, as the Member States would not have to defend their national positions. In this particular case, however, the problem of the guarantee was overshadowed by the strict conformity regulation, and the main impact was seen to be in imposing rules in this area. The European legislator chose the safer path, which meant concentrating on the traditionally perceived liability of the final seller, which might not be best fitted to address the economic reality of the European market, but at least it guarantees a certain result. The Consumer Sales Directive does not really deal with the issues that could effectively address the cross-border dimension of consumer sales in the EU: the liability in the commercial chain, the producer's liability or even the issue of redress. A limited regulation of the guarantee, in the form of a voluntary undertaking used mainly by producers as a competition tool fits well into the picture, underlined mostly by the political considerations.

2.2 Lack of knowledge and lack of distinction

The consumer sales guarantee is a legal construction that has gained enormous popularity in consumer transactions. In 1993, the Office of Fair Trading conducted a survey in the UK, according to which 74% of the respondents had purchased, during the previous three years, at least one product accompanied by a guarantee, and 20% of these consumers invoked this guarantee. It should, however, be underlined that nowadays the guarantee not only accompanies sales contract very frequently, but it is also offered as a separate service. Being a marketing tool, the guarantee has found its way into the consumer's consciousness. Virtually every shopper is likely to say that he knows what a guarantee is. The problem is that almost all of these answers would be incorrect, for a guarantee is very often - almost all the time - mistaken for the buyer's statutory rights (conformity), which results from the fact that most consumers do not know the content of not only the EU legislation, but also the content of their own legal systems.²⁰ For example, in 1990 Mamraj made a conclusion that in Poland, after 20 years of the application of the Civil Code, which extensively regulated guarantees and their relation with the statutory regime, and with a growing popularity of consumer transactions in which the guarantee is employed, very often it is still unclear to an average buyer what the reciprocal relations are between guarantee and statutory entitlements.²¹

It would be unfair to claim that only consumers confuse guarantee with conformity – as sellers and producers also make this mistake. At the same time, the sellers are often not interested in correcting buyers' false understandings, as in most of the cases the guarantee is constructed in a way minimising or even entirely lifting the seller's statutory liability. Typical examples include: shorter time coverage, exclusion of certain categories of good deficiencies, etc., up to the extreme situation, where the seller's liability is replaced - in the mind of the buyer - by the producer's guarantee. In this case, when the guarantee is given by a party other than the seller, the consumer may never seek recourse against the seller.

Another aspect that adds to the confusion in the area of relations between the guarantee and the statutory regime of liability is the terminology problem. The statutory regime of liability very often is referred to as a legal guarantee. It means that consumer must distinguish between two (and if a legal system recognises obligatory guarantees – between three) different types of guarantees in the area of sales contract.

²⁰ Wilhelmsson 2004, p. 325.

²¹ Marmaj 1990, p. 259.

2.3 Lack of a legal construction of a guarantee

The fluid border between conformity and guarantee is not the only problem associated with this legal institution. The lack of a clear-cut guarantee distinction is directly connected with another issue – that of the lack of sufficient definition of the consumer sales guarantee. Its fluctuating shape makes it very difficult, if not impossible, for the consumer to learn and to get used to what the guarantee really is. At the moment, the consumer sales guarantee acts as an umbrella scheme. Under one name it covers many different constructions sharing one common characteristic: they assure that the product bought will function in a certain way and otherwise some remedies or assistance will be provided.

2.4 If it is so problematic why use it? – the positive aspects of guarantee

Despite the numerous problems that appear regarding guarantees, they are an extremely useful tool, from both the consumer and the business point of view. The positive aspects of guarantee not only exist but even outweigh the difficulties, which is proven by the increasing presence of the guarantee on the European market.

From a business perspective, a guarantee is a tool to reach out to consumers, to attract their attention and establish a closer relationship (for example by asking them to register the guarantee on the company's web page). A guarantee signals the good, sometimes exceptional, quality of the goods, and proves the confidence of the guarantor in the offered goods. Additionally, it allows the structure of the liability scheme to be managed, especially in the case of networks where the producer and the seller belong to one economical unit. By providing a guarantee, the guarantor is able to shift the consumer's attention from the conformity scheme to the guarantee, and benefit from the fact that the consumer first seeks recourse through the guarantee scheme (which of course may lead to abuse). Moreover, the flexibility of the guarantee scheme offers the possibility of a quick adjustment of its content to the ever-changing market situation and the expectations of consumers. This aspect of the guarantee benefits not only the guarantors but also the consumers.

From the consumer's point of view, the guarantee potentially offers many advantages. First, it backs up the statutory rights, which in most cases means that there is an additional person liable for the failure of the goods. Second, the scope of the guarantee may be better fitted for the consumer's needs than the conformity scheme (for example it may provide a more effective system of remedies, or assume that the *onus probandi* is not on the consumer for the entire duration of a guarantee). Moreover, the guarantee does help the consumer to distinguish better quality goods on the market, and from a psychological point of view provides assurance to the consumer, who very often is not aware of the statutory scheme.

3. Origins of guarantee - introduction

It is not the aim of this thesis to analyse the history of the guarantee in detail. In any case, it would be hardly possible, given the European character of the thesis. It could, however, be interesting to see how the roots of the guarantee are seen in the Polish legal system, which has established legislation in this area.

3.1 Etymology of the word

The etymology of the word “guarantee” is claimed to be clear.²² Linguists²³ have traced it from the old German words “*Währ*” and “*Gewähr*”, which were in Medieval Latin, reformulated into “*guarantda*”, “*guarandia*”, “*guarantia*”, “*warantia*”. From this point on, national languages absorbed the term: *garantie* in Gallic, *garantie* in French, *garanda* and later *garanzia* in Italian, English *wary*, *warranty* and *guarantee*, Russian *garantija*, German *Garantie*, Polish *gwarancja* and Dutch– *garantie*.²⁴

3.2 Origins of the guarantee

In the historical development, the guarantee may be tracked back to the Magdeburian and Saxon-Magdeburian law.²⁵ The word “*gwar*” meant a promise, given by the claimant to the defendant, not to change the petition and to protect the defendant from the petitions of third parties in the same case. At the same time, the word “*gwar*” could mean a declaration of the seller concerning the non-defectiveness of the sold item.²⁶

3.3 Evolution of the guarantee

According to Żuławska,²⁷ the guarantee as understood nowadays was created initially not for sales but for service contracts, where the provider of the service guaranteed proper functioning of the created or repaired goods for a certain period of time. If the goods turned out to be defective, the service provider was obliged to repair the goods free of charge. Such a guarantee reflected the nature of the obligation of the result imposed on the service provider. When the guarantee surfaced in the sales contract, repair was joined by replacement of the defective goods if the defect was impossible to repair, or when repair was too expensive or would take too long.²⁸

4. Guarantee on the modern market

4.1 General

Taking a very general perspective, a guarantee is an instrument where the party that offers it (in whichever legal form) assures a certain result. As Fogt put it a guarantee is the contractual commitment by the guarantor to assume responsibility for a certain (economic) risk of an undertaking or venture.²⁹ So, if the obligations arising under a contract belong to the category of obligations of means, it provides a certainty for the creditor resembling the one he has under an obligation of result. A guarantee promise or contract – such as an independent guarantee, an accessory suretyship or other security agreements – has the obligation to take over (strict) liability in the event of realisation of a certain risk as its *essentialia negotii*.³⁰ The party who offers the guarantee might either be a party to the contract for which the result is assured, or it could be a third party. The guaranteed result means that the performance of the

²² Żuławska 1975, p. 9.

²³ Linde, Bruckner, Reczek, Karłowicz, Kryński and Niedźwiecki as referred to in Żuławska 1975, p. 9.

²⁴ For more examples see Charter III, part the name.

²⁵ Żuławska 1975, p. 9.

²⁶ Linde as referred to in Żuławska 1975, p. 9.

²⁷ Żuławska 1975, p. 17.

²⁸ Ibidem, p. 17.

²⁹ Fogt 2009, p. 238 and the literature referred to therein.

³⁰ Fogt 2009, p. 239.

contract will be manifested as defined in the guarantee, or certain remedies will follow. The guarantee may form a part of the contract (as a contractual stipulation), or it may be separated from it and take the form of an additional self-standing contract or a unilateral promise. A guarantee may either replace the statutory liability regime of the given contract, or supplement it by creating an alternative. Żuławska notes two more distinctive features common to all types of guarantees.³¹ First, a guarantee is always created by an assurance that relates to a future situation (not the situation that exists at the moment when the assurance is given). The guarantor assumes liability for future events that may be independent or only partially dependent on his actions or intent. Second, an element of intent is necessary for the creation of a guarantee: a guarantee arises only if the guarantor wishes so. The second characteristic, however, does not apply in all circumstances, as certain European legislations recognise “obligatory” guarantees, especially in the area of consumer sales.³²

4.2 Fields of guarantee application

At the moment, a guarantee as a liability scheme is used in many different areas of law. In fact it is difficult to point to every situation where a guarantee may be or is used. It is, however, possible to mention some of the most typical situations without claiming to be a full list. A guarantee as a legal institution is used in both public and private law. In public international law it appears, for example, in the Convention Establishing the Multilateral Investment Guarantee Agency or in the practice of international economic relations. In the private law area, its use is probably as frequent, as it is a very useful instrument of contract law, which assures the performance of a contract. In particular, the guarantee is used in sales and services contracts. It is also popular in the banking sector (bank guarantees of payment, or insurance).

5. Functions of the guarantee

On the consumer market the guarantee may play many functions, though the EU legislator does not recognise them all. This is surprising, as the Green Paper of 1993 has quite accurately described the differentiated nature of the guarantee. It stated: “Guarantees are steadily becoming a preferred method of competition between firms, and one of the most widespread arguments used in advertising (consumers look on guarantees as a quality label). To some extent, the offer of a guarantee is based on the firm’s need to establish a closer personal link with the client. They want to sell not only the product, but also a specific service guaranteeing that the product is in good working order. In some way, the offer of a commercial guarantee compensates for the trend in modern societies towards abstract and anonymous relations with consumers. Hence these guarantees play a fundamental economic and social role.”³³

The EU legislator recognised only some of the possibilities that the guarantee offers. The leading one is the marketing function, which inscribes the guarantee into the scheme of the sales contract. Under such an approach, the guarantee indeed works as a quality label, to be used in the advertising and as a tool to compete with other businesses, but at the same time a tool to reach out to clients. The guarantee signals good (“above-average”) quality of the goods it accompanies. As a competition device, it also carries a danger of deception, which was

³¹ Żuławska 1975, p 10.

³² For more details see: Charter IV, part 3.6 Obligatory guarantees.

³³ Green Paper of 1993, p. 15.

recognised at the EU level, and led to accepting – insufficient in my opinion – a regulation of the Consumer Sales Directive.

The traditional function of the guarantee, as accepted by legislation where the guarantee is well-established, is wider than that accepted at the EU level. Skąpski described it in the following manner: “to enable the buyer to use the bought goods according to its purpose, without disturbance, within a determined period.”³⁴ A similar formulation can also be found in the Green Paper of 1993,³⁵ which refers to “a specific service guaranteeing that the product is in good working order” The guarantee is a device that complements the system of liability for sold goods, but at the same time it goes a step further by offering a maintenance service. According to the traditional approach (such as the Polish one) it is designed especially for technically complex goods, so these goods, for which maintenance might be complicated. The contemporary development of the market seems to drive the guarantee into the direction of a service, performed against remuneration. Such a service is supposed to provide maintenance services and insure the buyer against the risks that are associated with the fact that the bought goods might not work as planned.

The third area where the guarantee may play a role is liability in the commercial chain. There are at least two aspects here. First, the guarantee can be used as a device that more equally spreads liability for the faults of the goods between the producer and the seller, who according to EU law is responsible not only for his own actions (*dicta et promissa*) but also for the faults of the producer (who in fact should be liable) as well as for public statements of other members of the commercial chain. Although the seller may, to a certain degree, limit his liability for the public statements of others, he bears full liability (within the scope of conformity) for the actions and omissions of the producer. As the redress process is not effectively established at the EU level, or at the level of most of the Member States, a voluntarily given guarantee of the producer may bring a bit more balance into this scheme. Second, a guarantee may play a very practical function from the point of view of the consumer, if he acquires goods from the member of a commercial chain that appears throughout the EU under one name in the cross-border context. If the consumer is entitled to claim from any member of the chain (for example a franchising chain), a guarantee may be an instrument of facilitating the process of claiming in the cross-border trade and reducing the problems related therewith. Of course, this function can also be important in domestic transactions.

6. Scope of the dissertation and the research question

6.1 Introduction

Guarantee, as a legal scheme, has a chameleon-like quality. It absorbs from other legal constructions and develops them further in various directions. Its limits are not clearly drawn and its interactions with other legal constructions are frequent. Even if the considerations are limited to the consumer sales guarantee, a thorough analysis reveals a variety of forms, structures and functions. The guarantee is developing rapidly. Electronic forms of trade, intensive action on the side of sellers and producers to establish long-lasting and intimate relations with consumers, as well as growing demand from consumers - all of these elements influence the shape of the guarantee. This dissertation deals only with a fraction of the possible problems in the area of consumer sales guarantees, as it discusses only those

³⁴ Skąpski 1976, p. 153.

³⁵ Green Paper of 1993, p. 15.

guarantees provided by businesses in the course of consumer sales in the European Union, in the context of the rules of the Consumer Sales Directive.

The first reason that influenced the choice of the subject for my dissertation was of a practical nature. I was engaged as a researcher in the work of the Study Group on a European Civil Code, and, as a member of the Dutch Team that worked on the sales contract, I stood behind the part on consumer guarantees. The decision to devote my dissertation to the subject of guarantees was therefore quite natural. However, the process of deciding the concrete subjective and objective scope of the thesis was more complicated. Taking the guarantee in general as a starting point, it required some serious narrowing down. This process involved the following steps: first, restricting the thesis to the area of guarantees in sales contracts. Second, within the sales contract, the choice had to be made whether the thesis should deal with all types of sales contracts, irrespective of the character of the parties (B2B, B2C, C2C) or whether it should be limited to certain types of contracts, according to the subject involved. Here, I opted to concentrate on consumer sales. Third, within the area of consumer sales, guarantees differ taking into account the party who provides them. It needed to be considered whether the thesis should deal with all types of guarantees, no matter who offers it (the seller, the producer, a third party), or whether the analysis should concentrate on a certain type or types only (for example on the most common guarantees provided by the producer). In this respect the choice was made to cover all types of guarantees in order to be able to present a comprehensive analysis. Finally, when the subject was established for consumer sales guarantees, a decision had to be made whether the thesis should rest on the assumptions accepted (primarily) for the function of consumer sales guarantees in the EU, or whether it should extend to other possible functions of the guarantee. The decision to follow the EU pattern was quite practical, as concentrating on the EU legislative dimension constitutes an answer to the problems that exist at the moment, whereas the alternative function of the guarantee are more a song for the future.

6.2 Why only sales?

As stated earlier on, the applicability of the guarantee is not limited to sales contracts only. Moreover, in all the areas and branches of law where it appears, the guarantee plays the same or very similar function – assuring the performance of certain obligation. Of course, taking a very broad perspective on the guarantee has its advantages: it allows the essence of the guarantee to be isolated and its functions in general to be discussed. In other words it allows the guarantee to be approached as a scheme. This analysis, however, would have to be quite abstract. On the other hand, limiting the analysis to a specific area of law presents a possibility to look at this particular area more closely. Sales contracts, as the contract that lies at the very heart of contract law, provides special possibilities in this respect, as the constructions employed in the sales contract regulation constitute a model for other contracts. The bottom up approach does not exclude making generalisations, but such generalisations are well grounded in the realms of the analysed contract.

6.3 Why only consumer sales?

Depending on the character of the parties involved, a sales contract may possess very different features. The first factor is the obvious distinctiveness of consumer relations, based on the inequality of the parties. The consumer sales contracts are normally adhesion contracts, where the parties do not negotiate the content (it applies also to guarantees). In such a case, the need to secure position of the weaker party is always more intensive than in the case when the contracting powers of the parties are spread more equally. Second, there is a common

regulation at the European level introduced by the Consumer Sales Directive, which includes rules on guarantees. Third, in the case of non-consumer sales, the liability regime is normally not mandatory. It means that the parties to a contract may deviate from the letter of law to the benefit of either of them, and a guarantee may be used as a scheme that replaces the liability regime. Fourth, in the case of non-consumer sales, the need to secure sufficient transparency of a transaction is less intensive (I recognise, however, that this statement may not apply to the transactions that involve MSEs). A guarantee, with all its benefits, obscures the frame of a sales contract, and in the case of the consumer sales the need to secure sufficient transparency intensifies. Lastly, a guarantee is a very popular marketing tool on the consumer market. Producers, sellers and commercial chains use guarantees to reach out to consumers, which also adds to its distinctiveness.

6.4 Sales means services these days

The shape of a sales contract has undergone a major change recently. The Consumer Sales Directive declared that contracts for the supply of consumer goods to be manufactured or produced will also be deemed contracts of sale, which means in practice that certain types of service contracts are qualified as sales contracts. Although the border between sales and services was never very clear, accepting this approach makes the border fade away even further. It is very difficult to say whether this approach, which runs counter to the classical notion of sales law, reflect or contradicts the market reality with its intensifying mass production accompanied by the customisation of the offered goods – two trends that contradict each other. Solving this problem would require studying the market and definitely exceeds the scope of this thesis. It is worth underlining, however, that speaking about sales contracts in the European context includes also certain forms of service contracts.

6.5 Guarantees by producers and guarantees by other parties

The most popular, and therefore the most typical guarantee, is the guarantee provided by the producer of the sold goods. This type of guarantee, however, is not the only type that exists on the market. Theoretically speaking, anyone could give a guarantee, no matter whether or not it is possible to trace any connection between the sales contract and the party offering the guarantee. Practice, however, shows that some kind of connection between the sold goods and the person who offers the guarantee can almost always be established. Normally parties somehow related to the contract of sales offer guarantees: producers, sellers and other members of the commercial chain that leads the goods to the final buyer. Guarantees are also offered by parties somehow engaged in the selling process, even though strictly speaking they are not members of the distribution chain. A good example could be perhaps a guarantee offered by the issuer of a credit card used to pay for the goods.

Although producer guarantees are the most common guarantees on the market, and certainly they possess some clearly distinctive features, limiting the analysis only to this type of guarantee would lead to limiting the picture of the consumer sales guarantee. One of the basic assumptions of this dissertation is to discuss as wide a range of consumer sales guarantees that exist on the market as is possible, without claiming, however, that they are equally popular. Limiting the analysis to the mainstream features would only have the opposite effect. Certainly, differences between the various types of guarantees can be established and, if they are relevant, the analysis reflects that. For example, guarantees offered by a person other than the seller create a situation when the guarantor does not have a direct contact with the buyer. Producer guarantees are perhaps most reliable as they are offered by the party who in fact stands behind the goods, whereas guarantees produced by the seller might be very confusing

for the consumer, because the line between the statutory liability and the guarantee is extremely difficult to draw in this case.

6.6 Other functions of the guarantee

The EU legislation of the consumer sales guarantee recognises the guarantee first and foremost as a tool that stimulates competition, while at the same time constituting a legitimate marketing tool³⁶ that accompanies the sales contract. The analysis contained in my thesis is in principle based on the assumptions accepted by the EU legislator, i.e. it deals with the guarantee that is intimately connected with the sales contract; at the same time, however, the thesis reaches beyond the limitations of seeing the guarantee barely as the competition tool, in the context of a guarantee that accompanies the sales contract. Yet, it must be firmly underlined that the potential context in which the guarantee appears on the market is not exhausted here.

6.6.1 *Guarantee as a service*

The guarantee may constitute a separate, self-standing contract that aims at (1): maintaining the value of the goods and providing maintenance services, not related to defects, and (2): securing the consumer against any loss. Such a contract can be recognised as a service contract or after-sales contract. Here the terminology is quite problematic, because distinguishing between various types of contracts in this area is very often based on criteria that may seem a bit superficial. Tenreiro, for example, states that “the definition of after-sales services is limited to services connected with the maintenance and repair of products supplied in return for payment. This is a fundamental distinction that aims to create a clear dividing line between after-sales services connected with a claim under a guarantee, which should not be treated independently of the guarantee, and after-sales services that are not covered by a guarantee, or are supplied after it expires.”³⁷ According to him, the element of payment distinguishes a guarantee from a service. Similarly, Howells³⁸ distinguishes between legal guarantees (imposed by law), commercial guarantees (voluntarily given) and after-sales services (provided against payment). However, considering that the guarantee is never offered for free, only sometimes its price is not spelled out expressly³⁹ it seems that applying the payment criterion here might be slightly misleading and superficial. Following this line of reasoning leads to the conclusion that guarantees may take the form of a service or after-sales service contract and play functions that exceed the functions prescribed to them by the EU legislator.

The situation in this particular area is further blurred by the fact that the EU legislator at a certain moment considered regulating after-sales services. The Green Paper of 1993 limited the understanding of after-sales services to the availability of spare parts.⁴⁰ The draft Consumer Sales Directive,⁴¹ in Article 9(1), addressed the sellers of whom “because of the nature and the price of the good, the consumer could reasonably expect the existence of after-sales service.” However, those sellers would not have to provide after-sales service, but if

³⁶ Consumer Sales Directive, recital 21.

³⁷ Tenreiro 1995, p. 81.

³⁸ Howells 1995, p. 77.

³⁹ See Chapter III part 2.1.7 Free guarantee and Chapter V part 6. Free guarantee and guarantee against payment.

⁴⁰ Green Paper of 1993, p. 16.

⁴¹ COM (95) 520.

they did not, they had to inform the consumer thereof before the purchase. According to the draft Directive, all sellers, producers and producer's representatives offering after-sales service must be in a position to:

- ensure maintenance of the goods;
- ensure the fast repair of the goods in the case of breakdown or malfunction;
- offer fair and transparent prices and inform of these prices in advance, in particular by providing a detailed breakdown of the costs of the necessary work, if requested by the consumer;
- give the consumer any technical information necessary.

This description makes it difficult to distinguish between the guarantee and after-sales service. The draft for the European Parliament's first report on the Directive⁴² intended to introduce a new article, not finally adopted, reading "If the consumer is entitled to expect an appropriate after-sales service on the grounds of the nature of the good, but the seller does not offer the service himself, he must inform the purchaser of the fact before the contract is concluded. At the purchaser's request, the seller must, before or after the contract is concluded, supply the purchaser with all practical information at his disposal on access to the after-sales service, any subsequent delivery and the duration of availability of the spare parts."

Another angle from which guarantees can be looked at, which will not be elaborated on in this thesis, is the relation between guarantee and insurance contract. As Brown put it: the insurance function of warranty coverage is of course well known.⁴³ According to Tenreiro, guarantees that have to be paid for, and extended warranties for which a charge is made, are not, strictly speaking, true guarantees, but disguised insurance policies, which have their own distinct problems.⁴⁴ Similarly, Twigg-Flesner⁴⁵ observed that extended warranties are often insurance policies, and as such pose additional problems that could not have been dealt with in the context of the Consumer Sales Directive.

What follows from these statements is that a guarantee, especially if it is a paid-for guarantee, may play a very similar or identical function as an insurance contract – i.e. securing against loss. One may argue that, in the case of very complex guarantees (although it is questionable whether such guarantees actually do happen in consumer relations) they come very close to insurance contracts, if it comes to the content of the undertaking. The elements that (quite superficially) distinguish such a guarantee from an insurance contract, could probably be sometimes reduced to the administrative requirements that must be met by the insurer. To give an example: in 1984, the British Office of Fair Trading put forward⁴⁶ a proposal whereby all guarantees purporting to give cover for more than one year should be a direct contract of insurance between the purchaser and an authorised insurer, to protect the former against the effects of insolvency of the supplier. Commenting on this proposal, the Law Society of Scotland⁴⁷ said that it appreciated that requiring that all such guarantees to be direct contracts of insurance between the purchaser and an authorised insurer would protect the consumer in the event of the trader's insolvency, as any valid claims the consumer may have would continue to be met during the life of the contract. It drew attention to the risks to the consumer involved in making extended warranties direct contracts of insurance between the consumer and the insurer. The general duty of disclosure, which exists in insurance contracts, means

⁴² A4-0029/98.

⁴³ Triest 1980, p. 1298.

⁴⁴ Tenreiro 1995, p. 81.

⁴⁵ Twigg-Flesner 1999, p. 185.

⁴⁶ OFT 1984, p. 2.

⁴⁷ The Law Society of Scotland 1984, p. 4.

that the cover afforded under the guarantee could be rendered invalid due to the consumer's failure to disclose facts material to the risks that the insurer agreed to cover.

6.6.2 *Guarantee as a tool to shape a liability scheme*

The guarantee may also be seen as part of a liability scheme in the sales contract. As such, it has a function to play in two separate contexts: first as a factor that distributes liability between the producer and the seller, and second as a tool that has the potential to allow the consumer to claim effectively from the members of a (cross-border) commercial chain.

6.6.2.1 Liability of the producer

The problem of the producer's liability for the quality of the sold goods is largely not regulated in the EU. Guarantees, as a voluntary undertaking, offered most often by producers, could be seen as filling the gap that exists in practice in the legislation, since, as the Green Paper of 1993⁴⁸ states, when a commercial guarantee is offered to the buyer, the consumer will not normally invoke its legal rights arising from the legal guarantee (which burdens the seller) and will begin by trying to invoke the commercial guarantee.

The need to restructure the liability scheme has been voiced at the EU level. In order to give a brief overview of the situation and its evaluation, I would like to refer first to the opinion expressed by the European Consumer Law Group on the basis of the draft Consumer Sales Directive. It said⁴⁹ that any legislative reform must reflect the fundamental changes in manufacturing, distribution and marketing of goods in the modern economy, the radical modification of the roles of the economic actors (manufacturer, distributor and retailer) and the importance of technological sophistication and the durability of consumer goods. The European Consumer Law Group stressed the predominant role of the producers, who build up a specific distribution system and who define the marketing strategy, and the correspondingly diminished role of the sellers, who have become a pure distributor of products. It claimed that legislation that focuses only or mainly on the seller-consumer relationship is a partial answer to the needs of consumers on the market, and it is blind to the realities of a modern economic system of production and distribution.⁵⁰ The ELCG underlined⁵¹ that liability for non-conformity of consumer goods cannot rest only on the final seller, and that additional action against manufacturers and importers should be granted by law. As far as the conformity of a consumer product is concerned, responsibility must also be shifted to where it belongs – to the manufacturer. The ECLG was strongly convinced that this is essential for the real and effective implementation of consumer rights in the case of defective goods.

The opinion of the European Consumer Law Group was not unique; a similar position was presented by Cranston, who said that, “one may ask why, in a modern commercial environment, the primary liability for the quality of consumer goods should fall on the final seller who, in most cases, is not their producer. In most cases the producer is the person ultimately responsible for any defects in the goods and who creates demands for, and shapes consumer expectations of goods through advertising. Would it not be more rational to place liability directly on the producer, who is, after all, directly liable for injuries and other losses

⁴⁸ Green Paper of 1993, p. 92.

⁴⁹ European Consumer Law Group 1998, p. 91.

⁵⁰ Ibidem, p. 92.

⁵¹ Ibidem, p. 92.

caused by defective goods?”⁵² Bradgate and Twigg-Flesner pointed to another aspect of this issue: that the legitimate expectations of consumers are that the manufacturer will accept responsibility for faulty goods. They said “The consumer may contact the seller to obtain redress, but the expectation is that the seller will be an ally of the consumer in getting the manufacturer to put things right” and “it is the manufacturer who will bear the ultimate responsibility.”⁵³

The problem of distributing liability for defective goods was taken up by the Green Paper of 1993, which forwarded the idea of joint liability of the producer and the seller for the lack of conformity.⁵⁴ The Economic and Social Committee,⁵⁵ in its opinion on the draft Consumer Sales Directive, backed this idea and stated that although, generally speaking, no contractual link exists between manufacturers and consumers, the decision to buy is often strongly influenced by consumer trust in a particular brand. The Committee proposed that, where the fault lies on the manufacturing side, consumers should be granted the right of recourse to either the manufacturer or his regional representative. It pointed out that this would be particularly important where, in the case of transborder purchases, it is difficult for the consumer to contact the trader. The Consumer Sales Directive, however, does not deal with the producer’s liability, and the only explanation given is that it is “the traditional solution enshrined in the legal orders of the Member States” (although there is direct action in French and Belgian law, manufacturer’s liability in Norway, Sweden and Finland, institutions like the contract in favour of a third party or network liability⁵⁶). The Consumer Sales Directive introduced a liability scheme that Bradgate and Twigg-Flesner call “front-line seller liability”.⁵⁷ The Consumer Sales Directive touches upon the question of the producer’s liability (and liability in the commercial chain in general) from the perspective of the final seller only, on the one hand limiting his liability for the acts of the other members of the distribution chain (Article 2(4)) and on the other declaring the possibility to pursue remedies against person liable for the non-conformity down the commercial chain (Article 4).

The most progressive opinion present in legal writing was in this respect presented by White.⁵⁸ He claimed: “Perhaps the Commission should not have put-off what seems inevitable, and instead proposed a type of mandatory, minimum producer’s guarantee. Producers are already liable for the safety of their products under Council Directive 85/374 concerning liability for a defective product, and there is a case for extending to producers a wider responsibility for quality defects. Such an approach would give consumers more rights. Further, where a consumer makes a cross-border purchase, it may be easier for him to seek redress from the producer, who will often be a large corporation with a presence in several member states, rather than from the retailer, who may have no presence in the consumer’s Member State. This approach would also avoid all the problems associated with harmonising domestic contract law on the sale of goods. And it would place liability with the person who is responsible for the quality of the goods, and who is in the best position to provide any repair or replacement, the producer.”

⁵² Cranston 1995, p. 115.

⁵³ Bradgate, Twigg-Flesner 2002, p. 352.

⁵⁴ Green Paper of 1993, p. 97.

⁵⁵ Opinion of Economic and Social Committee on the proposal for a European Parliament and Council Directive on the sale of consumer goods and guarantees adopted on 27 November 1996, OJ No C 66/5, 27.11.1996.

⁵⁶ European Consumer Law Group 1998, p. 93.

⁵⁷ Bradgate & Twigg-Flesner 2002, p. 348.

⁵⁸ White 2000, p. 15.

6.6.2.2 Liability in the commercial chain

As Grundmann says, in modern economies, privity of contracts is problematic. Contracts come in chains and networks, and are not isolated. This is a problem to be tackled.⁵⁹

The situation regarding the possibility to address the deficiency of goods with any member of the commercial chain through which the product is distributed on the EU level is rather peculiar. As Twigg-Flessner pointed out, competition law has for many years required the availability of guarantee service throughout the distribution network and therefore it is surprising that these rules have not been recognised in the context of the Consumer Sales Directive.⁶⁰ According to Beale and Howells, where goods are sold through selective distribution networks then consumers could be allowed to turn to any member of this network, in particular those in their own state.⁶¹ However, since no legislation of this kind exists in EU private law, a guarantee could be a very useful tool to remedy the legislative shortcomings, especially in light of the competition law rules. This would allow the consumers to effectively claim the deficiency of goods, primarily in the cross-border context, which in turn could substantially support the development of cross-border trade.

Based on competition law developments, the Green Paper of 1993 proposed imposing liability for non-conformity on retailers in the selective distribution networks, and suggested that this could be taken one step further to impose joint and several liability on all members of such selective distribution schemes⁶² (the condition of the Block Exemption Agreement applicable to motor vehicles⁶³). In its opinion on the draft Consumer Sales Directive, the Economic and Social Committee⁶⁴ stressed that issues regarding legal and commercial guarantee arrangements and after-sales service should not be viewed in isolation as a consumer problem alone, but considered as part of the chain manufacturer-wholesaler-retailer. It underlined that greater attention must therefore be paid to relationships within the marketing chain, in particular, the unsatisfactory contractual or *de facto* situation, in which retailers often find themselves with regard to their suppliers.

7. The research question and the plan of the thesis

This thesis has three main aims.

The first aim is to present the current legislative situation in the European Union and the process that led to accepting the assumptions concerning guarantees that laid foundations for the rules on guarantee contained in the Consumer Sales Directive. This aim is pursued at the beginning of the thesis in Chapter II, which contains a thorough analysis of the presence of the consumer sales guarantee in two different EU policy areas: competition law and consumer protection. In this chapter certain conclusions concerning the EU method of work are also drawn.

⁵⁹ Grundmann 2003, p. 245.

⁶⁰ Twigg-Flesner 1999, p. 190, Twigg-Flesner 1999(2) pp. 569-580.

⁶¹ Beale & Howells 1997, p. 41.

⁶² Green Paper of 1993, p. 97.

⁶³ Commission Regulation (EC) No 1475/95 OJ 1995 L145/95, art 5(1)(1)(a).

⁶⁴ Opinion of Economic and Social Committee on the proposal for a European Parliament and Council Directive on the sale of consumer goods and guarantees adopted on 27 November 1996, OJ No C 66/5, 27.11.1996.

The second aim is to analyse the EU rules on guarantees, as contained in the Consumer Sales Directive. At the same time, the correctness of the assumptions that underlie the EU legislation on guarantees is tested, as well as whether the rules as accepted in the Consumer Sales Directive are able to meet the objectives set for them. This part is contained in Chapter III. It analyses what is regulated in the Consumer Sales Directive and what remains for the market to deal with. Article 6 of the Consumer Sales Directive, which is entirely devoted to consumer sales guarantees, constitutes the main frame of the dissertation. Further, the question is asked whether the choices concerning the scope of rules in the Directive were correct, and if not, what other issues should have been taken into consideration.

The third aim is a thorough analysis of the guarantee structure, while accepting the EU assumption concerning the guarantee (the guarantee as a marketing and competition tool, which may mislead consumers, established on the basis of the sales contract). It is done in order to provide more background information as to the question, whether or not the rules of the Consumer Sales Directive are sufficient in the area of consumer sales guarantee, even if the same assumption as for the function of the guarantee are accepted. Here, the question is asked about which other aspects of the guarantee should be dealt with by legislation and in what form. This part of the analysis is contained in Chapters IV and V. In a way, they try to widen the view on guarantees, by reaching beyond the limits set by Article 6 of the Consumer Sales Directive. Both chapters present various aspects of the guarantee in a comprehensive manner. The subject matter of analysis in this part is divided between Chapter IV and Chapter V. Chapter IV deals with general issues that, where a directive is the main tool of harmonising law in EU, remain within the scope of interest and prerogatives of the Member States. Chapter V deals with specific matters that at the same time have a more practical character, and as such are more fit for the regulation on the EU level, with its pragmatic, market-oriented approach. In principle, most of the issues analysed in Chapter V relate to problems somehow touched by Article 6 of the Consumer Sales Directive and most of the problems dealt with in Chapter IV remain outside the scope of the Directive's interest. Chapter IV and Chapter V take into account the rules proposed by the PELES and the DCFR, which, while based on the same assumptions as the Consumer Sales Directive, address many more areas.

The concluding chapter (Chapter VI) summarises the findings of the three parts of the thesis and formulates suggestions for the EU legislator, concerning the guarantee regulation. Also, some thoughts about the European legislative process in general are voiced.

8. Methodology

The choice concerning the method of work on the thesis was very much influenced by the work of the Dutch Group of the Study Group on a European Civil Code. This method is in principle based on a problem-oriented approach and begins with defining problems in a given area. Working in an international research group gave me an opportunity to confront the list of problems with the approach represented by other Member States, also those without a legislative guarantee system. In this approach, the problem comes first, and only after it is illustrated by solutions accepted in various Member States in this regard or solutions simply present on the market. Here, I would like to make clear that the list of problems is heavily influenced by my Polish provenance, which is important to note, since the Polish legal system has a long tradition of guarantee legislation.

The first question that appears when such a method is accepted is certainly the question how reliable and how complete the list of problems is. Here, in truth, nothing can be taken for granted, considering the lack of empirical data that could support it. It is rather meaningful that all the authors who have dealt with guarantees at the European level have the same observation: lack of sources is the starting point. Therefore, it is only fair to say that common sense serves as the denominator.⁶⁵ Another significant element is that, during the work on the Principles of European Law on Sales in the area of guarantee, which followed exactly the same method, all theoretical examples, invented at the beginning of the work in order to construct the structure of the legislation on guarantees, have found confirmation, either in national legislations, case law or real life guarantees. All in all, it is probably just to say that the structure of the presented problems reflects the market structure, the problematic issue being the quantitative element. Here, considering the general shortage of market research on the EU level in the area of guarantee, “the basic common sense argument” or intuitive approach (we are all consumers at the end) must suffice.

The second question is why depart from the classical comparative method, as proposed by Zweigert and Kötz?⁶⁶ Why does the classical comparative method fall short? The answer to this is twofold. First, this is the aim of the thesis – i.e. analysis at the EU level. The playing field of the analysis is the EU law, and the thesis ends with conclusions and proposals directed at the sphere of a modern European legal system. D'Usseaux refers to this⁶⁷ as to “autonomous Community law concepts, rather than just as reflections of the corresponding national concepts”. Second, the thesis does not attempt to provide an overview of the legal solutions concerning consumer sales guarantees accepted in the Member States. Quite the opposite, examples of national solutions serve merely as illustration. There are two main reasons for that. First, as already stated, the thesis concentrates on the EU solution. Second, comprehensive legislation on guarantee is a rare phenomenon. Therefore, presenting it in the classical way would force a rather unusual choice of legislation. This by itself would not be a disqualification, though it would nevertheless serve no purpose in light of the aim of this thesis.

The used data includes various sources: national laws with particular emphasis on the available black-letter rules, together with preparatory acts, case-law, EU official documents, self-regulatory acts, consumer organisations’ reports, as well as examples of real guarantees (but without producing a complex empirical analysis). I would like to underline that many of these materials were collected during the work of the Dutch Team.

⁶⁵ See for example: Wilhelmsson 2004, p. 325.

⁶⁶ Zweigert & Kötz 1998, p. 43.

⁶⁷ d'Usseaux 1998, p. 320.

Chapter II: The consumer sales guarantee in EU policies

1. From competition law to private law - consumer sales guarantees in European policies

The consumer sales guarantee has been on the European agenda for years now. However, although the importance of the guarantee has been emphasised on various occasions, regulating the guarantee was never seen as a separate, self-standing problem and it was always perceived through the perspective of another larger issue.

So far, the guarantee has been tackled from several different angles. At first the guarantee was considered from the perspective of the market functioning (competition law). The guarantee was seen as a marketing tool which, when used inconsistently throughout the market, could cause a distortion of competition. This approach led to the appearance of the guarantee institution in several community acts of various nature. Some aspects of guarantee were also brought up in case law.

The first shift in the approach took place together with the Unfair Contract Terms Directive,⁶⁸ which introduced guarantees into the area of consumer regulation (i.e. private law). The guarantee was not, finally, included into the Unfair Contract Terms Directive, however, already in 1993 a separate study on consumer sales was initiated, which resulted in the Green Paper of 1993. This led later to the acceptance of the Consumer Sales Directive. The Consumer Sales Directive is currently under review.⁶⁹ The proposal of the Consumer Rights Directive,⁷⁰ which was to replace – among other things - the Consumer Sales Directive, has contained rather disappointing proposals regarding the guarantee. The end effect was that the Directive does not contain a part on consumer sales. In the meantime the European Commission initiated discussion on the future of not only consumer law, but also contract law in the united Europe.⁷¹ The discussion resulted in the preparation of Draft Common Frame of Reference by academics,⁷² which was presented to the Commission. The problems, which appeared during the work on the Consumer Rights Directive, (among others) have led to the return of the Commission to the idea of furthering the legal harmonisation through a private law instrument, for preparation of which the DCFR and other European legal projects could

⁶⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29-34.

⁶⁹ Green Paper on the Review of the Consumer *Acquis* (presented by the European Commission), Brussels, 08.02.2007, COM (2006) 744 final.

⁷⁰ Directive of the European Parliament and the Council on consumer rights, Brussels, 08.10.2008, COM(2008) 614/3.

⁷¹ Communication from the Commission to the European Parliament and the Council European Contract Law and the revision of the *acquis*: the way forward, Brussels, 11.10.2004, COM(2004) 651 final.

⁷² Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of References, Outline Edition, (eds.) Christian von Bar, Eric Clive, Hans Schulte-Nölke, Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Valenziano and Fryderyk Zoll, Sellier 2009.

be used. In 2011 the Commission established an expert group⁷³ comprising of legal practitioners like lawyers and notaries, former judges and academics as well as consumer and business representatives from across the European Union. The effect of the work of the expert group was published in a document called “A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback”.⁷⁴ The scope of the instrument proposed by the expert covers sales contract and some narrowly defined services, concluded between businesses as well as between business and consumer, but it does not include any rules on consumer sales guarantees. In the meantime the Commission published a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses,⁷⁵ which initiated a massive consultation process.⁷⁶ The European Parliament in principle supported the plans of the Commission in European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses.⁷⁷ At the moment the Commission is working on preparing a draft of the instrument of European contract law, which is to be presented in October 2011, but which most probably will not contain any rules on guarantees.

The following chapter presents the evolution of European policy in the area of consumer sales guarantees. Recently, the competition law approach to guarantees has not been commented on vividly, despite the fact that it may have a great impact on the guarantee, and as such it may contribute to the development of this institution. Therefore the competition policy on guarantees is presented in great detail and followed by a summary of principles established by it for consumer sales guarantees. The part dealing with consumer law merely presents developments within this area, as a detailed analysis of the proposed and accepted solutions is conducted in other parts of the book.⁷⁸

2. Guarantees in competition law

2.1 Introduction

Guarantees appeared on the competition stage quite early - notification on negative clearance in the *Zanussi* case was filed in 1962. Discussion on guarantees in the context of competition law began in the mid-1970s and continued throughout the 1980s and the 1990s. The importance of the guarantee was underlined especially at the end of the 1980s and the beginning of the 1990s, as the idea that the consumer guarantee accompanying product sold in the EEC must be effective throughout the Community fit very well into the idea of achieving a unified market by 1992.⁷⁹ After that date, guarantees surfaced less and less frequently in the competition context, and the mainstream actions were undertaken within the ambit of consumer law.

⁷³ Commission decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (2010/233/EU), OJ L105/109 of 27.4.2010.

⁷⁴ http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf.

⁷⁵ Green Paper on policy options for progress towards a European Contract Law for consumers and businesses Brussels, 1.7.2010 COM(2010)348 final
http://ec.europa.eu/justice/contract/files/consultation_questionnaire_en.pdf.

⁷⁶ http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm.

⁷⁷ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0262+0+DOC+XML+V0//EN>.

⁷⁸ Chapters III, IV and V.

⁷⁹ Fine 1989, p. 233.

2.2 Article 101 (formerly Article 81)

Community policy on guarantees was based on Article 85 (now Article 101) of the Rome Treaty, which was called “the foundation of EEC competition law regarding after-sale warranties”.⁸⁰ Article 101 prohibits all agreements between undertakings that may affect trade between undertakings, decisions by associations of undertakings and concerned practices that may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby by placing them at a competitive disadvantage;
- make the conclusion of contracts subject to the acceptance by other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contract.

The Green Paper of 1993⁸¹ lists the following as the “building blocks” of the European competition policy on guarantees: Commission Decision of 23.10.78 (*Zanussi*),⁸² Commission Decision of 10.12.84 (*Ideal Standard*),⁸³ ETA Fabriques d'Ébauches/ SA DK Investments (*Swatch*) Judgement of 10.12.85,⁸⁴ and Commission Regulations Nos 123/85 of 12.12.84 (distribution of motor vehicles)⁸⁵ and 4087/88 of 30.11.88 (franchising agreements).⁸⁶ The following analysis exceeds the scope indicated by the Green Paper of 1993 and tries to cover all the decisions, judgements and acts that influenced the European policy of consumer sales guarantees.

2.3 European competition law on consumer sales guarantees - decisions, cases and resolutions

2.3.1 Decisions and cases

2.3.1.1 Constructa

The Commission began defining the scope of Article 81(1) in the area of consumer guarantees in 1974, with the *Constructa* case.⁸⁷ This case dealt with a distribution system for electrical appliances was a German manufacturer of appliances, which was not administrated on an EEC-wide basis. The Commission claimed that it infringed Article 81(1). The proceeding ended with a settlement as Constructa voluntarily agreed to revise its guarantee scheme and provide guarantee coverage regardless of the country or the dealer of the purchase.

⁸⁰ Fine 1989, p. 235.

⁸¹ Green Paper of 1993, p. 60, footnote 47.

⁸² OJ No L 322 of 16.11.78, p. 36.

⁸³ OJ No L 20 of 24.1.85, Case 86/92, ECR 1984, p. 883.

⁸⁴ Judgment of 10 December 1985, case 31/85 Swatch, OJ C 374, 31 December 1985.

⁸⁵ OJ No L 17 of 18.1.85, p. 16.

⁸⁶ OJ No L 359 of 28.12.88, p.46.

⁸⁷ 7 Bull. Eur. Comm. (no. 7/8) para. 2129 (1974).

Although there was no formal decision in the *Constructa* case, in its comments to the case the Commission gave two suggestions that shaped the approach of EEC competition law in relation to guarantees. First, a consumer guarantee must be applied throughout the EEC, regardless where in the EEC the consumer purchased the product. Second, the EEC-wide coverage must be available even if the consumer purchased the product outside the official distributorship channel (suggested by the use of term “parallel import”⁸⁸).

In the Seventh Report on Competition Policy⁸⁹ the Commission recognized that a guarantee offered as a part of the after-sales service by manufacturers of consumer durables is an important factor – sometimes a decisive factor – for the consumer’s choice. The Commission reconfirmed its position in this respect stressing that “the manufacturer’s guarantee of his products should be valid throughout the Community, irrespective of the place of purchase.” It also referred to products that have not been exported through the manufacturer’s own networks, and stated that a refusal of guarantees for such products may be a substantial barrier to the normal development of trade within the Community.

2.3.1.2 Zanussi

The next step in the development of the guarantee policy was made in 1978, when the Commission issued a decision in the *Zanussi* case.⁹⁰ The Zanussi Group sold refrigerators, electric cookers, dishwashers, washing machines and television sets under various trademarks (such as “Zanussi”, “Rex”, “Castor”, “Zoppas”) and gave users a guarantee that defective parts would be repaired or replaced free of charge. The guarantee period varied according to the country or appliance concerned. Also, the technical characteristics of the products were different, depending on the Member States’ regulations concerning the safety requirements or operation standards (wiring, amperage plugs, seals).

Zanussi offered a guarantee stating that, within a limited period of time, it would carry out certain operations free of charge (mainly repairing or replacing defective parts) in the course of after-sale services scheme, which it set up in the common market. On 28 January 1962, Zanussi filed an application for a negative clearance.⁹¹ The supply contracts Zanussi concluded with its subsidiaries incorporated conditions of a guarantee that the dealers offered to consumers. These conditions stated *inter alia*:

- The user of a Zanussi appliance was entitled to service under guarantee only from the Zanussi subsidiary that imported the appliance;
- Guarantee service was refused when the appliance was used in a country other than that into which it was originally imported by the local subsidiary;
- Guarantee service was also refused when the appliance had been modified, or when anyone not approved by the local subsidiary had carried out alterations.

The Commission found that these three restrictions were incompatible with Article 81 of the Treaty. The Commission argued that conditions (1) and (2) placed Zanussi’s dealers in an artificially disadvantageous competitive situation comparing with other firms distributing Zanussi appliances, or similar appliances of other brands.⁹² As to condition (3), it prevented

⁸⁸ Fine 1989, p. 235.

⁸⁹ Commission of the European Communities, Seventh Report on Competition Policy No 17-20, 1978, Para 17.

⁹⁰ Commission Decision of 23.10.78 (Zanussi), OJ L 322 of 16.11.78, p. 36.

⁹¹ Zanussi application for negative clearance, No IV/1576 – Terms of Zanussi guarantees.

⁹² Ibidem, para 10, p. 38.

dealers who planned to import or export from making the appliance conform to safety and technical standards in other Member States, when it was essential to comply with these in order to sell the appliances.

The Commission refused to grant the negative clearance because the guarantee scheme prevented the technologically advanced products distributed in some Member States from becoming available throughout the common market, and did not give consumers a fair share of benefits resulting from the guarantee scheme.⁹³

Following representations by the Commission, Zanussi has been introducing a new guarantee scheme since May 1977, and finally has managed to obtain the negative clearance. The new scheme introduced the same conditions in various Member States, and entitled users to a guarantee service on an EEC-wide basis, regardless of where they first bought the appliance or where it was being used. The guarantee service was to be provided on the terms locally applied by the Zanussi subsidiary in the Member State where the appliance is used, and not on the terms of the country where the appliance was bought. The new scheme allowed dealers and users to adapt their appliances, or have them adapted, so that they would conform to the technical and safety standards of the country where they are used, without the guarantee being invalidated. Such adjustments could be done by Zanussi or by a qualified person capable of carrying them out properly.

The Commission concluded that this scheme no longer had the effect of restricting competition within the common market, as it did not discourage dealers from importing Zanussi appliances from, or exporting them to other Member States. Also, it did not dissuade the user from buying a Zanussi appliance in a Member State other from the country in which it will be used.⁹⁴

The *Zanussi* decision laid much of the groundwork for subsequent judgements of the European Court of Justice.⁹⁵ In this decision, the Commission showed that it was aiming at preventing the use of consumer guarantee schemes by manufacturers to insulate or partition the market by framing guarantees in a way that discourages parallel import or discourages consumers from purchasing the product outside their Member State of domicile, either by refusing a guarantee scheme when the consumer returns to his country, or by refusing to honour the guarantee if an adjustment has been made to permit him to use the product in his home state.⁹⁶

The policy on EEC-wide guarantees established in the *Zanussi* decision was later confirmed in the *Moulinex*,⁹⁷ *Bauknecht*⁹⁸ and *Matsushita Electrical Trading Company*⁹⁹ cases. The Commission used the *Zanussi* formula and, as the companies agreed to adjust their guarantee schemes, all cases ended up with settlements. In *Moulinex* and *Bauknecht*, the Commission further clarified its policy regarding various technical requirements and safety standards existing in various Member States. It reconfirmed that the producer should provide a guarantee in accordance with local conditions, even if the product was bought in another

⁹³ Ibidem, para 12, p. 38.

⁹⁴ Ibidem, para 14, p. 39.

⁹⁵ Fine 1989, p. 236.

⁹⁶ Fine 1989, p. 239.

⁹⁷ 13 Bull. Eur. Comm. (No 11) para. 2.1.18 (1980).

⁹⁸ 13 Bull. Eur. Comm. (No 11) para. 2.1.18 (1980).

⁹⁹ Commission of the European Communities, Twelfth Report on Competition Policy, para 77, (1982).

Member State. Such a product, if not complying with the local safety standards, should also be covered by the guarantee as long as the buyer is prepared to bear the costs of adapting the appliance to local safety requirements, which is quite a surprising solution, considering that the buyer would be consumer in this case. In another case (*Sony*¹⁰⁰), the Commission decided that if spare parts for a product are not available in the country where the product is used (e.g. because various parts are required to meet safety standards) a consumer may have to return the appliance to the country of purchase at his own cost in order to benefit from the guarantee.

2.3.1.3 Hasselblad

The Commission's doctrine was upheld by the European Court of Justice, which faced the problem of guarantee schemes for the first time in the *Hasselblad* case.¹⁰¹ This case concerned the relationship between a (commercial) guarantee provided by the producer and an additional guarantee offered by the distributors.

Hasselblad, a Swedish manufacturer of photographic equipment, notified its exclusive distributorship agreement to the Commission for review.¹⁰² In January 1979, Hasselblad GB (HGB) introduced a new guarantee to supplement Hasselblad's standard guarantee. HGB promised an additional 12 months of coverage and a 24-hour repair service for cameras imported by HGB and sold through HGB's dealership network. The HGB advertising also declared that "Silver Service Card holders will always have our first priority."¹⁰³

The Commission decided¹⁰⁴ that this practice violated Article 81(1), since HGB provided more rapid services for "normally" imported cameras, placing purchasers of parallel-imports at a disadvantage. For the "Silver Service" guarantee and a number of other restrictive practices, the Commission fined HGB with 165 000 ECU's. On 10 March 1982, HGB appealed to the European Court of Justice.

The Court observed that HGB had reserved advantages for its own customers exceeding the terms of the manufacturer's guarantee (i.e. the 12-month extension of the guarantee and the 24-hour repair service). At the same time, however, it held that the Commission had failed to prove that, in practice, parallel-imported cameras had to wait any longer for servicing than other cameras. When questioned about instances in which HGB had refused to repair or had postponed the repair of Hasselblad equipment by the Court, the Commission could refer only to one case of a refusal to repair. The Court concluded that such conduct could not be regarded as restricting the supply of parallel imports of cameras, where such cameras are fully covered by the manufacturer's normal guarantee, which the distributor is obliged to provide. Although the Court shared the view of the Commission regarding engagement of HGB in other restrictive practices in violation of EEC competition laws, its ruling in favour of HGB on the guarantee issue resulted in the reduction of the fine to 85 000 ECU's.

The *Hasselblad* case confirmed the *Zanussi* rule that the manufacturer's guarantee, which discriminates against parallel import, infringes Article 81(1). It also refined the EEC competition policy regarding the consumer's guarantees by upholding HGB's additional

¹⁰⁰ Commission decision of [xxx] Sony.

¹⁰¹ Judgment of 21 February 1984, *Hasselblad (GB) v Commission of the European Communities*, Case 86/82, ECR 1984, p. 883.

¹⁰² *Hasselblad*, 25 OJ L 161, 18, 1982.

¹⁰³ *Hasselblad (GB) Ltd v Commission of the European Communities*, point I (3)(c).

¹⁰⁴ Commission's decision of 2 December 1981, No IV/25, 757.

guarantee coverage.¹⁰⁵ However, because *Hasselblad* did not offer its guarantee in Luxembourg, the Court was not confronted with the issue of EEC-wide guarantee coverage. It is worth noting that the failure to provide a guarantee in one of the Member States did not result in infringement of Article 101(1).¹⁰⁶

Two further conclusions may be drawn from the *Hasselblad* case.¹⁰⁷ First, the Court shared the conclusion of the Advocate General that sole distributors may “lawfully combat parallel imports by offering a better or wider range of after-sales services, but they may not take steps to deprive parallel imports of benefits to which they are entitled under the manufacturer’s guarantee.”¹⁰⁸ The Court approved not only the distributor’s additional coverage, but also the special incentives to purchase the product from the distributor, such as the 24-hour repair service for the distributor’s customers. Article 101(1) permits such additional coverage or service as long as the manufacturer and distributor do not discriminate against parallel imports in their application of the manufacturer’s guarantee. Second, the Court held that some types of priority service for the distributor’s customers might be discriminatory and invalid, however it did not elaborate on what priority service might constitute discrimination against parallel imports. According to Advocate General Slynn, the accusation of discriminating against parallel import may only take place “if there is evidence either that guarantee work was not carried out on parallel imports at all, or that it took longer or was done less efficiently than comparable repair work, whether guarantee or non-guarantee, done to equipment sold through the sole distributor.”¹⁰⁹

2.3.1.4 Ideal-Standard

The next step was made in 1984,¹¹⁰ when Ideal-Standard GmbH (Ideal), a producer of plumbing fittings notified to the Commission a standard dealership agreement to be used with specialist plumbing and sanitary ware wholesalers throughout the common market. The Ideal’s dealership agreement limited applicability of the Ideal’s guarantee on fittings only to the plumbing installed by a plumbing contractor. Ideal justified the limitation by the fact that “its mark could be harmed during installation by DIY enthusiasts, who tend to blame any fault on the manufacturer rather than on faulty installation.”¹¹¹

The Commission refused to grant exemption under Article 101(3), claiming that the Ideal-Standard dealership agreement constituted an infringement of Article 101(1) of the EEC Treaty as it restricted the Ideal guarantees on plumbing fittings to those installed by plumbing contractors. In the eyes of the Commission, linking guarantee services to installation by a plumber substantially reduced the scope for other retailers to sell the Ideal products. Further, the Commission claimed that the householder should be free to install the fittings himself or, if he does not feel competent or if it is against the law to install it himself, to have the fittings installed by a plumbing contractor.¹¹²

¹⁰⁵ Fine 1989, p. 241.

¹⁰⁶ Fine 1989, p. 241.

¹⁰⁷ Fine 1995, p. 241.

¹⁰⁸ Opinion of Advocate General Sir Gordon Slynn delivered on 13 July 1983 *Hasselblad GB Limited v Commission of the European Communities*, European Court Reports, 1984, p. 00883.

¹⁰⁹ *Ibidem*.

¹¹⁰ Commission Decision of 10 December 1984 (Ideal Standard’s distribution System), OJ L 20, 24.01.1984, p. 38-45.

¹¹¹ *Ibidem*, para.7, p. 40.

¹¹² *Ibidem*, para. 23, p. 43.

In the *Ideal-Standard* case, the Commission simply applied the principles previously formulated in the *Zanussi* case whereby a guarantee scheme excluding coverage for parallel imports or discouraging consumers from purchasing products in another Member State infringes Article 101(1).

2.3.1.5 Ford

In another case (*Ford* of 1983¹¹³), a number of Ford dealers had published individually and jointly an advertisement in newspapers stating that they would no longer provide guarantee service on cars purchased in another Member State. At the same time, the advertisement also stated that the guarantee work could only legally be required from the dealer who sold the car. A unilateral refusal by a single retailer not to honour the guarantee on products bought in another Member State is unlikely to be caught by Article 101 because there would be no agreement or concerted practice.¹¹⁴ However, in this case the Commission found that there were grounds for suspecting that the advertisements could violate Article 101(1). The dealers subsequently agreed to publish advertisements stating that consumers who purchase Ford vehicles in other Community Member States will no longer be handicapped in this way.

2.3.1.6 Swatch

The next move was made by the European Court of Justice in the judgement of 10 December 1985, *Eta Fabriques/ SA DK Investments (Swatch)*.¹¹⁵ Swatch watches were marketed through exclusive distributors and the distribution agreement required the agent to buy a minimum number of watches. The watches were accompanied by the producer's guarantee for 12 months from the date of purchase by the consumer, subject to up to 18 months after their delivery to the distributors. The packaging of every watch contained a certificate of guarantee from the producer against all defects for 12 months from the date of purchase. In the event of a defect, the watch was replaced (repair for technological reasons was impossible).

The Brussels Tribunal de Commerce (Commercial Court) requested a preliminary ruling under Article 177 in a procedure involving the producer (ETA) versus several parallel distributors. The question was whether a manufacturer could restrict a guarantee on his product to the clients of the authorised dealers only.

As in the *Zanussi* case, the guarantee was withheld from the customers of parallel importers. ETA wanted to prevent parallel distributors from furnishing the watches with the guarantee certificate, arguing that the guarantee resulted from an agreement between ETA and the exclusive distributors, it was of a contractual nature and related only to watches sold through its network of distributors. Additionally, the agreement imposed a maximum storage period on the distributors, and ETA claimed that it is concerned to ensure the compliance with these periods.

¹¹³ Commission decision of 16 November 1983 (Distribution system of Ford Werke AG), OJ L 327, 24.11.1983, p. 31-39.

¹¹⁴ Twigg – Flesner 2003, p. 158.

¹¹⁵ Judgment of 10 December 1985, *Eta Fabriques/ SA DK Investments*, Case 81/85, ECR 1985, p. 3933.

The Court fully confirmed the Commission's policy and held that a guarantee scheme, under which a supplier of goods restricts the guarantee to customers of his exclusive distributor, places the latter and the retailers to whom he sells in a privileged position compared to parallel importers and distributors, and must therefore be regarded as having the object or effect of restricting competition within the meaning of Article 101(1) of the Treaty.

2.3.1.7 Bergerac

The ECJ confirmed its position in a judgement¹¹⁶ on a request for a preliminary ruling on the notion of misleading advertisement in Directive 84/450/EEC (the *Bergerac* case). In this case, an advertisement from an independent motor vehicle dealer concerning the manufacturer's guarantee was published in the press with the mention "buy your new car cheaper" followed by "a one-year manufacturer's guarantee". One of the questions concerned the misleading nature of the advertising. The Court referred to the *Swatch* ruling: "a guarantee scheme in which the supplier of goods reserves the guarantee only to the clients of his exclusive concessionary places this client and retail sellers in a privileged position vis-à-vis importers and parallel distributors, and must, consequently, be considered as having as its object or effect the restriction of competition for the purposes of Article 85(1) of the Treaty." Given that, the manufacturer would be required to uphold the guarantee, hence the advertisement could not be considered misleading because it corresponded to reality, the Court ruled.

2.3.1.8 Metro/Cartier

The next case decided by the Court – a judgement of 13 January 1994, *Metro SB-Großmärkte GmbH & Co. KG SA (Metro/Cartier)*¹¹⁷ – introduced an exception to the policy developed so far. Cartier SA (furthermore Cartier) was a subsidiary and a distribution company for Cartier Monde. Cartier operated a selective distribution system in the EEC, notified to the Commission in 1988. According to the terms of the contract, Cartier undertook to supply Cartier products within the Community only to authorised dealers, and in return the dealers could sell these products within the Community only to final consumers, or else to other authorised dealers established there.

Metro did not belong to the network of the licensees, but it was able to obtain Cartier products lawfully in non-member countries such as Switzerland, where there were gaps in Cartier's selective distribution system. Metro marketed them lawfully in the EEC, but outside Cartier's selective distribution system. Cartier's watches were offered a manufacturer's guarantee. Cartier honoured the guarantee on the condition that the guarantee certificate, which was to be completed at the time of the purchase, bore the stamp and the signature of an authorised Cartier licensee. Since 1984, Cartier has refused to honour guarantees on watches sold by Metro.

Advocate General Tesauro, who spoke in this case, was clearly supporting the already established principle prohibiting any restrictions on the validity of the guarantees on grounds relating to the status of the seller. "To permit a restriction on the guarantee means that consumers who have lawfully acquired original products from independent dealers are deprived on this ground alone, of the producer's normal guarantee for manufacturing defects.

¹¹⁶ Judgment of 16 January 1992, Criminal Proceedings against x, known as *Bergerac* case, Case C-373/90, ECR 1992, p. 131.

¹¹⁷ Judgement of 13 January 1994, *Metro SB-Großmärkte GmbH & Co. KG SA (1994) (Metro/Cartier)* C-376/92.

This constitutes a wholly unjustified form of discrimination, at least in so far as the defects are attributable to the producer and not to the independent dealer who sold the product.”¹¹⁸ The Court did not share the opinion of the Advocate General. It stated that the restrictions on the manufacturer’s guarantee to products covered by the contract, which are obtained through a selective distribution system, must be regarded as valid. The Court explained that, in the case of a selective distribution systems “a contractual obligation to restrict the guarantee to dealers within the network and to refuse to grant it in respect of goods sold by third parties leads to the same result and has the same effect as contractual terms that reserve the right to sell to members of the network. Similar to these terms, the restriction of the guarantee is a means whereby the manufacturer can prevent anyone outside the network from marketing products covered by the system.”¹¹⁹

This judgement was evaluated as “undoubtedly correct” from a competition law perspective.¹²⁰ The aspect that distinguishes this case from others is that it involves a selective distribution system that any retailer who satisfies the qualitative criteria may join. However, the selective distribution systems are acceptable only for a limited category of products.¹²¹

2.3.1.9 Principles concerning guarantees established by the case law

As Tenreiro said in 1995,¹²² the idea that the Community competition law has provided a clear, final answer to the problem of guarantees in the context of the internal market is not more than a myth. Fine confirms this observation,¹²³ stating that although some generalisations can be drawn from the cases settled or decided by the European Commission and the Court, these Community institutions have taken an *ad hoc* approach, limiting their inquiry to the facts of each case. These generalisations (according to Fine) or principles (by Tenreiro) could be formulated as follows:

- Guarantees must be effective throughout the EU (*Constructa*), although there is no obligation to provide a guarantee in every Member State (*Hasselblad*);
- Members of a distribution system are required to deal with claims under guarantees bought in other Member States and regardless of where the product is used (*Zanussi*);
- Guarantees may not be refused if the product was bought from a parallel importer (*Swatch*), with the exception of a selective distribution network (*Metro/Cartier*);
- A distributor may offer an additional guarantee (as compared with the manufacturer’s guarantee) as long as the additional guarantee does not discriminate against the parallel import in the application of the manufacturer’s guarantee (*Hasselblad*);
- The guarantee should apply on the terms regarding technical and safety standards of the country where the product is used. If a product did not meet the safety standards of the country where the consumer resides, the guarantee would be honoured if the consumer arranged and paid for the adaptation (*Moulinex* and *Bauknecht*);
- Adaptation (when required by technical and safety standards) (*Moulinex* and *Bauknecht*) as well as installation by the buyer (unless it is against the law) (*Ideal-Standard*) do not invalidate the guarantee;

¹¹⁸ Opinion of Advocate General Tesaro delivered on 27 October 1993, *Metro SB-Großmärkte GmbH & Co. KG SA v Cartier SA*, European Court Reports 1994, p. I-00015.

¹¹⁹ Judgement of 13 January 1994, *Metro SB-Großmärkte GmbH & Co. KG SA (1994) (Metro-Cartier)* C-376/92, para.32.

¹²⁰ Goyder 1996, p. [Xxx].

¹²¹ Twigg-Flesner 2003, p. 160.

¹²² Tenreiro 1995, p. 87.

¹²³ Fine 1989, p. 245.

- If the spare parts for a product are not available in the country where the product is used (e.g. because different parts are required to meet safety standards), the consumer may have to return the appliance to the country of purchase at his own expense in order to benefit under the guarantee (*Sony*).¹²⁴

2.3.2 Regulations

Competition law policy on guarantees is complemented with a number of regulations and guidelines issued by the Commission, dealing in principle with exclusive distribution agreements, sometimes limited to specific sectors or franchising contracts.

The first regulation in question dealt with categories of exclusive distribution agreements¹²⁵ and was in force between 1 July 1983 and 31 December 1997. It regulated exemptions by category, and contained only a reference to guarantees. Article (2)(3)(c) stated that the distributor's obligations to take measures for the promotion of sales, in particular to provide customer and guarantee services, do not prevent an exemption by category. The scope of application of this regulation was limited to exclusive and selective distribution agreements in the motor vehicle industry.¹²⁶ Such agreements could not lead to an elimination of competition or to partitioning the national markets. Article 5(1)(1) stipulated as a condition of exemption that all undertakings in the distribution network must honour the guarantee and perform free servicing and vehicle recall work irrespective of the place of purchase of the vehicle in the common market. According to the Regulation on categories of franchise agreements,¹²⁷ it is necessary to obtain exemption by category to comply with an obligation that, where the franchiser obliges the franchisee to honour the guarantees for the franchiser's goods, that obligation applies in respect of goods supplied by any member of the franchise network, or other distributors who give a similar guarantee in the common market. These regulations simply reconfirmed the position of the Commission established earlier.

In 2000, the Commission issued a notice – Guidelines on Vertical Restraints.¹²⁸ The guidelines set out the principles for assessing vertical agreements under Article 101. According to the definition provided in Article 2(1) of the Commission Regulation on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerned practices¹²⁹ (the Block Exemption Regulation) vertical agreements were understood as agreements or concerned practices entered into between two or more undertakings, each of which operates, for the purpose of the agreement, at a different level of production or distribution chain, and relating to the conditions under which parties may purchase, sell or resell certain goods or services. The notice clarified that the hardcore restriction set out in Article 4(b) of the Block Exemption Regulation may result from the supplier not providing a Community-wide guarantee service, whereby all distributors are obliged to provide the

¹²⁴ Twigg - Flesner 2003, p. 158.

¹²⁵ Commission Regulation (EEC) No 1983/83 of June 22, 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements OJ L 173/1, 30.6.83.

¹²⁶ Regulation No 123/85 on certain categories of motor vehicle distribution and servicing agreements OJ C17 of 18.1.85.

¹²⁷ Commission Regulation No 4087/88 on categories of franchise agreements, OJ L 359 of 28.12.88.

¹²⁸ Commission notice, Guidelines on Vertical Restraints, OJ C 291 of 13.10.2000.

¹²⁹ Commissions Regulation No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerned practices, OJ L 336 of 29.12.1999.

guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory.¹³⁰

In 2002, the Commission touched upon a wide issue of maintenance services in the Regulation on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerned practices in the motor vehicle sector.¹³¹ According to this regulation, the provisions of Article 101(1) do not apply to vertical agreements where they relate to the conditions under which the parties may purchase, sell or resell new motor vehicles, spare parts for motor vehicles, or repair or maintenance services for motor vehicles. According to Article 4, the exemption does not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, are aimed at such things as: the restriction of the authorised repairer's ability to limit its activities to the provision of repair and maintenance services and the distribution of spare parts (letter h); the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers using these parts for the repair and maintenance of a motor vehicle (letter i); the restriction of a distributor's or authorised repairer's ability to obtain original spare parts, or spare parts of matching quality from a third undertaking of its choice, and to use them for the repair or maintenance of motor vehicles, without prejudice to the ability of a supplier of new motor vehicles to require the use of original spare parts supplied by it for repairs carried out under warranty, free servicing and vehicle recall work (letter k). The regulation does not elaborate on any of the previously mentioned subjects – it deals with limitations on repair and maintenance services and restrictions concerning the availability of the spare parts (original and of a matching quality). An interesting issue here is the division employed by this regulation: maintenance services, free servicing, warranty and recall work; this division does not match any of the categories known in private law.

3. Guarantees in consumer programmes

3.1 Opening the discussion

The interest in regulating guarantees within the ambit of consumer law has not been born together with the famous Green Paper of 1993. This subject was already brought up in the first two EEC programmes of 1975¹³² and 1981¹³³ for a policy for the protection and information of consumers. The 1975 programme underlined that the consumer is entitled to a satisfactory after-sale service for consumer durables. It gave priority to fighting unfair commercial practices in the field of guarantee conditions, mainly for durable goods, and to harmonising the law on product liability. The second EEC programme reaffirmed the double-edged need: protecting the economic interests of consumers in respect of defective products, while at the same time ensuring the existence of a satisfactory after-sale service.

In 1979¹³⁴ the Consumer Consultative Committee, in its opinion on the draft programme of action, presented a view that priority should be given to the motor vehicle and electrical

¹³⁰ Commission notice, Guidelines on Vertical Restraints, OJ C 291 of 13.10.2000, paragraph 49.

¹³¹ Commission Regulation (EC) No. 1400/2002 of July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerned practices in the motor vehicle sector, EC OJ 2002 L 203/30.

¹³² Council Resolution on a preliminary programme for a Community consumer protection and information policy of April 14, OJ 1975 C92/1.

¹³³ Council Resolution of May 19, OJ 1981 C 133/1.

¹³⁴ CCC/44/79 of 24 April 1979.

appliance sectors, and thus for the first time it was suggested that guarantees tend to appear more frequently in certain sectors of the market.

1986 saw the introduction of a new cross-border dimension to the discussion. The Council, in its resolution concerning the future orientation of EEC policy for the protection and promotion of consumer interests,¹³⁵ was specifically concerned with the quality of after-sale services provided by producers and suppliers, as well as by the companies providing maintenance and repair. The Council paid attention to issues like the guarantee period, the transport costs, the out-of-service costs, and the availability of the replacement parts. At the same time it highlighted the difficulties consumers encounter when invoking guarantees on products purchased in other Member States. It was declared that the guarantee, as a service linked to a product and relating to a consumer durable, had to be honoured in the consumer's country of residence, even if it had been purchased in another country. It is worth noting that this approach was in line with the competition policy on guarantees developing at that time.

In 1989, the Council, in its resolution on future priorities for re-launching a consumer protection policy,¹³⁶ invited the Commission to conduct a study on the possible initiatives in this field. In 1990, the Commission published a new Three Year Action Plan of Consumer Policy in the EEC (1990-1992).¹³⁷ In this document, the Commission declared to view the guarantee from the perspective of smooth operation of the internal market. The Action Plan revealed the Commission's plans to examine ways to simplify cross-border contracts, guarantees and after-sale services.

In 1992, the Council published a resolution on future priorities for the development of consumer protection policy.¹³⁸ It emphasised the need for supplementary measures to create consumer confidence in the Single Market. At the same time, the Council invited the Commission to assess the purpose and the desirability of the approximation of the guarantee system and the improvement of the after-sales service for goods and services in the internal market.

In addition, the European Parliament contributed to the discussion on guarantees, adopting in 1992 a resolution on standards of consumer protection and public health with regard to the completion of the internal market (the Albert Report).¹³⁹ The Parliament asked the Commission to "review the laws of the various Member States on guarantees schemes and to propose schemes that will ensure a minimum European standard, but to retain contractual guarantees that go further than this as a special form of competition and not to regulate them in European laws." In the course of the discussion, the Economic and Social Committee published an own-initiative Opinion on the Completion of the Internal Market and the

¹³⁵ Council Resolution of June 23 concerning the future orientation of EEC policy for the protection and promotion of consumer interests, OJ 1986 C 167/1.

¹³⁶ Council Resolution on future priorities for relaunching consumer protection policy of 9 November 1989, OJ 1989 No C 294/1.

¹³⁷ Commission Three Year Action Plan of Consumer Policy in the EEC (1990-1992) of 3 May 1990, COM (90) 98 final.

¹³⁸ Council Resolution on future priorities for the development of consumer protection policy of 23 July 1992, OJ 1992 C 186/1.

¹³⁹ Parliament Resolution of March 11 1992 on standards of consumer protection and public health with regard to completion of the internal market, OJ 1992 C 94/217.

Consumer Protection¹⁴⁰ and an Additional Opinion on the Consumer and the Internal Market,¹⁴¹ which both underlined the need for action regarding guarantees in cross-border transactions. In the latter, the Committee declared: “particular attention should be paid to the establishment of an EC system that would be effective throughout the Community, to provide consumers with guarantees in respect of latent defects.”

3.2 The Unfair Contract Terms Directive

The European Parliament and the Economic and Social Committee expected that (what would become) the Unfair Contract Terms Directive would deal with consumer guarantees. At first the Commission’s proposal indeed envisaged this,¹⁴² but later, at the Council’s request, the subject was repealed from the draft. The initial proposal aimed at regulating unfair contract terms in general. It expressly referred to disparities in terms of consumer sales of goods and services contracts that could cause a distortion of competition among sellers when they sell in other Member States. The proposal signalled the problem of liability of the seller in the event the supplied goods are not in conformity with the contract or are not fit for the purpose for which they are sold (but a uniform concept of conformity had not been formulated in that draft), listed the remedies of the buyer and spelled out the buyer’s right to damages.

The proposal expressly referred to guarantees: point (c)(1) of the Annex dealt with the manufacturer’s guarantees transferred to the consumer by the seller. According to the proposed rules, in such a case the terms were unfair if they had the object or effect of denying consumers the right, as purchaser under the contract of the sale of goods, to benefit from the manufacturer’s guarantee for a period equal at least to the normal life of the goods or 12 months, whichever is shorter, and to enforce payment, from either the seller or the manufacturer, of the costs incurred by the consumer in obtaining the implementation of the guarantee.

This was, in fact, the first European attempt to regulate the content of the guarantee. Interestingly, the proposal dealt only with the manufacturer’s guarantee, without paying attention to the guarantees provided by the seller, or by other parties. Also, it referred to the act of “transmitting” the guarantee by the seller to the buyer, which could raise questions about the seller’s position as the party who is (potentially) obliged to transmit the guarantee. The proposal dealt with two guarantee elements: the period and the enforcement of payment. The proposal set a flexible minimal period of the guarantee: it referred to the much-feared measure of “the normal life of the goods”, but at the same time in fact it severely reduced its impact, limiting it to 12-month period. The proposal gave the consumer the right to recover the costs incurred by the consumer in implementing the guarantee. It is difficult to decide whether the proposal was also aimed at banning other forms of payment for the guarantee, i.e. to eliminate guarantees against payment.

In its opinion concerning the proposal,¹⁴³ the Economic and Social Committee argued that the Commission has not dealt with the problem of guarantees and after-sale services sufficiently,

¹⁴⁰ Economic and Social Committee Opinion of September 26, 1991 on the Completion of the Internal Market and the Consumer Protection, O.J. C 339/16.

¹⁴¹ Economic and Social Committee opinion of November 24, 1992 on the Consumer and the Internal Market, OJ 1992 C 19.

¹⁴² Article 6 of the amended proposal, COM (92) 66 final of March 4 1992, OJ 1992 C 73.

¹⁴³ Economic and Social Committee opinion on the Commission Proposal for a Council Directive on unfair terms in consumer contracts, OJ C 159 of 17/6/91, p. 34-37.

and insisted on a comprehensive discussion with all interested parties in order to assess the need for Community action in the field of after-sale services and guarantee conditions. It argued that the lack of consumer confidence in cross-border transactions, due to the diversity of after-sale services and guarantee conditions, constitutes a major barrier to cross-border trade. The Committee pointed out that the “warranty period” should take account of shorter periods for second-hand goods.

In 1993, the Commission published its second Action Plan concerning consumer policy for 1993-95,¹⁴⁴ called “Placing the Single Market at the service of European consumers”. The Action Plan stated that appropriate guarantee and after-sales services conditions are important if consumers are to be encouraged to benefit from the opportunities offered by the Single Market. It also underlined that cross-border shopping can only flourish if the consumer knows he will enjoy the same guarantee and the same after sale services under the same conditions no matter where the supplier is located. The Action Plan announced a Green Paper on guarantees for consumer goods and after-sales services, which appeared later that same year.¹⁴⁵

3.3 The Green Paper of 1993

The Green Paper represents the “new wave” approach of green papers aimed at opening up discussion among concerned parties and Community institutions before any formal proposals for new measures are adopted.¹⁴⁶ The publication of the Green Paper was preceded by intensive consultation procedures that involved Member States, business circles, the Committee on Business and Distribution and other interested parties.¹⁴⁷

3.3.1 Objectives of the Green Paper

The objectives of the Green Paper were manifold.¹⁴⁸ First, it aimed at analysing the existing situation at a national level, which was requested by the business community during the preparatory consultations.¹⁴⁹ Second, it attempted to identify the problems that consumers and business have to face - a target recognised by all interested groups. The third objective was to outline certain possible solutions at a Community level. This objective was of interest not only to the business and consumer organisations, but also to national authorities seeking new solutions in domestic regulations.¹⁵⁰

3.3.2 Scope of the Green Paper

The Green Paper discussed three different notions: a legal guarantee, a commercial guarantee and after-sales services. It defined them in the following way:¹⁵¹ the legal guarantee, as the traditional protection deriving directly from the law, is present in all the national legal orders. According to this regime, the seller (or some other person) is held liable to the buyer for

¹⁴⁴ Commission Three Year Action Plan “Placing the Single Market at the Service of European Consumers” of July 28, 1993, COM (93) 378.

¹⁴⁵ Commission Green Paper on guarantees for consumer goods and after-sales services of 15 November 1993, COM (93) 509, final.

¹⁴⁶ Tenreiro 1995, p. 79.

¹⁴⁷ Green Paper 1993, p. 5.

¹⁴⁸ Ibidem, p. 6.

¹⁴⁹ Ibidem, p. 5.

¹⁵⁰ Ibidem, p. 5.

¹⁵¹ Ibidem, p. 6.

defects in the sold products. The commercial guarantee refers to additional features offered optionally by the producer, seller or any other person in the product distribution chain. The person offering it freely establishes the effects and conditions for invoking the guarantee. The after-sales services are understood in the strict sense, i.e. those that are not part of the guarantee, and which, consequently, are provided against payment.

The Green Paper made some restrictions as to the scope of its considerations. First of all it excluded services, although it recognised the similarities existing between problems that appear in the area of sales and services. Next, it limited its study to the sale of movable consumer goods that are durable and new, as, in the opinion expressed in the Green Paper, these are the type of goods most likely to pose problems for consumers in cross-border transactions.¹⁵²

3.3.3 Identified problems

The Green Paper pointed out two types of problems arising for commercial guarantees. The first was the commercial practices regarding the guarantee, such as the presentation of the guarantee, its application, legal status and relation to the legal guarantee, advertising referring to the guarantee, inadequate information provided to consumers, etc. The second problem concerned the functioning of the commercial guarantee in the context of the Single Market.

3.3.4 The proposed solutions

Generally speaking, the Green Paper proposed a legal scheme applicable to commercial guarantees based on the principle that guarantees should be offered voluntarily. Under such a scheme, the rules would aim at assuring adequate consumer information and the necessary market transparency “with a view to encouraging healthy competition based on good commercial practices.”¹⁵³ The Green Paper identified three fundamental principles on which the commercial guarantees legal scheme could be based:

- establishing certain mandatory rules concerning the legal status of the guarantees and of certain elements that should be present in the guarantee document;
- establishing supplementary rules concerning the concrete guarantee scheme applicable in the event of gaps in the commercial documents;
- establishing the principle whereby advertising concerning the guarantee is considered as a part of the guarantee documents, making the advertiser directly liable to the individual consumer.

The Green Paper based its considerations on a balanced assumption that the legal framework should be designed to reinforce the “competitive” element contained in the guarantee, to ensure the effectiveness of the producer’s guarantee throughout the Single Market and to contribute to correct and complete information of consumers. The framework was not to affect the voluntary nature of the commercial guarantee but to ensure the transparency and proper operation of the market.¹⁵⁴

The Green Paper offered three specific regulatory schemes for guarantees:

1) A regulatory and unitary option (a mandatory Community legal scheme). According to the Green Paper, the main advantage of this solution would be that it fully solved the problems

¹⁵² Green Paper of 1993, p. 7.

¹⁵³ Green Paper of 1993, p. 95.

¹⁵⁴ Ibidem, p. 15.

resulting from the absence of legislation on guarantees and the problems resulting from the operation of the guarantee in cross-border situations. Under this option, the guarantee would be given on a voluntary basis, though it would be assumed that guarantees offered by producers are valid throughout the common market and subject to uniform conditions. In other words, all the commercial guarantees offered by a producer in a Member State would hence inevitably have to be “European Guarantees”.

The Green Paper has rightly pointed out that such a solution might be an excessive burden on businesses, notably on smaller firms that often do business only in one or a few Member States, and which would therefore find it hard to guarantee after-sale services throughout the Single Market. In principle, such a solution would benefit large companies present in all the Member States, which could offer a guarantee for their products, as opposed to smaller firms, which in practice would often be unable to do so, because they could no longer limit the territorial scope of their guarantees.

2) A voluntarist option involving optional voluntary schemes adopted to improve the quality of the guarantees offered on the market and to resolve the problem of applying these guarantees in a large market. Professionals would be free to adhere to such a scheme. The Commission proposed two variants of this solution: the first would involve a Community legal instrument, permitting access to a “quality label” concerning the guarantee or use of a protected designation or brand name. The second would be self-regulation in the form of codes of conduct. In the first case, control would be effected *a posteriori* on guarantee conditions applied by those who claim to belong to the “system” by the competent organisations or national authorities. In the second case, codes of conduct would have to include effective mechanisms to ensure compliance.

This option would involve creating a supplementary voluntary scheme concerning the “European” status of the guarantee. According to the Green Paper it would require distinguishing between three types of guarantees: the normal guarantee, entirely subject to freedom of contract; the quality guarantee, subject to the established quality standards; and the European guarantee subject to the additional requirement that it will be valid throughout the common market under uniform conditions.

The Green Paper itself identified two major drawbacks to this approach. First, it would not solve consumers’ problems in connection with “normal” guarantees or the unresolved legal aspects of these guarantees. Second, the Commission predicted that the Member States would initiate legislative actions along the lines of Member States where specific legislation already exists, hence risking a multiplicity of approaches, that might lead to distortions in competition and barriers to trade. Here, however, one could observe that if the existing legislations would be followed, one or two dominant approaches, possibly with small national derogations probably appeared on the market.

3) A mixed option involving a mandatory Community legal scheme, supplemented, where relevant, by voluntary rules on the basis of self-regulation, combined with an entirely voluntary scheme (to solve the problem of the large market). This approach would lead to the creation of a mandatory legal framework applicable to all commercial guarantees and an optional “European Guarantee”, subject to certain supplementary rules on uniformity and applicability throughout the Community.

3.3.5 The Euroguarantee

The Green Paper also put forward the idea of establishing a Euroguarantee scheme.¹⁵⁵ Such a scheme would be based on two assumptions. The first was an application of standard guarantee conditions in all Member States for the same type of goods of the same brand. The second assumption was that there should be a real possibility of implementing the guarantee in all the Member States, no matter where the goods were purchased. The Green Paper explained that the Euroguarantee would not impose on the producers an obligation to market the goods in all the Member States, or an obligation to be present or represented in all the Member States, in order to give the buyer an opportunity to invoke the guarantee. It would be enough if the guarantor granted the same guarantee wherever the goods were sold and gave the consumer EU-wide access to any system that would allow the guarantee to be invoked. The Green Paper proposed that such a scheme could include returning the defective product to the producer at his expense. Such a construction was supposed to open the Euroguarantee to small and medium enterprises. The Green Paper gave a suggestion of a specific legislative proposal to regulate the Euroguarantee. The first part was to contain a definition of the Euroguarantee, the second one would describe the additional conditions to be met for the Euroguarantee (for example: detailed information concerning all formalities connected with invoking the Euroguarantee).

3.4 The following developments

After publishing the Green Paper, the Commission began work on the Consumer Sales Directive and did not pay much attention to the issue of guarantees in official policy papers. The Commission's third three year Action Plan 1996-98¹⁵⁶ started a new, wider Community initiative in the field of consumer protection, but it did not deal specifically with guarantees. The priorities listed in the plan included: taking account of the consumer interest in the internal market, education and information, financial services, public utilities, measures relating to the Information Society, foodstuff, sustainable consumption, promoting the representation of consumers in Central and Eastern Europe and promoting consumer protection in developing countries. The next Consumer Policy Action Plan for 1999-2001¹⁵⁷ concentrated on three issues: "A more powerful voice for the consumer throughout the EU, a high level of health and safety for EU consumers and full respect for the economic interest of consumers." This document did not specifically recall the EU sales rules either.

3.5 The Consumer Sales Directive

The decisive step for establishing the European policy on consumer guarantees was the adoption of the Directive on certain aspects of consumer goods and associated guarantees.¹⁵⁸

The first proposal for a directive¹⁵⁹ declared a need to establish "certain common principles applicable to the guarantees offered by the economic operators." 'Guarantee' was defined in Article 1 (2)(d) as any additional undertaking given by a seller or a producer, over and above

¹⁵⁵ The Green Paper, p. 102.

¹⁵⁶ Commission Priorities for Consumer Policy 1996-1998, (95) 519 final, 31.10.1995.

¹⁵⁷ Consumer Policy Action Plan 1999-2001. Communication from the Commission. COM (98) 696 final, 01.12.1998.

¹⁵⁸ Directive 1999/4/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12.

¹⁵⁹ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees OJ C 307, 16.10.1996, p. 8.

the legal rules governing the sale of consumer goods, to reimburse the price paid, to exchange, repair or handle the product in any way, in the case of non-conformity of the product with the contract. Article 5 of the proposal contained a declaration of the binding force of the guarantee under the conditions laid down in the guarantee document and the associated advertising (paragraph 1). Further, it required the guarantee to place the beneficiary in a more advantageous position than that resulting from the rules governing the sale of consumer goods set out in the applicable national provisions. Paragraph 2 of that article dealt with the transparency requirements: the guarantee was to be in a written document, freely available for consultation before purchase and was required to set out clearly the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee, as well as the name and the address of the guarantor.

In its opinion on the proposal,¹⁶⁰ the Economic and Social Committee repeated its position already presented in the opinion on the Green Paper of 1993:¹⁶¹ broad backing of the gradual harmonisation of minimum standards in the field of legal guarantees, but the rejection of the full scale and obligatory harmonisation of commercial guarantees. Supporting the Directive's approach to guarantees, the Committee underlined that the idea of the advantage helps to protect consumers from being misled and enhances honourable trade practices. In the eyes of the Committee, "The obligation to provide a minimum level of guarantee enhances the status of the commercial guarantee not only merely as an advertising tool but also increasingly as a competitive tool."¹⁶²

The European Parliament proposed some changes to the draft Directive:¹⁶³ the name "guarantee" was replaced with "commercial guarantee", the remedies listed in the definition (reimbursement of the price paid, exchange, repair and handling the goods in any way) were now reduced to a simple "putting things right", the coverage of the guarantee (previously: the non-conformity of the product with the contract) was defined as covering the goods not matching the characteristics described in the guarantee statement or the relevant advertising. The Parliament also amended the transparency requirements listed in Article 5 by adding the name and address of the person to be contacted and the procedure to be followed in order to make a claim under the guarantee to the list of information to be provided to the consumer. Additionally, the guarantee was required to "*advise*" consumers that they have legal rights, and that the guarantee does not affect those rights in any way. Moreover, where a guarantee was intended to apply only to specific parts of the product, it was required to clearly indicate this limitation, otherwise the limitation would be invalid. The next amended proposal by the Commission¹⁶⁴ introduced no changes regarding guarantees.

¹⁶⁰ Opinion of Economic and Social Committee on the proposal for a European Parliament and Council Directive on the sale of consumer goods and guarantees adopted on 27 November 1996, OJ No C 66/5, 27.11.1996, p. 7.

¹⁶¹ OJ C 295, 22.10.1994.

¹⁶² Opinion of Economic and Social Committee on the proposal for a European Parliament and Council Directive on the sale of consumer goods and guarantees adopted on 27 November 1996, OJ C 66, 27.11.1996, p. 10.

¹⁶³ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees OJ C 104, 10.03.1998, p. 30.

¹⁶⁴ Commission amended proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, OJ C 148, 14.5.1998, p. 12.

The common position adopted by the Council¹⁶⁵ contained the final version of the rules on guarantees. The draft returned to the name “guarantee” and introduced the requirement of the guarantee to be given without extra charge (Article 1(2)(e)). The definition again included a full list of remedies, i.e. reimbursement of the price paid, replacement, repair or handling consumer goods in any way, and the coverage referring to the goods not meeting the specifications set out in the guarantee statement or in the relevant advertising. Article 6, now fully devoted to guarantees, contained new elements. The guarantee was to set out, in a plain and intelligible language, not only the particulars necessary to claim under the guarantee, but also the contents of the guarantee (Article 6(2)). Three new paragraphs were added. Paragraph 3 further developed the transparency requirements: at the request of the consumer, guarantees were to be made available in writing, or featured in another durable medium available and accessible to him. Paragraph 4 added a new rule on languages: within its own territory, the Member State in which the consumer goods are marketed may, in accordance with the rules of the Treaty, provide that the guarantee be drafted in one or more languages determined from among the official languages of the Community. Paragraph 5 secured the validity of the guarantee against an infringement of the transparency requirements; such an infringement was in no way to affect the validity of the guarantee, on which the consumer may still rely on and require it to be honoured.

The final version of the text did not include some of the earlier proposals. First of all, the requirement that the guarantee should offer the consumer additional advantage over and above the legal rights was repealed. The Council did not give clear reasons for this decision, it justified it in the following way: “the Council concluded, after a thorough discussion, that the criterion of ‘more advantageous position’ was not applicable and deleted it.”¹⁶⁶ It seems that the additional advantage requirement was replaced by an obligation to set out the contents of the guarantee. Second, the requirement that the guarantee should be freely available for consultation before the purchase was replaced by the requirement that the guarantee should be available, in writing, or feature in another durable medium available and accessible to the consumer at that consumer’s request. Third, the provision regulating the issue of guarantee on parts of the goods only was simply repealed.

The deadline for transposing the directive was set for 1 January 2002 (Article 11). The directive (Article 12) obliged the Commission to review its application by 7 July 2006, and to submit a report to the European Parliament and the Council. Among other things, the report was to examine the case for introducing the producer’s direct liability. The Communication on the implementation was published in 2007.¹⁶⁷

¹⁶⁵ Common position (EC) No 51/98 adopted by the Council on 24 September 1998 with a view to adopting European Parliament and Council Directive 98/ /EC, of... on certain aspect of consumer goods and associated guarantees OJ C No 333, 30.10.98, p. 46.

¹⁶⁶ Common position (EC) No 51/98 adopted by the Council on 24 September 1998 with a view to adopting European Parliament and Council Directive 98/ /EC, of... on certain aspect of consumer goods and associated guarantees OJ C No 333, 30.10.98, p. 54.

¹⁶⁷ Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers’ liability, 24.04.2007 COM (2007) 210 final.

3.6 After the Consumer Sales Directive

In 2001, the Commission issued a Report on Action Plan and General Framework,¹⁶⁸ with a view to preparing a new consumer strategy. It represented a more general approach, setting three mid-term objectives, implemented through actions included in short-term rolling programmes. The new Consumer Policy Strategy for 2002-2006¹⁶⁹ established three general objectives of the policy: a high level of consumer protection, effective enforcement of consumer protection rules and the involvement of consumer organisations in EU policies. It underlined that EU consumer policy was aimed at setting a coherent and common environment ensuring that consumers are confident in shopping across borders throughout the EU.¹⁷⁰ The Consumer Sales Directive was not mentioned as one requiring revision (probably because the time for its transposition had not yet passed). The EU Consumer Policy Strategy for 2007-2013¹⁷¹ continues the tendency established in the previous programme, strongly underlining that consumer policy is the key to improving the internal market.

Another dimension to the debate on European consumer law was added in 2001. The Commission launched a public discussion on European contract law by publishing a Communication on European Contract Law¹⁷² (further: the 2001 Communication). Before that date the European Parliament adopted a number of resolutions on the possible harmonisation of substantive private law. In 1989¹⁷³ and in 1994,¹⁷⁴ the Parliament called for the commencement of work on the possibility of drawing up a common European Code of Private Law. In its resolution concerning the Commission's work programme 2000,¹⁷⁵ the European Parliament called on the European Commission to conduct a study in the area of civil law and its harmonisation. The next incentive to begin this process were conclusions of the European Council held in Tampere,¹⁷⁶ which requested "as regards substantive law an overall study on the need to approximate a Member State's legislation in civil matters in order to eliminate obstacles to good functioning of civil proceedings."

The 2001 Communication was the first consultation document issued by the European Commission that envisaged a more fundamental discussion about the way in which problems resulting from divergences between contract laws in the EU should be dealt with at a European level. The Commission asked whether the accepted selective approach consisting of adopting directives on specific contracts or specific marketing techniques was in need of

¹⁶⁸ Report from the Commission On the "Action Plan for Consumer Policy 1999-2001" and on the "General Framework for Community activities in favour of consumers 1999-2003", 23.8.2001 COM(2001) 486 final.

¹⁶⁹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions Consumer Policy Strategy for 2002-2006, COM(2002) 208 final, OJ C 137, 8.6.2002, p. 2.

¹⁷⁰ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions Consumer Policy Strategy for 2002-2006, COM(2002) 208 final, OJ C 137, 8.6.2002, p. 3.

¹⁷¹ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee EU Consumer Policy strategy 2007 – 2013 Empowering consumers, enhancing their welfare, effectively protecting them, COM(2007) 99 final.

¹⁷² Communication from the Commission to the Council and the European Parliament on European contract law, Brussels 11.07.2001, COM(2001) 398 final.

¹⁷³ Resolution of the European Parliament A2-157/89, OJ C 377, 29.12.2000, p. 323.

¹⁷⁴ Resolution of the European Parliament A3-0329/94, OJ C 205, 25.7.1994, p. 518.

¹⁷⁵ Resolution of the European Parliament B5-0228, 0229-0230/2000, OJ C 377, 29.12.2000, p. 323.

¹⁷⁶ Presidency conclusions, Tampere European Council 15 and 16 October 1999, SI (1999) 800.

correction. The Communication presented four options for future developments of contract law:

- No EC action;
- Promoting the development of common contract law principles leading to more convergence of national laws;
- Improving the quality of the legislation already in place;
- Adopting new comprehensive legislation at the EU level.

The 2001 Communication listed the Consumer Sales Directive as the first one among important Community *acquis* in the area of consumer contract law. In 2003, the Commission published a further consultative document - A More Coherent European Contract Law, an Action Plan (further: the Action Plan),¹⁷⁷ which identified the main problems of the *acquis*:

- Use of abstract legal terms in directives, which are either not defined or too broadly defined;
- Existence of areas where the application of directives does not solve problems in practice;
- Differences between national implementing laws deriving from the use of minimum harmonisation in consumer protection directives;
- Inconsistencies in EC contract law regulations.

The Action Plan suggested a mix of non-regulatory and regulatory measures in order to solve those issues. The proposed measures were aimed at increasing the coherence of the EC *acquis* in the area of contract law, promoting the elaboration of EU-wide general contract terms, and examining further whether problems in the European contract area may require non-sector specific solutions, such as an optional instrument. The Commission identified the need to increase (where necessary and possible) coherence between instruments that are part of the EC contract *acquis*, both in their drafting and in their implementation and application. The Commission expressed an intention to elaborate, via research and with the help of all interested parties, a Common Frame of Reference that would provide for the best solution in terms of common terminology and abstract terms like “contract” or “damage”. The Commission concluded that a review of the current European contract law *acquis* could remedy the identified inconsistencies, increase the quality of drafting, simplify and clarify the existing provisions, adapt the existing legislation to the economic and commercial developments not foreseen at the time of adoption, and fill the gaps in EC legislation that led to problems in their application.

The European Parliament¹⁷⁸ and the Council¹⁷⁹ adopted resolutions welcoming the Action Plan. In 2004, the Commission announced the follow-up to the 2003 Action Plan - Communication on European Contract Law and the revision of the *acquis*: the way forward.¹⁸⁰ The Communication outlined a plan to develop the Common Frame of References in order to improve the coherence of the existing and future *acquis*, and set out specific plans for the parts of the *acquis* relevant to consumer protection, in line with the Consumer Policy

¹⁷⁷ Communication from the Commission to the European Parliament and the Council, A more coherent European contract law, an Action Plan, Brussels, 12.2.2003, COM(2003) 68 final.

¹⁷⁸ European Parliament resolution on the Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan (COM(2003) 68 - 2003/2093(INI)), A5-0256/2003.

¹⁷⁹ Council resolution on "A More Coherent European Contract Law", 14.10.2003, OJ 2003/C 246/1□2.

¹⁸⁰ Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the *acquis*: the way forward, Brussels, 11.10.2004, COM(2004) 651 final.

Strategy 2002-2006. Regarding the CFR, the Commission discussed the following: the possible functions of the CFR, the legal nature of the CFR, the possible structure and the content of the CFR. The Communication also discussed the possibility of introducing an optional instrument.

3.7 Further review of the consumer *acquis*

The Commission continued the process of reviewing the consumer *acquis*, and in 2007 it published a Green Paper on the Review of the Consumer *Acquis* (further the Green Paper 2007).¹⁸¹ The Commission selected eight directives aimed at protecting consumers¹⁸² for review, including the Consumer Sales Directive. The Green Paper 2007 identified, as the overarching aim of the review process, the achievement of a real consumer internal market that would strike the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity. The public debate on the future of the consumer *acquis* received quite a lot of attention – the European Commission obtained 307 responses to the Green Paper. Chapter V contains references to the suggestions concerning guarantees, which appeared in the responses.

The Green Paper 2007 considered the issue of guarantees in a relatively extensive manner, referring to them as to consumer goods guarantees or commercial guarantees. It gave a short and rather unclear introduction to the subject saying that “on top of the rights conferred upon consumers by legislation, sellers or producers may offer consumers additional rights on a voluntary basis. They can, for example, grant consumers certain rights in case the goods do not meet specifications set out in the guarantee statement and in associated advertising.”¹⁸³ The Green Paper 2007 posed very specific questions relating to three issues: the content of the guarantee, the transferability of the guarantee and the guarantees on specific parts.

Regarding the content of the guarantee, the Green Paper asked¹⁸⁴ whether the horizontal instrument (as it called the future directive) should contain default rules regulating the contents of the guarantee, which would apply in the situation when the guarantee statement fails to inform the consumer about the content of the guarantee. The Green Paper proposed that such a default content could offer the guarantee holder a right to replacement or repair if

¹⁸¹ Commission Green Paper on the Review of the Consumer *Acquis* of 8 February 2007, COM (2006) 744 final.

¹⁸² Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, p.31; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, p. 59; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29; Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, p. 27, Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12.

¹⁸³ Commission Green Paper on the Review of the Consumer *Acquis*, p. 30.

¹⁸⁴ *Ibidem*, p. 31.

the goods were not in conformity with the contract, the duration would be equal to the estimated lifespan of the goods, and the costs of invoking and performing the guarantee would be borne by the guarantor. Such a guarantee would be EU-wide (no explanation as what that would actually means was given).

Addressing the problem of transferability, the Green Paper remarked¹⁸⁵ that the Consumer Sales Directive does not regulate this issue, although in practice this is important for consumers who intend to resell the product, as well as for the subsequent buyers who would like the products to be covered by the commercial guarantee, especially in the context of cross-border transactions. The Green Paper presented three options: (1) no regulation, (2) a mandatory rule, according to which a guarantee is automatically transferred to subsequent buyers, and (3) a default rule under which the guarantor would be able to exclude or limit the possibility to transfer a commercial guarantee in certain circumstances.

As to the guarantees on specific parts, the Green Paper referred¹⁸⁶ to the problem that may arise in the case of complex goods, where different parts of a product are accompanied by different guarantees. It considered whether the horizontal instrument should deal with the issue at all, and if so, whether it should only provide for the information obligation, or whether it should additionally provide that, by default, a guarantee covers the entire product.

The outcome of the consultation was offered as a proposal for a directive on consumer rights,¹⁸⁷ which the Commission finally presented at the end of 2008. Point 44 of the preamble simply explains that some traders or producers offer consumers commercial guarantees. As with the Consumer Sales Directive, the proposal underlines the importance of transparency – the preamble states that, in order to ensure that consumers are not misled, commercial guarantees should contain certain information, including their duration, territorial scope and a statement that the commercial guarantee does not affect the consumer's legal rights. As with its predecessor, the proposal gives a definition of the commercial guarantee (Article 2 (18)) and devotes only one article to its regulation. According to the proposal, the commercial guarantee means any undertaking by the trader or the producer (the guarantor) to the consumer to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract. Article 29, devoted to the regulation of the guarantee as such, deals with the binding force of the guarantee and offers a solution for the situation where there is no guarantee statement: a commercial guarantee will be binding on the guarantor on the conditions set out in the guarantee statement. Paragraph 2 deals with the guarantee statement, which must be drafted in plain intelligible language and be legible. Moreover, it lists the elements that the statement should contain: information on the legal rights of the consumer, as provided for in Article 26, and a clear statement that those rights are not affected by the commercial guarantee; the contents of the commercial guarantee and the conditions for making claims, notably the duration, territorial scope and the name of the guarantor. The guarantee statement should also, without prejudice to Articles 32 and 35 and Annex III(1)(j), set out, where applicable, that the commercial guarantee cannot be transferred to a subsequent buyer. According to paragraph 3, at the consumer's request, the trader will make the guarantee statement available in a durable medium. Paragraph 4 reproduces the solution of the Consumer Sales Directive, and states that

¹⁸⁵ Ibidem, p. 31.

¹⁸⁶ Ibidem, p. 31.

¹⁸⁷ Proposal for a directive of the European Parliament and of the Council on consumer rights, Brussels, 08.10.2008, COM(2008) 614/3.

non-compliance with paragraphs 2 or 3 will not affect the validity of the guarantee. During the legislative process Chapter IV of the Directive, which dealt with consumer sales (including guarantees) was removed from the draft, and at the end the Directive was adopted in a very reduced form.

4. Conclusions

4.1 The aim of this chapter

The main aim of this chapter was to present the evolution of European policy on guarantees, and to cast some more light on the first phase of the process, i.e. the achievements of the competition policy. However, such a collection of information, regarding the approach adopted in two separate European policies provokes certain questions, regarding primarily the interaction of the two, the differences and similarities between them, the tools employed as well as the results achieved by them.

Drawing conclusions, even if they are valid only for the guarantee regulation, certainly has a value, since the interaction between the competition policy and consumer protection has received little attention to date in general.¹⁸⁸ It is, however, necessary to clearly establish the limits of such conclusions. First of all, as already stated, these observations are made in the context of the guarantee regulation only and do not claim to have a universal character. Second, they aim at evaluating the general approach rather than concrete substantial solutions.

4.2 What conclusions may be drawn from analysing the policy steps regarding the guarantee?

4.2.1 *Different but convergent aims of the competition policy and of consumer law*

The competition policy and consumer protection are intimately related, they are two sides of the same coin of consumer sovereignty.¹⁸⁹ Competition law disciplines the supply side of the market (guaranteeing consumers have a choice among competing offers) while consumer law controls the demand side (so that consumer choice is not thwarted by unfair/unexpected contract terms).¹⁹⁰

Being more precise, consumer law is constructed with competition targets in mind (the double edge of consumer law, the Janus face of the consumer policy¹⁹¹). It tries to establish a proper level of consumer protection, but at the same time also facilitate the development of the Single Market by boosting consumer confidence. Competition law, on the other hand, aims at securing the proper use of the market for consumers, by preventing the business from depriving consumers of their rights resulting from the establishment of the Single Market.

Taking the above into consideration, it should only be reasonable to expect that competition law and consumer law go hand in hand regulating certain sectors of the market, building on each other's experience and complementing each other as the two component parts of an

¹⁸⁸ Monti 2007, p. 295, Gomez 2004, p. 187, but see: Cseres 2005.

¹⁸⁹ Waller 2003, p. 1.

¹⁹⁰ Monti 2007, p. 295.

¹⁹¹ Reich 1996, p. 56.

overarching unity of consumer sovereignty.¹⁹² The reality within the area of the guarantee is, however, surprisingly different.

4.2.2 Different approach to the problems and different tools used to implement the policies

4.2.2.1 Competition law

Competition law was the first of the two to develop an interest in the guarantee. It established certain principles, in connection to Article 101, however it has never produced a complete policy regarding guarantees in the competition context. Recently, policy development is on the decline. What represents the biggest value of the competition law achievements is that it accepted the bottom-up approach, and it took care of some very practical aspects of offering guarantees throughout Europe, all in light of assuring that there are no barriers on the market. Such an approach could in fact benefit consumers, as it considers real consumer problems. At the same time, competition law adopted a very consumer friendly approach. Monti¹⁹³ goes as far as to claim that the competition policy went well beyond the minimal harmonisation achieved by the EC consumer law, based on the fact that the Commission exempted certain distribution agreements under Article 101(3) on the condition that manufacturers who decide to include a guarantee should offer a Community-wide guarantee system. He continues¹⁹⁴ that Article 101 was used to impose standard terms in consumer contracts designed to protect consumers in a manner resembling consumer law, and that competition law does the work of consumer law because of political failure.¹⁹⁵

At the same time, it is worth remembering the limits of competition law.¹⁹⁶ This is a sphere of law concerned only with business activities that come within the ambit of the law on concerned practices. It does not deal with issues like the existence of the guarantee, its content or the conditions for invoking it. Most importantly, it does not create any right for the consumer to rely on directly. Also – as underlined by the Green Paper of 1993¹⁹⁷ – it does not contribute in the field of harmonisation with regard to the transparency of guarantees either. It merely provides that the guarantee offered to a consumer who shops abroad must be performed in conformity with the conditions practised in the country in which the guarantee is invoked, while recognising that the guarantee scheme offered by the same manufacturer for the same product may not necessarily be the same throughout the Community.

4.2.2.2 Consumer law

Consumer law accepted consumer sales guarantees in the sphere of its interest later on. From the very beginning of the development of consumer law, however, it strongly underlined that it sees the guarantee through the perspective of the market functioning. At first (1986), it underlined that a guarantee should be honoured in the consumer's country of residence, even if it had been purchased in another country, which was a direct reference to the competition policy developed at that time. Later it referred to the smooth functioning of the market and to encouraging consumers to benefit from the opportunities offered by the market, but at the

¹⁹² Averitt, Lande 1997, p. 713.

¹⁹³ Monti 2007, p. 307.

¹⁹⁴ Ibidem, p. 307.

¹⁹⁵ Ibidem, p. 307.

¹⁹⁶ Green Paper of 1993, p. 65.

¹⁹⁷ Ibidem, p. 65.

same time pointed out other arguments, such as the consumer's ability to benefit from the same guarantee and after sale services conditions no matter where the supplier is located,¹⁹⁸ consumer information and the necessary market transparency.¹⁹⁹ The Green Paper of 1993 elaborated on the principles established by competition law and proposed the introduction of the Euroguarantee,²⁰⁰ though this idea never made it to the Consumer Sales Directive. The Consumer Sales Directive perceived guarantees as a factor stimulating competition.²⁰¹

Two observations can be made on the grounds of consumer policy. Firstly, as compared with the competition policy, the relevance of the proposed or considered solutions is much less anchored in market reality. Competition law starts with real life cases and builds upon them. Consumer law, despite rather a good beginning (review of the consumer problems arising within the area of guarantees), departs from its initial findings and severely reduces the scope of its impact (on this issue: see chapter III). Secondly, consumer law does not take into account the (very few) principles established by competition law, first of all that the guarantees must be effective throughout the EU,²⁰² although there is no obligation to provide a guarantee in every Member State. The other important principles are for example that members of a distribution system are required to deal with claims under guarantees bought in other Member States regardless of where the product is used; that the guarantee should apply on the terms regarding technical and safety standards of the country where the product is used, or that if a product did not meet the safety standards of the country where the consumer resides, the guarantee is to be honoured if the consumer arranged and paid for the adaptation; the adaptation (when required by technical and safety standards) as well as installation by the buyer (unless it is against the law) do not invalidate the guarantee.

¹⁹⁸ Commission Three Year Action "Plan Placing the Single Market at the Service of European Consumers" of July 28, 1993, COM (93) 378.

¹⁹⁹ Green Paper of 1993, p. 95.

²⁰⁰ Ibidem, p. 102.

²⁰¹ Preamble, para.21.

²⁰² Twigg-Flesner 1999, p. 190.

Chapter III: Consumer sales guarantees – European regulatory framework

1. Introduction

1.1 General

Article 6 of the Consumer Sales Directive constitutes the first (and so far – the last) European attempt to comprehensively regulate consumer sales guarantees. It is a landmark, defining the European approach towards guarantees. The ten years that have passed since the introduction of the Consumer Sales Directive now allows evaluation as to whether the Directive met the targets set for it, and – more importantly – whether these targets were correctly established.

The chapter begins with presenting the regulatory assumptions of the rules on guarantees contained in the Consumer Sales Directive against the background of the general assumptions of the Directive. In the main part the analysis deals with the Directive's guarantee rules, also in the context of the conformity regulation. Finally, the question is posed as to whether the rules of the Directive are able to meet the targets set by the Directive itself, and whether this approach answers the requirements of effective consumer legislation.

1.2 Regulatory assumptions of the Directive

1.2.1 *The main aims of the Directive*

The Directive is based on Article 95 of the EC Treaty, which makes clear that the accomplishment of the internal market is at the heart of the regulation. At the same time, recital 1 reminds that Articles 153(1) and (3) of the Treaty provide that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts pursuant to Article 95. The double aim²⁰³ or the double line of reasoning²⁰⁴ of the Directive is explicitly stated in Article 1(1): “The purpose of this Directive is the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market.” Recital 5 of the Directive underlines that these two aims of the regulation complement each other because “the creation of a common set of minimum rules of consumer law, valid no matter where goods are purchased within the Community, will strengthen consumer confidence and enable consumers to make the most of the internal market.” This approach reflects the Janus-face character of EC consumer law and policy – on the one hand aimed at creating a common internal market, on the other striving at some protective goals as well.²⁰⁵

²⁰³ Serrano in Bianca & Grundmann 2002, p. 93.

²⁰⁴ Staudenmayer 1999, p. 548.

²⁰⁵ Reich 1996, p. 56.

1.2.2 Assumptions of the Directive regarding guarantees

Recital 21 identifies the Directive's assumptions concerning the current position and function of the guarantee on the market and establishes the foundation of the provisions on the guarantee in the Directive. The recital reads as follow:

“Whereas, for certain categories of goods, it is current practice for sellers and producers to offer guarantees on goods against any defect that becomes apparent within a certain period; whereas this practice can stimulate competition; whereas, while such guarantees are legitimate marketing tools, they should not mislead the consumer; whereas, to ensure that consumers are not misled, guarantees should contain certain information, including a statement that the guarantee does not affect the consumer's legal rights (...).”

The first part of the recital refers to the current position of the guarantee on the market according to the Directive: producers and sellers offer guarantees on goods against any defect, which becomes apparent within a certain period. The recital presents the position, but in no way does it indicate a need for legal intervention. The second part of the recital briefly describes the function of the guarantee in the view of the Directive: an instrument that stimulates competition and, at the same time it constitutes a legitimate marketing tool. In this part, the recital warns of the danger hidden in the guarantee - that of misleading consumers. The last part of the recital indicates what, in fact, constitutes the subject matter of the rules on guarantee: the Directive aims at assuring that guarantees will not mislead consumers. Therefore, the guarantee should give consumers certain information, most importantly – the information that the guarantee does not affect the consumer's legal rights.

The two main assumptions of the Directive regarding guarantees clearly flow from recital 21. The first one concerns the function of the guarantee on the market; the second one refers to the dangers that the guarantee may present for consumers, and the (best) way of preventing them.

1.2.2.1 The first assumption

The Directive perceives the guarantee as a factor in the competition and marketing policy. According to the Directive, this is the playfield for the guarantee. The Directive accepts as its starting point the perception of a guarantee by a professional guarantor engaged in a commercial chain (the market perspective). Yet, the Directive is created also with another aim in mind: the achievement of a high level of consumer protection (recital 1). Assuming such a perspective provokes the question of whether the function of the guarantee, as indicated by the Directive, is the only function the guarantee has on the market, and if not, whether this is the most important function of the guarantee.

1.2.2.2 Functions of the guarantee

Even without any reference to all the theories that have been created for guarantees,²⁰⁶ the approach of the Directive seems to be oversimplified. The Green Paper of 1993²⁰⁷ describes the function of the guarantee in the following way: “Guarantees are steadily becoming a preferred method of competition between firms, and one of the most widespread arguments used in advertising (consumers look on guarantees as a quality label). To some extent, the offer of a guarantee is based on the firms' need to establish closer personal links with the

²⁰⁶ See for example Twigg-Flesner 2003, pp. 35-42.

²⁰⁷ Green Paper of 1993, p. 15.

clients. They want to sell not only the product, but also a specific service guaranteeing that the product is in good working order. In some way, the offer of a commercial guarantee compensates for the trend in modern societies towards abstract and anonymous relations with consumers. Hence the guarantees play a fundamental social and economic role.”

Although this view also concentrates mainly on the perception of the commercial participants of the market, it clearly shows that the function of the guarantee cannot be simply reduced to that of the “marketing tool” and moreover, it pays attention to the receipt of the guarantee by consumers: they look on the guarantees as on a quality label. This view is confirmed in legal writing, which underlines that the guarantee signals good quality of the goods to the buyer (“the above-quality”²⁰⁸). This view is also recognised by legislation in some of the Member States, which require guarantees to offer the consumer a better position than he enjoys under the statutory law.²⁰⁹

1.2.2.3 The second assumption

The second assumption of the Directive is that proper information (in particular that the guarantee does not affect the consumer’s statutory rights) will prevent the consumer from being misled by the guarantee. However, given that the Directive assumes the perspective of the commercial participants of the market regarding guarantees, is it possible that the Directive rightly identifies the areas sensitive from the consumer’s point of view and provides him with proper legislative support? Is the Directive really trying to achieve a high level of consumer protection in the field of guarantees? An analysis of the rules of the Directive will prove that the assumptions of the Directive are not entirely correct (or complete) and that providing bare information on the existence of the statutory rights to the consumer may turn out to be insufficient to secure the legal position of the consumer and to answer the important of the consumer’s concerns.

1.3 Analysing the Directive

For several reasons, an analysis of the Directive’s rules on guarantees is rather complicated. Firstly, the rules on the guarantee in the Directive are very concise. This necessitates an extensive interpretation process. Interpretation is fairly difficult as it involves filling in many gaps in the legislation. In this particular case it should be further considered that the Directive is not applicable directly, but requires implementation into the national legal systems. After the transposition, the rules of the Directive begin their life in the environment of a domestic legal system. Gaps in the legislation are filled by the national legal rules and the existing rules receive meaning according to national understandings.

It should further be underlined that the Directive is primarily concerned with the transparency requirements, and as a rule it does not deal with the contents of the guarantee. At the same time, however, transparency rules do have a certain impact on the substance of the guarantee. The Directive actually limits the discussion on guarantees to a discussion on what and when should be presented to the consumer, without paying any attention to the consequences and effectiveness of the adopted approach.

Another factor, which makes analysing the Directive rules on guarantee a challenging task, is the fact that it is very difficult to establish how closely one may rely on the conformity

²⁰⁸ Riesenhuber 2001, p. 354.

²⁰⁹ On that see Chapter V, in the part 3. Coverage of the guarantee.

regime, when interpreting the rules on guarantees. As the rules on guarantees are rather scarce and require an extensive interpretation process, it would seem rather reasonable to at least consider referring to the conformity rules at some points. However, the Directive does not provide clear guidance as to how far the rules on conformity relevant for the guarantee regulation, it only specifies that the guarantee does not affect entitlements of the consumer arising under applicable national legislations governing the sale of consumer goods. At the same time the link is evident, taking into account that conformity and guarantee are regulated by one legal act, concern one object, engage the same entities, etc. However, it is rather difficult to state in general terms how far the rules on conformity may serve as guidelines in interpreting the guarantee provisions.

2. Analysis of the Directive's rules

2.1 The scope of the rules on the guarantee in the Directive

2.1.1 Introduction

The legislation on the guarantee in the Directive is limited in two different ways. The first category of limitations strikes the Directive's general limitations. These relate to the types of contracts regulated by the Directive, as well as the object of the contract and the subjects involved. The second category concerns limitations designated exclusively for the rules on guarantees.

2.1.2 Contracts covered

As Article 1(1) indicates, the Directive regulates certain aspects of the sale of consumer goods. The Directive does not, however, specify what is understood by a contract of sale. On the one hand there are those that claim that "all the legal systems of the individual Member States agree to consider this onerous contract in a uniform way."²¹⁰ On the other hand, this fact is perceived as "(...) surprising (to English eyes at least)."²¹¹ Article 1(2)(4) adds that, for the purposes of the Directive, also contracts for the supply of consumer goods to be manufactured or produced will be deemed contracts of sale. In fact, therefore, the Directive covers contracts of sale and some types of service contracts, where goods are manufactured or produced for the consumer.

A guarantee is a legal construction, the existence of which depends upon the structural support of another contract. Within the scope of the Directive, this support is given in principle by the contract of sale. However, the Directive approaches the contract of sale in a rather broad manner, by saying in Article 1(4) that contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive. In fact then the Directive re-qualifies some service contracts as sales contracts. The Directive provides uniformed rules for the contracts of sale and the re-qualified services contracts. This fact fixes the position of the guarantee. Whether the guarantee is offered as a result a prior conclusion of a sales contract or a service contract (which is re-qualified by the Directive as a sales contract) does not have an impact on the guarantee under the Directive.

Nevertheless, one may claim that there is a practical difference between the contract of sale and the contract of supply of goods to be manufactured or produced. The difference lies in the

²¹⁰ Serrano in Bianca & Grundmann 2002, p. 95.

²¹¹ Bradgate & Twigg –Flesner 2003, p. 23.

fact that in most cases the service provider produces or manufactures the consumer goods himself, while the commercial chain leading the goods through the final seller to the consumer buyer, may involve many links. It means that the applicable guarantee scheme will normally be simpler and more transparent when established on the basis of a service contract than in the case of a consumer sales contract, as the most obvious candidate for the guarantor – the producer of the goods – is at the same time the seller of the goods. It very much limits the number of the parties engaged in offering a guarantee and makes the liability schemes under such contract more comprehensible.

2.1.3 Object of the contract

The second type of limitation relates to the object of the contract. The Directive is only concerned with consumer goods. What are “consumer goods”? Article 1(2)(b) defines them as any tangible movable item, with the exception of goods sold by way of execution or otherwise by authority of law, water and gas where they are not put up for sale in a limited volume or set quantity, and electricity. The first two exemptions reproduce the exemptions contained in Article 2(c) and (f) of the United Nations Convention on Contracts for the International Sales of goods of 1980. The Directive introduces one more optional limitation. According to Article 1(2)(3), Member States may provide that the expression “consumer goods” does not cover second-hand goods sold at a public auction where consumers have the opportunity of attending the sale in person.

Here it suffices to indicate that the Directive eliminates some categories of goods from its scope, because of their special functions, the extraordinary difficulties that accompany their regulation, or the special way the sale is executed. These limitations have certainly not been introduced with the guarantee in mind. However, given the fact that the notion of guarantee is linked to that of consumer goods, limitations to the latter also affect the scope of the provisions on the guarantee. Especially the exclusion of the second-hand goods, although it refers only to goods sold at a public auction, can be problematic from the point of view of the guarantee regulation.

Since the Directive introduces a very flexible guarantee construction, it seems that there are no further limitations concerning the applicability of the rules on the guarantee in the Directive.

2.1.4 Parties engaged in the guarantee relation

The third sphere in which the Directive sets limitations relates to the parties engaged in consumer sales. The Directive defines for its purposes the three most important players on the field: the consumer, the seller and the producer. Article 1(2) provides the following definitions:

- (a) consumer: means any natural person who, in the contracts covered by this Directive, is acting for purposes not related to his trade, business or profession;
- (c) seller: means any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;
- (d) producer: means the manufacturer of consumer goods, the importer of consumer goods into the territory of the Community, or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods.

These definitions apply directly to the guarantee regulation and affect the functioning of the guarantee, as the definition of the guarantee (Article 1(2)(e)) expressly states that the guarantee is “any undertaking by a seller or producer to the consumer.”

2.1.5 Guarantor

The Directive defines the guarantee as any undertaking by a seller or producer to the consumer. This wording suggests that there are two parties engaged in the distribution chain that may offer a guarantee: the seller and the producer.

A closer analysis reveals that the situation is more complicated. With regard to the seller, the Directive presents a clear-cut solution: the seller, according to Article 1(2)(c), is any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession. However, the definition of the producer presented in Article 1(2)(d) introduces new parties into the field: it is not only the manufacturer of the consumer goods but also the importer of the consumer goods into the territory of the Community, or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods - an “own brand”²¹² of consumer goods.

The Directive provides a very broad definition of the producer. It includes not only the entity that actually produces the goods, but also certain categories of intermediaries. Any person may be a guarantor if he:

- Produces the goods. The Directive is silent as to the place of the production (in or outside the Community) as well as to the producer’s registered office/domicile. Twigg-Flesner²¹³ points out that the definition does not cover the non-manufactured produce (for example a grower of organic fruit).
- Imports the goods into the territory of the Community. This means that an intermediary engaged in the distribution chain could only offer a guarantee as covered by the Directive if he imports the goods into the Community. If the goods are already within the territory of the Community, then the Directive does not regulate the guarantee offered by this particular intermediary. Such an intermediary could only offer the consumer a guarantee falling within the scope of the Directive if he satisfies the conditions of the third option (purports to be a producer). It seems that this situation is a result of a simple legislative mistake: the definition of the producer has been introduced into the draft Directive by an amendment of Parliament.²¹⁴ At the same time, the amendment also included a definition of the producer’s representative,²¹⁵ which meant that the Directive covered all the links of the commercial chain. Amendment 16 was abandoned later in the legislative process, though no changes were introduced into the definition of the producer.

A very similar problem appears in the case of goods to be manufactured or produced if the producer uses materials acquired from a third party for the production or the manufacture, and if the materials come with the third party’s guarantee.

²¹² Bradgate & Twigg - Flesner 2003, p. 173.

²¹³ Ibidem, p. 173.

²¹⁴ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees (COM (95) 0520 – C4-0455/96 – 96/0161(COD)); OJ C 104, 6.4.98, p. 33.

²¹⁵ Amendment 16: “any natural or legal person who acts as the official distributor and/or official service provider of the producer, with the exception of independent sellers who operate exclusively as retailers.”

Example: A consumer orders a wardrobe that is to be manufactured to fit into his apartment. The wardrobe has sliding doors, and the producer of sliding mechanisms offers a 10-year guarantee.

As the producer of parts of the product does not fall under the definition of either the seller or the producer, the Directive does not cover such a guarantee.

- Purports to be a producer by placing his name, trademark or other distinctive sign on the consumer goods. This formulation carries a clear resemblance of the product liability directive,²¹⁶ which in Article 3(1) refers to “any person who by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.” The drafting history of the Directive provides also a wider context for this particular formulation. The amendment of the Parliament,²¹⁷ which added a definition of the producer, also introduced in the draft Directive a direct liability of the producer and his representatives.²¹⁸ The definition of the producer was therefore created with the network liability principle in mind, which did not make it to the final version of the Directive.

The person at stake here neither produces the goods nor sells them to the consumer. The only connection that person has with the goods is the cover under which the goods appear on the market, which most probably results from his engagement into the commercial network. In other words: the consumer perceives this person as directly involved in the production/distribution process.

From a systematic point of view, the solution of the Directive concerning the guarantor is quite unconvincing. Of course, it is impossible to deny that the vast majority of guarantees is offered either by the producer or the seller of the goods. At the same time, however, if the definition covers a wider range of entities than the seller and the actual producer, what is the reason for not including all the persons potentially engaged in the distribution chain?

The Directive does not differentiate between various categories of guarantors. In Article 6(1) it refers to the offerer, without distinguishing between the producer and the seller. The Directive pays no attention to the potential difficulties the consumer may encompass because of a third party's (the producer's) engagement in the contractual relation between the seller and the buyer. In this case, a question may arise: what are the consequences of such a scheme? Are there any contractual obligations that would encumber the seller created by the guarantee offered by the producer? Can the producer's guarantee be enforced against the seller and – if so - in what circumstances? Considering the silence of the Directive regarding

²¹⁶ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 307 of 12.11.1988, p. 54.

²¹⁷ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees (COM (95) 0520 – C4-0455/96 – 96/0161(COD)); OJ C 104, 6.4.98, p. 33.

²¹⁸ Amendment 25: “By derogation from paragraph 1, the consumer may apply directly to the producer or, where applicable, to his representative in the consumer's Member State, if: - the seller of the goods is established in another Member State, - the seller has ceased trading or has established himself elsewhere without giving notice of this fact, - the seller cannot be informed in good time of the lack of conformity.”

these questions, it is very difficult to decide them *in abstracto*, as the analysis requires a strong reference to the national rules regulating law of contracts.²¹⁹

Member States do not present a uniform approach to the rules applicable to the guarantor. Some legislations approach this issue in a rather general way. Austria²²⁰ and Denmark²²¹ simply refer to the professional. Poland²²² and Spain²²³ make use of the term guarantor without further specifications. In Germany, Article 443 CC states that it is the seller or a third party. The French Consumer Code does not even define who stands behind the guarantee and only refers to the buyer.²²⁴ Also under Czech law the parties of the guarantee are not expressly defined. Other legislations, like Sweden, deal only with guarantees provided by a particular party. § 21 (1) of the Swedish KKL provides no express definition of the guarantor; it applies if the seller, or another person acting on his behalf provides a guarantee. According to the preparatory works of the Swedish Parliament, the notion “on behalf of the seller” shall be interpreted in a wide sense. It is, therefore, not necessary that the guarantor and the seller have a direct contractual relationship. Instead, the decisive criterion should be that the seller and the guarantor appear to form a unit from the consumer’s point of view, for instance if the consumer, at the time of concluding the sales contract, receives a written guarantee from the producer or a third party.²²⁵ In Swedish legal literature this has been criticised as rather far-reaching, for example in the case where the package of the goods contains a guarantee certificate from the producer, instructing the buyer to put his claims directly against the producer and not against the seller.²²⁶ In the Netherlands Article 7:6a of the Civil Code explicitly indicates that the guarantee may be issued by the seller or producer, but it is generally accepted that the guarantee may be also offered by a party other than the seller and the producer.²²⁷ Other legislations decided to expressly indicate the list of the potential guarantors: in Latvia it is the manufacturer, the seller or the service provider and in Slovenia the seller, the producer²²⁸ and in some cases also the importer. In England and Scotland it is simply a person who offers a consumer guarantee to consumer.²²⁹ More specific rules exist in Finland, where according to Article 5:15(a)(2) of the Consumer Protection Act if the guarantee was provided by a person other than the seller, either at the previous level of the supply chain or on behalf of the seller the goods shall also be considered defective under the normal terms and conditions (as established in Article 5:15 (a)(1) of the Consumer Protection Act). In Belgium the broad description of possible guarantors presupposes that every person in the contractual chain can act as a guarantor.²³⁰ Moreover, if a person purports to be a producer by placing his name, trademark, etc. on the goods, the decisive criterion is whether a

²¹⁹ This problem is further analysed in Chapter V, in part 2. The Parties engaged in the guarantee relation.

²²⁰ Consumer Protection Act, Article 9b.

²²¹ Marketing Act Article 12.

²²² Consumer Sales Act Article 13(1).

²²³ Consumer Sales Act Article 11.

²²⁴ Consumer Code Article L. 211-15.

²²⁵ Prop. 1989/90:89 p. 111.

²²⁶ Herre 1999, p. 263.

²²⁷ Loos 2004, p. 36-37.

²²⁸ OC Article 481.

²²⁹ SSGCR Article 2.

²³⁰ Rutten, Straetmans & Wuyts 2009, p. 204.

normal diligent consumer perceives the trademark or distinctive sign as an indication that the owner of the trademark played a role in the manufacture of the product.²³¹

2.1.6 Beneficiary

The Directive is not very precise with respect to the beneficiary of the guarantee, either. The Directive deals only with consumer sales, so the regulation is applicable to “any natural person who, in the contracts covered by the Directive, is acting for purposes that are not related to his trade, business or profession”. The buyer of the consumer goods becomes the beneficiary of the guarantee, if one is offered. The Directive does not deal with the technicalities of the “becoming process” i.e. whether the consumer acquires the status of beneficiary automatically, or whether any special acts are required. The Directive also does not offer an answer to the question whether the status of the beneficiary belongs only to the first buyer or whether the guarantee follows the product, which is interpreted for example by White that the guarantee would be enforceable only by the consumer buyer.²³² It seems however that such interpretation should not prevail – i.e. the Directive simply makes no stand as to the transferability of the guarantee, and hence leaves the decision to the Member States.

Most of the Member States follow the Directive’s scheme and refer to either the buyer (Germany, Slovenia, Poland, France, Finland) or the consumer (the Netherlands, England and Scotland, Austria, Denmark, Sweden) as the beneficiary of the guarantee.

Also, most of the Member States does not deal directly with the issue of transferability of the guarantee to the subsequent owner of the goods. This problem is normally solved through application of general rules. The usual solution in such case is that the guarantee is transferable to the subsequent owner, subject to any condition in the guarantee document stating otherwise. In the Netherlands, for example, the guarantee is considered as a “qualitative right” under Article 6:251 of the Civil Code, which implies that if the good itself is transferred, the guarantee automatically follows. However, the seller, the producer or other party that issued the guarantee may prevent the transfer of the guarantee if it so determines at the moment the guarantee is issued. In Scots and English law rights, including those deriving from a guarantee, may freely be assigned by a consumer to another party, unless (i) this is prohibited by the terms of the guarantee itself, or (ii) the contract is affected by the rule relating to “personal contracts” (English law) or *delectus personae* (Scotland). These rules have similar effect, according to the English rule the contractual rights may not be assigned by a creditor where it is clear that the debtor intended performance in favour of the original contracting party alone (a “personal contract”).²³³ In the Scots²³⁴ doctrine it is applicable in any contract in which the choice by party A of the other party B was influenced by specific qualities possessed of B, in which case assignment may not be effected without A’s consent. Neither common law rule is likely to apply to a consumer sales contract, unless, perhaps, the consumer assigns the guarantee to a non-consumer. Also under German law there is no explicit rule on the transferability of the guarantee. However, the normal rules on the transfer of rights as contained in CC Article 398 ff of the Civil Code will apply, which means that the transferability of the guarantee can be limited. The courts recognized such principle

²³¹ Hof van Beroep Antwerp, 10 January 2000, RW 2004-2005, 794; rechtbank Namen 14 November 1997, Revue de Jurisprudence de Liège 1998, 644, as referred to in Rutten, Straetmans & Wuyts 2009, p. 204.

²³² White 2000, p. 13.

²³³ Treitel 2003, p. 639 – 641.

²³⁴ Stair Memorial Encyclopaedia, Vol. 20, para. 859 as referred to in PELS, p. 361.

concerning the buyer's rights against the seller (e.g. the right to repair: BGH, 24.10.1985²³⁵). However, transferability can be excluded by contract on the basis of Article 399 of the civil code, and this seems to occur in guarantee contracts. The courts have even accepted standard terms excluding transferability and have held that they were not unfair (e.g. BHG, 7.10.1981²³⁶).

A straightforward solution is accepted in Finland, where according to the law a guarantee is given for a specific product and remains valid even if the product is transferred to a new owner. A guarantee may be transferred together with the good to which it refers. However, the purpose of use of the good may not significantly change. The seller may also require receipt of a written notice upon change of ownership relating to the good guaranteed.²³⁷ Similarly in Ireland, according to the Sale of Goods Act of 1980 "buyer" includes all persons who acquire title within the duration of the guarantee.²³⁸ The recommendation drew up by the Danish ombudsman on the use of the term "guarantee" and its content (adopted in 1978 and amended in 1987²³⁹) clearly stated that the guarantee must be transferable to third parties (subsequent purchasers, donors, users).

Quite the opposite approach is accepted in the Czech Republic, where according to case law the rights stemming from liability for defects do not pass to subsequent owners; if the guarantee provides for transferability, that provision is null and void for breaching the mandatory rules on liability for defects. It is possible to extend the scope of a guarantee but only among the parties – extension to third persons is not possible and cannot be qualified as a *pactum in favorem tertii*, on the basis of Article 50 of the Civil Code. Only a claim, which arises after the first buyer (the original contracting party) notifies the original seller, is transferable.²⁴⁰ It should however be noted that part of the legal doctrine considers rights from liability for defects to follow the object and therefore to be transferable.²⁴¹

On the basis of the Polish Civil Code rules (that do not apply to consumer sales within the scope of the Consumer Sales Directive) an opinion was formed²⁴² that the person entitled on the basis of the guarantee is the buyer, however, if the buyer transfers the goods accompanied with the guarantee he can at the same time transfer the rights arising from the guarantee. The situation is quite simple if the guarantee card clearly indicated the every person who is in its possession is entitled under the guarantee (*gwarancja na okaziciela*). In such a case every person, who has the guarantee document can make a claim on the basis of the guarantee, without the necessity to prove his legal title to the goods and to the guarantee. Proving the legal title will be necessary only in the case when the guarantee document identifies the person entitled or the guarantee gets lost (Article 246 Polish code of the civil procedure).

²³⁵ BGHZ 96, 147.

²³⁶ NJW 1982, 180.

²³⁷ Consumer Agency and Ombudsman Guidelines on Liability for defects, Guarantees in the Contract for the Sale of Consumer Goods, 8.

²³⁸ White 2000, p. 6.

²³⁹ Green Paper of 1993, p. 45.

²⁴⁰ NS CR 33 Odo 329/2004.

²⁴¹ Knappová & Švestka 2002, p. 107.

²⁴² Żuławska 1999, p. 136.

2.1.7 Free guarantee

The second group of limitations consist of limitations designed especially for regulating the guarantees. It is only one, but rather an important limitation: guarantees against payment are excluded from the scope of application of the Directive. The definition of the guarantee (Article 1(2)(e)) *expressis verbis* indicates that the guarantee is an undertaking given without extra charge. At first sight, this statement seems to be sufficiently clear – the Directive wanted to make a clear distinction between commercial guarantee and after sale services.²⁴³ A closer look, however, reveals its ambiguity.

The guarantee is to be “given without extra charge”. There are two areas in which this formulation requires a further analysis. First, what does the “extra charge” stand for and second, what does it mean that the guarantee is to be *given* without extra charge?

Concerning the first issue, a guarantee is never free – if it appears as free then its costs are hidden in the price of the product. The Directive does not cover guarantees in which the price has been spelled out,²⁴⁴ i.e. when the consumer has to pay for the guarantee separately. This excludes all kinds of “extended guarantees”, “insurance policies” and so on from the scope of its application. It also allows the guarantor to escape the requirements of the Directive by simply charging 1 euro for the offered guarantee. It needs to be noted that the requirements of the Directive are set so low that it is difficult to find a reason to try to look for an escape route. Nevertheless, it is very easy to avoid application of the Directive.

The original proposal of the Directive²⁴⁵ covered guarantees against payment. The “no extra charge” condition was introduced only in the final stage of drafting.²⁴⁶ What could be the reason behind such a choice? From a theoretical point of view, one could argue that the guarantee represents an “integral part of the bundle of satisfaction” and consumers should not be required to pay an additional price over the price of the guaranteed product.²⁴⁷ From a practical point of view, guarantees offered against payment are (or at least should be) much more elaborated, and without doubt, of a contractual nature. The Directive presents simple rules for simple undertakings, and the more elaborated guarantees fall outside, for the market to regulate. It is clearly a policy choice. The question remains: is this the right choice? The majority of the legal authors supports this solution,²⁴⁸ though, there are also opposite voices.²⁴⁹

It is interesting to note that although the majority of the Member States accept the solution of the Directive, there are exceptions to this approach: Austria,²⁵⁰ where the explanatory remarks in the legislative materials clarify that it does not make any difference if the consumer pays for the guarantee or if it is already included in the selling price,²⁵¹ the Netherlands and²⁵² the

²⁴³ Rutten, Straetmans and Wuyts 2009, p. 204.

²⁴⁴ Malinvaud 2002, p. 223.

²⁴⁵ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees OJ No C 307, 16.10.1996, p. 8.

²⁴⁶ Common Position (EC) No 51/98, adopted by the Council on 24 September 1998 with a view to adopting European Parliament and Council Directive 98/ /EC, of...on certain aspects of the sale of consumer goods and associated guarantees, OJ C 333/46, p. 48.

²⁴⁷ Udell & Anderson 1968, p. 1.

²⁴⁸ Twigg – Flesner 2003, p. 152, Deards 1998, p. 108.

²⁴⁹ Loos 2004, p. 36-37, with references.

²⁵⁰ Article 9b Austrian Consumer Protection Act.

²⁵¹ RV 422 BlgNR 21.GP 25, as referred to in Augenhöfer 2009, p. 180, footnote 69.

Czech Republic.²⁵³ Also in Belgium the legislator feared that a strict interpretation of the Directive's rules, which excluded the guarantee against payment could "give rise to endless disputes about whether a commercial guarantee offered by the producer against an additional charge had to be considered as a guarantee within the meaning of the provision or not."²⁵⁴ The Irish Sale of Goods act of 1980 requires in section 16 the guarantee to state clearly what the manufacturer/supplier undertakes to do and what charges apply, if any. Failure to comply is an offence according to section 2(6), but does not affect the existence of the guarantee.

The next question is whether the Directive really excludes all kinds of payments that may arise in relation to guarantees, or whether it leaves an option for the guarantors who would like to impose certain payments on the guarantee holders? The guarantee is to be *given* without extra charge. However, charges that may be imposed on the buyer in connection with the guarantee are not limited to the payment for obtaining the guarantee. In addition, there may be a charge for invoking or performing the guarantee.

Example: a guarantee requires a yearly check up of the goods for the guarantee to remain in force. An indicated company should perform it and the guarantee holder is obliged to pay for the provided services.

It is not entirely clear whether the "extra charge" extends to these costs. To compare, the Directive expressly regulates that repair and replacement are to be performed free of charge in the case of non-conformity (Article 3(2)). One could argue that *a contrario*, these charges are not prohibited in relation to guarantees. In such a case, the Directive would accept the situation that the consumer receives a free guarantee and is obliged to pay for the maintenance activities or for the repairs performed under this guarantee when the goods fail. An extreme example of such an approach would involve payment required upon making a claim under the guarantee. Such a situation is regulated in Malta, where no fee for dealing with a consumer claim may be charged unless this is stated expressly in the guarantee.²⁵⁵ Accepting such a solution would mean that although the guarantee is *given* without extra charge, it does not mean that it is free, only that the moment of payment is different. It could also lead to a situation where a consumer has to pay for the performance of repair or replacement work under the guarantee, whereas the application of the "legal guarantee" would lead to receiving such performance free of charge.

Concluding, it seems that the main idea underling the rules on guarantees contained in the Directive was to eliminate all categories of costs in relation to consumer sales guarantees. However, the imprecise formulation of the provision leaves room for speculation.

2.2 General: name, source, legal nature, creation

2.2.1 The name

The Directive accepts the name "guarantee" without further specifications. However, during the legislative procedure, the name "commercial guarantee" was also used (for example in the

²⁵² Article 7:6a Dutch BW.

²⁵³ Articles 598 and 620(5) CC.

²⁵⁴ Samoy 2005, p. 108.

²⁵⁵ Article 86 Maltese Consumer Affairs Act.

Green Paper of 1993 or in the opinion of the Economic and Social Committee²⁵⁶). The choice of the Directive may be confusing, because guarantee, within the meaning attributed to it by the Directive and used in consumer sales, is hardly distinguishable from other types of guarantees that are present on the market.²⁵⁷ The Member States accept the name almost unanimously. It is *Гаранция* in Bulgarian, *garantía* in Spanish, *garanti* in Danish, *Garantie* in German, *garantii* in Estonian, *guarantee* in English, *garantie* in French, *garanzia* in Italian, *garantija* in Lithuanian, *garantija* in Latvian, *garanzija* in Maltese, *garantie* in Dutch, *gwarancja* in Polish, *garantia* in Portuguese, *garanție* in Romanian, *garancija* in Slovenian and *garanti* in Swedish. The Member States that opted for a different name are the following: Czech (*zárukou*), Greece (*Εγγύηση*), Hungary (*jótállás*), Slovakia (*záruka*) and Finland (*takuulla*).

2.2.2 The nature of the guarantee

The Directive opts for a voluntary instrument, which means that no party is obliged to provide a guarantee. This is a confirmation of the modern trend of regulation in Europe, as in the vast majority of Member States the guarantee also exists on a voluntary basis.²⁵⁸

An exception to this approach is, for example, Slovenian law, where at the moment there are two types of guarantees: voluntary and obligatory. A wide range of products (“technical goods”) can only be sold with the obligatory guarantee of proper functioning, which normally lasts for one year.²⁵⁹ This however, does not preclude obligatory rules on conformity – the regime of obligatory guarantees and the obligatory regime of liability exist next to each other.²⁶⁰ If the seller does not provide the buyer with the obligatory guarantee, or if the guarantee does not possess the required contents or form, the buyer *ex lege* receives the required entitlements²⁶¹ and the seller is punishable.²⁶² A similar situation also exists in Hungary, where the Civil Code, in the part called “Ancillary obligations securing a contractual performance”, contains § 248, which applies equally to mandatory and voluntary guarantees. Additionally, there are acts in force that regulate the issue of mandatory guarantees in relation to certain products and services.²⁶³

2.2.3 Binding force of the guarantee.

Article 6(1) indisputably establishes the binding force of the guarantee. It declares: “A guarantee will be legally binding on the offerer on the conditions laid down in the guarantee statement and the associated advertising.” The Directive does not introduce obligatory guarantees, which means that there is no obligation imposed at any potential guarantor to

²⁵⁶ Opinion of the Economic and Social Committee on the ‘Proposal for a European Parliament and Council on the sale of consumer goods and guarantees’ OJ C 66, 3.3.97, p. 10.

²⁵⁷ See Chapter I, in the part Guarantee on the modern market.

²⁵⁸ On this point see Chapter IV, section 3: The (dual) nature and the source of the guarantee.

²⁵⁹ Article 15b Slovenian CPA and Regulation of Trade Minister, Official Journal 73/2003.

²⁶⁰ This problem is further analysed in Chapter IV, part 3.6 Obligatory guarantees.

²⁶¹ Article 18 para 2 CPA.

²⁶² Article 77 para 1 No 7 and 1 and para 2 CPA provide that the seller/producer are punishable with a fine. It is a minor offence (“prekršek”). The fine may range from 3000 to 40000 € for the company and, additionally, from 1200 to 4000€ for the responsible person in the company.

²⁶³ Government-decree 151/2003. (IX. 22.) on the mandatory guarantee concerning durable consumer goods, Government-decree 249/2004. (VIII. 27.) on mandatory guarantee concerning repair and maintenance services to consumers, Government-decree 181/2003. (XI. 5.) on mandatory guarantee concerning housing (house construction).

offer a guarantee. Any potential guarantor is absolutely free to make the decision whether or not to offer a guarantee.²⁶⁴ If, however, the seller or the producer decides to offer a guarantee, it becomes binding. As Staudenmayer put it: “This appears to be just the confirmation of a general principle and therefore quite self evident.”²⁶⁵ However, contrary to what Staudenmayer suggests, this was not self-evident for every legal system. This rule was introduced to solve the English law problem according to which, where the person who offered a guarantee was not in a direct contractual relationship with the consumer or the consumer was not aware of the guarantee until the contract was concluded, there could be some technical legal defences based on lack of privity which could be raised against a consumer who tried to invoke a guarantee.²⁶⁶

There are several issues directly linked with the declaration of the binding force of the guarantee. First, the Directive states that the guarantee is binding but remains silent as to the legal form the guarantee takes (see the analysis below). Second, there is the already discussed problem whether the guarantee is binding only in the favour of the first buyer, or it can be transferred to subsequent owners? Third, there is the issue, raised by Malinvaud,²⁶⁷ who claims that the guarantee “is not binding on the consumer, who remains free to make claims under the guarantee or to rely on the provisions of the Directive or those of his national legislation.”

It is true that the consumer has no obligation to base his claim on the guarantee, and may turn to the statutory regime for relief. However, especially if the guarantee is classified as a contract, the beneficiary may bear certain obligations under the guarantee: for example an obligation to maintain the goods in a special way. Most probably, these obligations to maintain should be classified as duties (*Obliegenheiten*) and not as obligations, meaning that the guarantor would have a defence if the consumer did not treat the goods in accordance with the maintenance instructions, rather than allowing the guarantor to claim specific performance or damages.

2.2.4 Legal nature of the guarantee

The Directive defines the guarantee as “an undertaking” by the producer or seller. This is a very ambiguous formulation that does not provide any clue as to the legal nature of the guarantee. The legal qualification of the guarantee is definitely important, as it has an influence on many aspects of the guarantee, for example: its creation, its interpretation or the impact of the collapse of the sales contract on the existence of the guarantee. However, the approach of the Directive in this respect is not unique – usually it is the national legal writing or the case law that decides on the question of the legal nature of the guarantee in a given legal system. In general, there are three options available: a contract, a contractual stipulation (the guarantee constitutes only a part of another contract) and a unilateral promise.²⁶⁸

The legal writing does not offer a uniform approach to this problem. Hogg is of the opinion that “the Directive’s use of the term “offeror” suggests that the Directive envisages guarantees as a species of contract, which would exclude from its ambit those guarantees that are

²⁶⁴ Malinvaud 2002, p. 223; Twigg – Flesner 2003, p. 157.

²⁶⁵ Staudenmayer 2000, p. 559.

²⁶⁶ Beale & Howells 1997, p. 38, see also Chapter IV, part 4.5.10 The Problem in UK.

²⁶⁷ Malinvaud 2002, p. 223.

²⁶⁸ This issue is extensively discussed in the Chapter IV, part 4. The legal form of the guarantee.

unilateral promises.”²⁶⁹ Holdych presents a similar opinion²⁷⁰ and states that “the inclusion of that term (offerer) implies that the rules of offer and acceptance may apply, subjecting the acceptance of a guarantee to national rules requiring an offeree to know of an offer in order to accept it.” Serrano claims that guarantees “are to be technically evaluated in the same way as accessory agreements of the sale contract.”²⁷¹ Malinvaud presents the opinion that the guarantee has the form of a contract. He states: “it is not specified that the guarantee must be included in a formal contract,”²⁷² indicating that the guarantee takes the form of a contract. Also, according to the Consumer Law Compendium, guarantees generally take the form of a contractual obligation.²⁷³

In my opinion, it is difficult to state *in abstracto* which legal form will be the most appropriate under the Directive, considering that the Directive itself does not indicate it. There are two elements that primarily influence the legal qualification of the guarantee: the contents of the guarantee (the scope of the parties rights and obligations under the guarantee) and the party offering the guarantee.

Regarding the first point, as the Directive does not interfere with establishing the contents of the guarantee, which remains entirely up to the guarantor – it is not a very helpful criterion. However, the Directive does not cover guarantees offered against payment, and so the guarantees that definitely constitute synallagmatic contracts are excluded from its scope of application. It does not mean that all the payments under the Directive are banned,²⁷⁴ and in any case payment is not a necessary element for creating a contract.

The second element is also more of a guideline than a qualification criterion. According to the Directive, either the seller or the producer may offer a guarantee.²⁷⁵ The Directive does not differentiate in its rules between guarantees given by the seller and by the producer. It is worth mentioning here²⁷⁶ the most distinctive differences between the seller’s and the producer’s guarantees from the perspective of the Directive’s rules. First, a guarantee offered by the seller is structurally “closer” to a sales contract, as the parties of the guarantee are the same as the parties of the sales contract. Moreover, the seller is already burdened with the liability under the conformity scheme. In such a case, the guarantee will tend to merge with the sales contract and may in fact constitute only an extension of the seller’s liability under the sales contract. The element that artificially distinguishes the guarantee in such a situation is the guarantee document. Therefore, it may be claimed that the seller’s guarantees will rather tend to become a part of the sales contract, though, of course, a self-standing legal constructions cannot be excluded.

In the case of the producer’s guarantee, the guarantee will only indirectly be based on the existence of the sales contract, and therefore, it will rather constitute a separate contract or unilateral promise. Of course, also here it cannot be excluded that, in a given case, the guarantee by the producer will become a part of the sales contract, and a tripartite contract

²⁶⁹ Hogg, 2001, p. 349.

²⁷⁰ Holdych, 1998, p. 87.

²⁷¹ Serrano in: Bianca & Grundmann 2002, p. 100.

²⁷² Malinvaud 2002, p. 225.

²⁷³ Consumer Law Compendium, p. 688.

²⁷⁴ See above section: Free guarantee.

²⁷⁵ And some other parties engaged in the commercial chain – see section Guarantor above.

²⁷⁶ As already indicated, the entire scheme is discussed in detail in Chapter IV.

will be created. The same applies to the guarantees offered by intermediaries, though in this case the connection between the product and the offeror of the guarantee is even looser.

Answering the question whether the guarantee constitutes a contract or a unilateral promise depends, among other things, on issues like the manner in which the guarantee is created, its contents and whether the guarantee imposes any obligations on the buyer. Taking the above into consideration, in my view it is not possible to form any binding opinion on the legal form of the guarantee under the Directive. The three indicated options are all possible under the Directive, and the final qualification will depend on the approach towards the guarantee accepted in the national legal system.

The Member States approach this problem in different manners. Some of the Member States expressly follow the Directive, referring to an undertaking without giving further explanation. This is the case in Belgium,²⁷⁷ in Italy²⁷⁸ and in France.²⁷⁹ In Sweden the guarantee is generally defined as a guarantor's undertaking under which he takes responsibility for the correctness of certain circumstances concerning one or more characteristics of the goods.²⁸⁰ In Finland, Germany and Spain the legal form of the guarantee is not expressly regulated.

Other systems take more elaborated position on this subject. In Estonia²⁸¹ and in the Netherlands²⁸² the guarantee is classified as a unilateral contract between the parties. Under English law, all guarantees are contractual in nature: the seller, supplier or manufacturer makes an offer of the substance of the guarantee, which is accepted by the customer. Acceptance of the offer of the guarantee, however, may tacitly be inferred from the acceptance of the goods themselves, so that this requirement becomes merely formal in nature. In Scots law, guarantees may also be contractual in nature, although it is possible to view some guarantees as unilateral promises. A unilateral promise is a separate type of obligation from a contract, and is binding without acceptance. A unilateral promise must be made in formal writing in order to be valid, unless it is made in the course of business, which will be so in the case of consumer guarantees.²⁸³ SSGCR chapter 2 classifies a consumer guarantee as a "contractual obligation", but says nothing about the nature of any acceptance of such a contractual obligation by the consumer. It can be argued either that the terms of Reg 15(1) are intended to give effect to such contractual guarantees without the need for any acceptance, or that the offer of a guarantee contract is tacitly accepted by the consumer (as outlined above). In Poland under the Consumer Sales Act article 13(1) a guarantee is created by a declaration by the guarantor. There are no further specifications as to its legal nature. However, under the part of the Civil Code, which applies to non-consumer sales, depending on the circumstances a guarantee could be classified either as a contract, a contractual stipulation or a unilateral promise.²⁸⁴ In Slovakia²⁸⁵ guarantees are classified either as a contract or as a unilateral declaration. The same applies under Czech law.²⁸⁶ In Slovenia the legal nature of a guarantee is not clear; in cases of an obligatory (statutory) guarantee it arises

²⁷⁷ Civil Code, article 1649bis §2, 5°.

²⁷⁸ Consumer Code, article 128(2)(c).

²⁷⁹ Consumer Code article L. 211-15(2).

²⁸⁰ Herre 1999, p. 257

²⁸¹ Article 230 Law of Obligations Act.

²⁸² Article 7:6a Civil Code.

²⁸³ MacQueen & Thomson 2000, p. 63-69 as referred to in PELS, p. 361.

²⁸⁴ Żukowski 2001, pp. 38-40.

²⁸⁵ Articles 502 and 620-621 Civil Code.

²⁸⁶ Knappová & Švestka 2002, p. 106.

from the Consumer Protection Act, therefore the guarantor's statement (guarantee promise) or the handing over of the guarantee document to the consumer are in fact not relevant.

2.3 Contents of the guarantee

2.3.1 Introduction

The legislation of the Directive regarding the content of the guarantee is very modest. The starting point is that, under the Directive, the guarantor is free not only to offer a guarantee, but also to determine the contents of his undertaking. However, the Directive itself is, to put it mildly, not very helpful in providing guidelines concerning the contents of the guarantor's undertaking.

The analysis in this part begins with considering how far the conformity regulation may be relevant for discussing the content of the guarantee. Later, it tries to answer the question of what actually constitutes the content of the guarantee and how the particular elements that create the contents of the guarantee should be interpreted. Next, it analyses the problem of setting the content of the guarantee: the places where the content is to be established and the relation between the various mediums that may potentially carry the content (the guarantee document and the advertisement).

2.3.2 Conformity regulation

The conformity rules contained in the Directive, as opposed to the rules on the contents of the guarantee, are elaborated in great detail, which does not mean that there is no controversy as to their meaning and interpretation. Article 2(1) establishes the seller's obligation to deliver goods that are in conformity with the contract, and in paragraph 2 it explains when the goods are presumed to be in conformity with the contract. The goods must (letter a) comply with the description given by the seller and possess the qualities of the goods that the seller has held out to the consumer as a sample or model; (letter b) be fit for any particular purpose for which the consumer requires them, and which he made known to the seller at the time of concluding the contract, and which the seller accepted; (letter c) be fit for the purposes for which the goods of the same type are normally used; and (letter d) show the quality and the performance that are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. The Directive aims at establishing the scope of the seller's liability precisely, so in paragraph 3 it specifies that there is no lack of conformity if, at the time the contract was concluded, the consumer was aware or could not reasonably be unaware of the lack of conformity. The same limitation applies if the lack of conformity originates in the materials supplied by the consumer. A further limitation is established by paragraph 4, according to which the seller is not bound by public statements, as referred to in paragraph 2(d) in three cases: (1) if he shows that he was not, and could not reasonably have been aware of the statement in question, (2) shows that when the contract was concluded the statement had been corrected, or (3) shows that the decision to buy the consumer goods could not have been influenced by the statement. Paragraph 5 makes clear that the lack of conformity resulting from the incorrect installation of consumer goods will be deemed to be equivalent to the lack of conformity of the goods, if the installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. It applies equally if the product is intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to shortcomings in the installation instructions.

How far then are the rules on conformity relevant for discussing the scope of the guarantee? How much do the two have in common, and how illustrative can the conformity regulation be for the scope of the guarantee? It seems not too much. The reason for this is quite obvious: the content of conformity, as opposed to the content of the guarantee, is established by the rules of law (the parties to the contract can influence its final shape to a limited extent, within the scope allowed by the law). The content of the guarantee, on the other hand, is the subject of the guarantor's decision, also within the scope allowed by the law; however, in this case the limits are much more flexible (they are set, for example, by the validity requirements, the unfair contract terms legislation, etc.). There is only one common element that can be established for these two, namely the first part of Article 2(2)(a) (The goods must comply with the description given by the seller (...)). However, it only constitutes a fraction of the conformity scheme, and at the same time it exhausts the scope of the rules designed to regulate the guarantee content. In conclusion, a comparison of the conformity regulation in the context of the guarantee content is not very helpful for the analysis and therefore will not be further taken into consideration.

2.3.3 The contents of the guarantee

The Directive mentions in several places the elements that can form the content of the guarantee. Article 1(2)(e) defines the guarantee as any undertaking by a seller or producer to the consumer, given without extra charge, to *reimburse the price paid or to replace, repair or handle consumer goods in any way* if they do not meet the *specifications* set out in the guarantee statement or in the relevant advertising. Further, the Directive states that the guarantee is binding on the offerer on the *conditions* laid down in the guarantee statement and in the associated advertising (Article 6(1)). In Article 6(2) it requires the guarantee to be set out in plain intelligible language the *contents* of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and the territorial scope of the guarantee, as well as the name and the address of the guarantor.

The Directive employs various notions: contents, conditions and specifications, and gives examples of the remedies. However, the modesty of the wording makes it very difficult to decipher what is hidden behind each of these notions and the relations between them.

2.3.3.1 Specifications, conditions and remedies?

The broadest notion amongst those used by the Directive is the contents, mentioned in Article 6(2), which, according to the Directive, has to be set out in the guarantee. In legal writing a rather broad interpretation of this notion is given. Twigg-Flesner suggests that this covers “the guarantee promises itself, the remedies for non-fulfilment and other important terms and conditions.”²⁸⁷ Malinvaud²⁸⁸ understands it in a similar manner, referring to “what [the guarantor - AWD] promises to do,” indicating that Article 1(2)(e) could be helpful in this regard (“an undertaking to ... reimburse the price paid, or to replace, repair or handle consumer goods in any other way.”)

On the basis of the text of the Directive, it may be deduced that the content of the guarantee is formed by three different categories of legally relevant elements: (1) specifications concerning the goods, (2) conditions under which the guarantee is offered, (3) remedies under

²⁸⁷ Twigg – Flesner 2003, p. 163.

²⁸⁸ Malinvaud 2002, p. 229.

the guarantee. Unfortunately, the wording of the Directive is not very precise, and the terms are not used consistently, which causes problems with establishing in what meaning exactly they are used throughout the Directive.

2.3.3.2 Specifications concerning the goods

Specifications concerning the goods are expressly mentioned in the definition of the guarantee, though the Directive does not elaborate on them further. The rules in the Directive regarding the conformity of the goods cannot provide any help here either, as the Directive only establishes that the legal rights under the applicable national legislation are not affected by the guarantee. It should therefore be concluded that the guarantor is free to give any kind of specifications as long as they do not infringe other rules governing such legal relations.

In my opinion, specifications should be understood as a description of the goods given by the guarantor. In other words: the guaranteed properties, the technical characteristics and capabilities of the goods, the quality of materials used for their production, an indication of defects or malfunctions covered by the guarantee, etc. - the objective measures that could be applied to evaluate the goods. Twigg-Flesner²⁸⁹ questions (without giving a definite answer) whether satisfaction guarantees are covered by the Directive, since they do not normally provide any specifications the product should meet and they relate to subjective attitudes of consumers towards the goods rather than to any shortcomings that fall within the seller's or manufacturer's responsibility. However, the scope of the guarantor's freedom to declare what kind of specifications he guarantees should not be restricted, as long as the specifications are sufficiently clear - the consumer should know what qualities of the goods are guaranteed. If the guarantor decides to guarantee the subjective feelings of the consumer regarding his goods, he should be allowed to do so.

2.3.3.3 Conditions

Conditions are mentioned in Article 6(1) of the Directive in the context of the binding force of the guarantee. There is no clarity as to what kind of conditions the Directive refers to,²⁹⁰ as the term conditions is quite confusing and it may be understood twofold: in a narrow or a broad manner.

The narrow understanding of the term "conditions" refers to the conditions under which, strictly speaking, the guarantee is offered to the consumer. This is the understanding based on the meaning given to the term 'condition' within the ambit of general contract law. The DCFR, for example, defines 'condition' as a provision that makes a legal relationship or effect dependent on the occurrence or non-occurrence of an uncertain future event. That could include, again, two types of conditions:²⁹¹ (i) formal conditions, i.e. the formal steps that the consumer is required to take before the guarantee becomes available to him (register the guarantee with the seller or the guarantor, fill in and return the registration card), and (ii) substantial conditions, i.e. the terms and conditions that relate to the content of the guarantee, such as the duration, the territorial scope of the guarantee, the procedure for making a claim under the guarantee (mentioned in Article 6(2) of the Directive), and the statement that the guarantee is valid (or not) for any subsequent owner of the goods. It is possible to categorise them by a negative description: all the terms and conditions that do not refer to the

²⁸⁹ Bradgate & Twigg-Flesner 2003, p. 172.

²⁹⁰ Ibidem, p. 175.

²⁹¹ Ibidem, p. 175 – 176.

specifications concerning the goods and the remedies available under the guarantee. There is one more category that could be classified as a condition within this meaning: the maintenance or servicing requirements. However, these are questionable in light of the legislation on guarantees in general. If any kind of obligation is imposed on the consumer, he should be expressly informed about it, especially given the emphasis that the Directive lays on the consumer information in the context of the guarantee.

Regarding the first type of conditions (the formal requirements) Twigg-Flesner claims²⁹² that the conditions within this meaning may actually make the guarantee conditional (unless the registration procedure is not performed, the guarantee is not binding). Generally speaking, this opinion could be upheld. However, taking into account the Directive's modest regulation, it brings about many problems (similar to those mentioned above in the context of the maintenance or servicing requirements). The starting point is that the Directive does not expressly deal with this issue – and definitely does not expressly prohibit such a practice. However, if this issue was considered during the drafting process, it should have somehow been reflected in the wording of the Directive, as the consequences of accepting it are far-reaching for the consumer. The consumer pays a higher price for the goods, but due to the non-fulfilment of the formal requirements set by the guarantor the guarantee is not valid. The consumer should therefore know exactly what he has to do in order to make the guarantee work. Since the guarantee document is provided only at the request of the consumer, the seller (who has a direct contact, or at least is in the closest relation with the consumer) should be obliged to inform the consumer about the formalities required by the guarantor. Naturally it becomes more complicated if the informational duties imposed on the seller relate to the producer's guarantee. In the most extreme case, the seller would be obliged to inform the consumer about the guarantee's content, which he may actually not know.

The narrow understanding of the conditions does make sense, especially if it is combined with the other components of the contents of the guarantee: specifications concerning the goods and remedies, as indicated above (the contents of the guarantee – specifications, conditions and remedies?). This structure (conditions, specifications, remedies) completes the legal construction of the guarantee, at the same time, however, it raises rather serious doubts concerning the formulation of the Directive, which aims at granting the consumer sufficient information.

The broad understanding of the term “conditions” refers to the entire content of the guarantee, i.e. the entirety of the guarantor's obligations towards the consumer, which would in fact mean that Article 6 uses two different notions to describe the same contents: “conditions” in paragraph 1 and “content” in paragraph 2.

It is very difficult to decide which of the interpretations is correct, as none of them can be applied without raising some controversies. Considering the wording of Article 6(1) of the Directive, which declares the guarantee legally binding under the conditions laid down in the guarantee statement and the advertising, the narrow understanding of the term “conditions” proves to be insufficient, as the guarantee should bind the guarantor according to its full contents, which means the specifications, the remedies and the (narrowly perceived) conditions. Within this understanding the word conditions is superfluous. On the other hand, it is equally possible that Article 6(1) does refer to the narrow understanding, i.e. the conditions that encumber the consumer (whichever content may be prescribed to such

²⁹² Ibidem, p. 176.

conditions). However, as explained above, this understanding creates problems in relation to the transparency requirements, since Article 6 does not expressly mention any informational duties regarding information about the conditionality of the guarantee. This problem could, of course, be solved at a national level on the basis of general contract rules (e.g. unfair contract terms), but it is rather surprising that a Directive that targets transparency as its main goal would omit such an important issue. Other language versions (Polish, French or German) are not very helpful here either, as they also contain certain inconsistencies in wording.

2.3.4 Remedies

The Directive is a bit more specific regarding the remedies under the guarantee, as it at least provides a list of them. At the same time, it remains very laconic and leaves more than enough room for interpretation. On the one hand, such an approach could be seen as elastic, flexible and user friendly. On the other – the modesty of regulation may have its drawbacks, especially if the guarantor does not elaborate properly on the remedial scheme proposed in the guarantee.

This part of the analysis begins with underlining the strong connection that exists between the conformity remedial scheme and the guarantee remedial scheme, followed by analysis and comparison of specific components of these schemes.

2.3.4.1 Close relation with the conformity remedial scheme

The Directive's rules on conformity cast a shadow over the guarantee regulation. It becomes especially intensive in the case of remedies, for both regimes use a specific system of remedies and share some of them. Therefore, the analysis of the remedies under the guarantee may only be complete if conducted against a strong background of the rules on conformity.

Conformity offers four remedies: repair, replacement, price reduction and rescission of the contract (Article 3). The Directive only defines repair. The remedies are ordered hierarchically: first repair and replacement – Articles 3(2) and (3), then price reduction and rescission of the contract – Article 5. The application of any of these remedies is subject to a number of limitations: the seller may demand repair or replacement, unless this is impossible or disproportionate (if it imposes such costs on the seller in comparison with the alternative remedy). The consumer may require an appropriate reduction in price or have the contract rescinded only if the consumer is not entitled to repair or replacement, or if the seller has not completed the remedy within a reasonable time, or if the seller has not completed the remedy without significant inconvenience to the consumer.

Any repair or replacement must be completed within a reasonable time and without significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods, and free of charge (Article 3 (2)).

2.3.4.2 No definition

The definition of the guarantee indicates the possible remedies available to the beneficiary if the goods do not meet the specifications set in the guarantee statement or in the relevant advertising. These are: reimbursement of the price paid, replacement, repair or handling the goods in any other way. The Directive provides information as to the meaning of the remedies only in the context of the conformity scheme. Article 6, which exclusively deals with the

guarantee, does not even mention the remedies - it only generally refers to the contents of the guarantee, without giving it a precise meaning.

2.3.4.3 Open and indicative character of the remedies list

The rule regulating the guarantee remedial scheme is open, flexible and has an indicative character. It gives the impression that the drafters were more concerned with describing the concept of remedies for guarantees, than with giving them a legal structure. The list of the remedies remains open – the expression “handling the goods in any other way” leaves no doubt about that. Therefore the guarantor may either propose one of the three “nominate” remedies, mix the elements of different remedies or resort to any other construction he deems fit.

2.3.4.4 Hierarchy, party to choose remedy, default remedies

The Directive does not structure the remedies of guarantee in any kind of a hierarchy - the order in which the remedies are presented does not seem to have any particular meaning. Moreover, the Directive is silent with regard to all the issues related to the process of choosing the remedy under the guarantee. The Directive does not elaborate on questions like who selects the remedy or whether it is possible to block the choice of that party, as under the conformity scheme. The guarantor must therefore decide all these issues. It means that even if the ultimate choice of the remedy is given to the beneficiary, it is made according to the establishments of the guarantor (the beneficiary chooses amongst the remedies indicated by the guarantor and follows the procedure created by the guarantor).

There are two questions that arise in this respect: (1) what if the guarantor does not indicate the remedies, (2) what if the procedure of choosing the remedy is not established?

The Directive does not offer any help in answering the question of how to solve the problem of a guarantee that does not provide remedies. In such a case, it might be fair to ask whether a guarantee will be created at all. The Polish implementation of the Directive clearly states, for example, that a guarantee statement that does not establish the guarantor's obligations does not create a guarantee.²⁹³ If this line of reasoning is accepted, then a guarantee that does not specify the remedy will not fall within the scope of the Directive. It could, however, be classified as a public statement for which the seller is accountable under Article 2(2)(d).

The answer to the second question, in my opinion, should be that if there is no procedure established, the interpretation most favourable for the consumer should be chosen, i.e. the beneficiary of the guarantee should be free to choose any of the remedies available according to the guarantee. To support this view, one can refer to the rules of Unfair Contract Terms Directive, i.e. the *contra proferentem* rule and the transparency requirement established by it.

2.3.4.5 Reimbursement of the price paid

Reimbursement of the price paid constitutes a remedy under which the guarantor pays the price back to the guarantee holder if the goods do not meet the specifications set out in the guarantee statement or in the relevant advertising. The use of the phrase “reimbursement” against the “price reduction” adopted in the conformity scheme suggests that the reimbursement at stake covers the entire price paid by the consumer. At the same time, it does

²⁹³ Article 13, Polish Act on the Special Conditions of Consumer Sales.

not change the terms of the contract - the amount of the price remains as agreed - only the performance of the buyer is returned. It should be stressed, however, that the wording of the Directive in no way restricts the guarantor from offering a reduction in price as a remedy, as the list of remedies is not exhaustive.

The use of the reimbursement of the price paid as one of the remedies indicated *expressis verbis* by the Directive creates many difficulties in establishing the consequences of applying this remedy, taking into account the circumstances that need to be considered during an analysis of the Directive. First, the Directive gives the guarantor a very far-reaching freedom in creating the contents of the offered guarantee, which includes defining the meaning of the offered remedies. Second, the Directive is not applied directly - it requires implementation, and subsequently its transposed rules function in the internal legal environment, which approaches the given problem from a domestic perspective. In a way, an analysis of the rules of the Directive in the context of the guarantee regulation is sometimes not more than posing questions and presenting options. Analysis of the reimbursement is an excellent example of such a situation.

2.3.4.6 Special position of the reimbursement

The position of the reimbursement of the price paid among the other remedies is special for several reasons: it is a very far-reaching remedy (the entire performance of one party is returned), evidently stronger than the price reduction used in the conformity scheme. Such a remedy would normally be associated with situations where there is a major failure in the goods; usually of such a nature that the goods could not be used anymore, or their use is severely limited (the *kinescope of a TV set breaks down, and the TV can only be used as a night-table*) or with satisfaction guarantees (*satisfaction guaranteed or your money back*). That said, one must remember that the guarantor is absolutely free to regulate the contents of the remedies so that the offered remedies do not have to be adjusted to the gravity of the goods' deficiency and, moreover, the consequences of applying a particular remedy could be specifically defined by the parties of the widely understood legal relation (guarantor, seller, buyer).

2.3.4.7 Reimbursement and remedies under conformity

The reimbursement of the price paid does not exist under the conformity scheme. It may, however, be linked with two other remedies of the conformity scheme: price reduction and rescission (i.e. termination for non-performance) of the contract. On the one hand, one could claim that the reimbursement of the price paid constitutes only the extreme form of a price reduction, as the *entire* price is paid back to the beneficiary of the guarantee (which does not have to necessarily be the buyer of the goods), however, as already stated, reimbursement does not alter the terms of the contract. On the other hand, if the entire price is paid back, it means that the performance of one of the parties of the sales contract is fully returned – which is characteristic of the rescission of a contract. It provokes additional questions like: what are the consequences of the reimbursement of the price paid under the guarantee for the guarantee (contract) and for the sales contract on which the guarantee is based, or what impact does it have on the entitlements of the consumer arising under the sales contract? It must be remembered that the Directive does not cover (in principle) guarantees provided against payment, so the reimbursement here concerns the price paid under the sales contract.

It is impossible to answer in an abstract manner whether the fact that the price has been fully reimbursed means that the guarantee has been performed and ceases to exist. Although the

intuitive answer would be yes (a typical example of such a guarantee would be a satisfaction guarantee) it cannot be ruled out that in a particular case the guarantor prescribes another function to the reimbursement of the price paid. If the reimbursement is to have a compensatory function, in other words it replaces the remedies of repair or replacement, in which case the interest of the guarantee holder is fully satisfied by reimbursement. However, unlike in the case of repair and replacement, even if the guarantee period exceeds the moment of reimbursement, the beneficiary should not be able to claim further remedies for the same deficiency of the goods under the guarantee, as his interest under the guarantee has already been satisfied by the reimbursement - the unsatisfactory quality of the goods was compensated through the reimbursement.

Consequently, if the reimbursement is offered next to other remedies as an additional one, then the beneficiary should be entitled to claim also the other remedies.

Example: The guarantee holder is entitled to either repair or replacement, with the reimbursement of the price paid if the chosen remedy is not performed within three weeks.

As the reimbursement of the price paid is closely associated with the rescission of the contract, an obvious question would be whether the reimbursement of the price paid automatically generates an obligation to return the goods? An argument to support this view would be that, by the reimbursement of the price paid, the legally protected interest of the guarantee holder has been satisfied and by keeping the goods he is unjustifiably enriched. On the other hand, the reimbursement of the price paid constitutes a remedy different than the rescission of the contract, and it would be misleading for the consumer if the rescission of the sales contract was caused by the application of the reimbursement of the price paid under the guarantee scheme. Next, the parties of the sales contract should not be prohibited from structuring their relation as they find fit. In such a case, the sales contract and the liability schemes that exist within it should be approached from the widest possible perspective. The guarantee and the parties involved in it should be considered as an element of a wider liability scheme under the sales contract, as it is impossible to create a functioning remedial scheme under the guarantee involving the reimbursement of the price paid, if there is no co-operation between the seller and the guarantor. There is another element to be considered here: the seller, and certainly the producer, may actually not be interested in getting the goods back if the goods are defective and cannot be used anymore. An automatic and general obligation to retransfer the goods to the seller or producer may therefore not be in the guarantor's interest.

However, the rescission of the contract does not really make much sense if the guarantee is to grant a good and undisturbed operation of the goods for a specified period of time. Therefore, reimbursement fits the best with the scheme of satisfaction guarantees (unless it is to play the function of damages). In the case of satisfaction guarantees, the goods are returned to the seller and the guarantee is, from the legal construction point of view, closely related to a sale on trial, and the right of withdrawal, as exists in distance or doorstep selling.

Another problem in this area for the consumer may appear in the situation when the guarantee offers the possibility of a full refund of the price, and at the same time the consumer is allowed by law to claim (consequential) damages. If the consumer is required to return the goods, he may no longer be able to prove towards the seller that he is entitled to damages as he cannot show the goods and have it examined by the seller whether there really is non-conformity. This would mean that the guarantee in practice operates as a restriction of the legal rights of the consumer, even if that is not intended.

These considerations definitely do not exhaust the discussion on the reimbursement of the price paid under a guarantee. However, they already give an impression of how legally complicated the situation is. It is difficult to find convincing reasons why the reimbursement of the entire price has been put forward so explicitly. It may be argued that in the case of a price reduction, the conditions of the contract of sale are being altered, which would be impossible if it is the producer (not the seller) who is to execute it, as there is no separate price for the guarantee under the Directive. The reimbursement of the price paid does not interrupt the structure of the sales contract, and can be easily performed by anyone engaged in the distribution chain.

2.3.4.8 Damages

At this point it can be observed that a result very similar to the one described above could be obtained by referring to damages. This, of course, provokes a question concerning the place of damages within the guarantee remedial scheme. It seems however, that because damages belong to the area of general contract law, they can interfere with the guarantee remedial scheme only to a limited extent. If a guarantee is qualified as a self-standing contract, the law indicates in what circumstances the damages are due. The same applies if the guarantee is seen as a part of the sales contract. So if the guarantee expressly indicates damages as one of the offered remedies and the damages would be granted in situations similar or identical to that prescribed in the applicable law, it would be extremely misleading for the consumer (he “receives” something he already has under the law). An even more dangerous situation would exist if the scope of damages indicated in the guarantee would be lesser than in the general contract law. However, if the damages under the guarantee covered more than the consumer’s entitlements according to the general contract law the situation would be different. In any case, the need to ensure the transparency of such a guarantee should be underlined.

2.3.4.9 Repair and replacement

Repair and replacement are the two remedies shared by the conformity and guarantee schemes.

The Directive only offers a definition of repair. It states that repair, in the event of non-conformity, means bringing consumer goods into conformity with the contract of sales (Article 1(2)(f)). The definition itself clearly limits its application to cases of non-conformity. How then should repair be understood in the case of a guarantee? In my opinion, the definition of repair should be applied in line with the repair performed in the course of the guarantee. This would mean bringing consumer goods to a state where they meet the specifications set out in the guarantee statement and in the relevant advertising. Of course, here, there is a problem concerning situations where there are no specifications, or they are not precise enough in order to establish what should be performed under the guarantee.

As under the conformity scheme,²⁹⁴ under a guarantee “replacement” should be understood as exchanging faulty goods (the goods that do not meet the specifications set out in the guarantee statement and in the relevant advertising) with goods that meet all these specifications. The application of replacement is limited by the nature of the goods – recital 16 of the Directive clearly indicates that the specific nature of the second-hand goods makes it generally impossible to replace them. Twigg-Flesner and Bradgate prove that this is not always the case

²⁹⁴ Bianca 2002, p. 161.

and minor differences in the individual characteristics of second-hand goods will often be inconsequential.²⁹⁵ They provide an example of a second-hand car of a particular make, model and specification, where replacement with another second-hand car of a very similar quality is possible, since the differences between the cars have little or no impact on the market value of the two cars. Sivesand claims that replacement is impossible for all specific goods, including those not expressly mentioned in the Directive.²⁹⁶ It should be noted that, depending on the definition of the specific goods, the availability of a replacement might be drastically reduced (specific goods might even consist of goods of mass production, distinguishable on the basis of their individual numbers or as goods with absolutely unique characteristics²⁹⁷). One should remember, however, that under the guarantee it is the guarantor who (in the vast majority of cases) independently decides on the offered remedies and is able to specify the qualities of the replacement goods, so the problems mentioned above could easily be avoided.

The question of availability of spare parts and replacement goods is also not so pressing in the case of guarantees as it is in the discretion of the guarantor to establish the duration of the guarantee as well as the available remedies, and as a result the period during which the spare parts and replacement goods should be available. In other words, the guarantor should not be able to refuse performance under his guarantee on the basis of the unavailability of spare parts, since it is the guarantor himself who establishes the scope of his own obligations.

The next question relates to the issue of applying the limitations of Article 3(2) of the Directive (impossible or disproportionate) concerning the availability of remedies to the guarantee scheme. The solution seems to be clear: this legal structure is designed exclusively for conformity, and therefore it does not apply to guarantees. The conformity scheme is created for an obligatory application in consumer sales and the possibility of its alternation by the parties is in fact excluded. In the case of guarantee, much is left up to the guarantor, as the scale of flexibility is much greater. Of course, if the guarantor chooses so, he may refer to the scheme voluntarily.

It is worth mentioning that in Estonia there is a presumption that a guarantee grants the consumer the right to repair or replacement.²⁹⁸ A similar assumption exists in the Polish Civil Code (Article 577(1)), but as a result of implementation of the Consumer Sales Directive it does not apply to consumer sales.

2.3.4.10 Handling the goods

Handling the goods in any other way is the last remedy listed by the Directive. It adds openness and flexibility to the remedial scheme of guarantees. Reimbursement, replacement and repair play only an indicative function and serve as examples of the possible remedies.

²⁹⁵ Twigg-Flesner, Bradgate: 2000, <http://webjcli.ncl.ac.uk/2000/issue2/flesner2.html>.

²⁹⁶ Sivesand 2005, p. 27.

²⁹⁷ Wiewiórowska 2008, p. 140.

²⁹⁸ Consumer Law Compendium, p. 702.

2.3.4.11 Differences between the conformity remedial scheme and the guarantee remedial scheme

The guarantee and conformity - from both the theoretical and the practical point of view - are close to each other.²⁹⁹ The similar systems of remedies confirm this. Yet, the differences in the regulations are quite substantial and they do not relate only to the amount of attention given by the Directive (although the rules on conformity are much more precise and elaborated). What caused the differences in the choice of the remedies and in the way of regulating them?

In my opinion, the reason underlying the different method of regulation is the different nature of both of these schemes: obligatory in the case of conformity and voluntary in the case of a guarantee. In the case of guarantee there is an almost unlimited scope of freedom for the guarantor to design his own remedial scheme, while in the case of conformity the scheme is fixed rather firmly.

The second element that influences the approach of the Directive is the parties that might eventually be engaged in the legal relation. In the case of conformity, in principle, the parties are limited to that of the sales contract, in other words: a liability scheme is established on the axis of the final seller to the first buyer. In the case of guarantee, the list of the parties potentially involved is much wider, and includes also producers, intermediaries and possibly also persons that have obtained the goods covered by the guarantee from the first seller.

2.3.4.12 Remedies of conformity scheme not used in the guarantee

There are two remedies of the conformity scheme that are not repeated in the guarantee regulation, namely the rescission of the contract and a price reduction. Generally speaking, these are the remedies that have the closest connection with the structure of the sales contract, and their application always affects the sales contract. A reduction of the price paid means the alteration of two of the essential elements of the sales contract, as the buyer is forced to live with a lesser product than he had bargained for, in exchange for the lower price, the rescission of the contract simply ends the contract.

2.3.4.13 Reimbursement of the price paid

The price reduction has already been discussed in relation to the reimbursement of the price paid. The conclusion of the discussion is that if the Directive mentions a remedy that involves the alteration of the price of the sales contract from both practical and theoretical points of view, it is quite dangerous to refer to a price reduction, as it potentially provokes deep repercussions for the sales contract. To speak of a partial or appropriate reimbursement of the price paid is safer in that respect, although generally speaking repair and replacement are better suited as remedies under a guarantee, as they make possible the proper operation of the goods and the continuation of the ownership of the goods by the guarantee holder. This direction is confirmed by the formulation used in the Directive “handling the goods in any other way”, which suggests work on the goods.

²⁹⁹ On that see also Chapter IV part 5. Legal guarantee and commercial guarantee – internal and external relationships between two regimes.

2.3.4.14 Rescission of the contract

Not including the rescission of the contract in the list of remedies, although it does not exclude it from the list of potential remedies altogether, should be welcomed. A general question that could be asked in this respect, is whether the rescission of the contract fits as a remedy in the guarantee scheme proposed by the Directive? To be more precise: which contract would be rescinded, and what interest would the guarantee holder have in rescinding the contract?

Regarding the question of which contract gets rescinded – the Directive does not elaborate on the legal form of the guarantee, and there are several options available. If the guarantee is offered in a form of a contract, the situation is sufficiently clear – it would be the guarantee contract that is rescinded. The situation is much more complicated if the guarantee constitutes a part of the sales contract or a unilateral promise. Would the possibility of rescission even exist then?

There is a number of questions regarding this issue. Should rescission of the sales contract be allowed by exercising a legal option arising under a guarantee that constitutes only a part of the sales contract? If the answer is yes, does it extend to all situations involving the guarantee forming a part of the sales contract, or are there other relevant circumstances to be taken into account (for example how important is the function of the guarantee in the given sales contract, is it relevant that the conformity period has elapsed, etc.)? If it is not possible to rescind the sales contract, could it be modified to extinguish the binding force of the provisions on the guarantee?

The next question concerns the legal interest the consumer could have in rescinding the guarantee contract. The guarantee according to the Directive cannot be offered against payment and does not affect the consumer's statutory rights. It could be argued that the consumer could have an interest in ending the guarantee relation, if he was obliged to undertake, for example, annual check ups of goods, which could be very costly,³⁰⁰ however, in such a situation the guarantor would definitely not be interested in offering such a remedy to the guarantee holder.

2.3.4.15 Approach of the Member States

Most of the Member States follow the approach of the Directive and reproduce in their legislations the wording of Article 6(1)(e)), which states that if the goods do not meet specifications set out in the guarantee statement or in the relevant advertising, the guarantor will reimburse the price paid, replace the goods or handle consumer goods in any other way. Such an approach is reflected in most of the legal systems (Belgium, Denmark, England and Scotland, Finland, France, Germany, Spain, Poland).

Different solutions are to be found for example in Estonian Law,³⁰¹ where a presumption exists that unless the guarantee document provides otherwise the guarantee entitles the buyer to claim, free of charge, a repair or replacement of the goods if any defect is discovered during the guarantee period. In Sweden, the consumer has access to all remedies prescribed by law for lack of conformity in the Consumer Sales Act, i.e. repair, replacement, a price reduction, termination and damages.³⁰² Similarly under Czech³⁰³ and Slovak³⁰⁴ law, the

³⁰⁰ See part Free guarantee of this Charter.

³⁰¹ Article 231(4) Law of Obligations Act.

³⁰² PELS 2008, p. 379.

³⁰³ Article 620(5) Civil Code.

guarantee established by an agreement or a declaration by the seller may not be narrower than the statutory guarantee, meaning that the buyer will at least have access to the normal remedies for lack of conformity. Interestingly, in Polish non-consumer sales regulation,³⁰⁵ which does not apply at the moment in to consumer sales within the scope covered by the Directive, a rule exists, according to which in the case of doubt, the guarantor is obliged to rectify the physical defects of the thing.

2.3.5 Presentation (of the contents) of the guarantee

As mentioned in the introduction to this chapter, the rules of the Directive aimed at securing the transparency of the consumer guarantees also affect the substance of the guarantee. Any attempt to separate them will be somehow artificial, as these two functions of the regulation penetrate each other. However, for the sake of clarity of reasoning, it is better to discuss them separately. Therefore in this part the analysis deals with the substantive aspects of the presentation of the guarantee contents, while the next part discusses the transparency of the guarantee.

2.3.5.1 General

According to Article 6(2) “the guarantee will (...) set out the content of the guarantee.” Unfortunately, this formulation gives no clue as to what exactly it refers to. As stated before, it can be claimed that specifications, conditions and remedies create the contents of the guarantee. The main question in this part refers to the place where the content of the guarantee is established, as in this respect the Directive lacks coherency. It refers to the following notions: a guarantee, a guarantee statement, relevant advertising and associated advertising. The question then would be: what are the relations between these notions and how can the actual contents of the guarantee be reconstructed. In other words: where should one look for the guarantee?

The starting point should be the guarantee statement, mentioned in Article 1(2)(e) and Article 6(1). The guarantee statement should contain specifications concerning the goods (Article 1(2)(e)) and conditions under which the guarantee is binding on the guarantor (as established above, conditions within the meaning of Article 6(1) should be understood as the contents of the guarantee). Additionally, both articles refer to advertising (associated and relevant) as a part of the guarantee undertaking (Article 1(2)(e)), and the place where the conditions under which the guarantee is binding may be found (Article 6(1)). A problem appears in relation to Article 6(2), according to which the guarantee will set out the contents of the guarantee. Is this the guarantee statement from Articles 1(2)(e) and 6(1)? Or is it the guarantee document – never mentioned in the text of the Directive? Or maybe these two notions are in fact the same thing. These questions may seem superfluous or theoretical, but answering them has an impact on the way the content of a guarantee is established according to the Directive.

From this perspective, the literal reading of the Directive is quite confusing. The guarantee (document), according to Article 6(2), should present the full contents of the guarantee. According to Article 1(2)(e), a guarantee is formed by the conditions set in the guarantee statement OR in the relevant advertising, and is binding under conditions laid down in the guarantee statement AND the associated advertising (Article 6(1)). If the Directive refers to two different notions and distinguishes the guarantee statement (Article 1(2)(e), Article 6(1))

³⁰⁴ Article 502(2) Civil Code.

³⁰⁵ Article 577 Civil Code.

from the guarantee (document) (Article 6(2)) – then it means that the specifications and conditions made in the advertising should also be repeated in the guarantee (document), because the guarantee (document) should specify the full contents of the guarantee, which includes the specifications and conditions made in the advertising. If, however, the guarantee statement (Article 1(2)(e)) and Article 6(1) and the guarantee (Article 6(2)) refer to same notion, then the literal reading of the Directive does not require the advertisement statement to be repeated in the guarantee.

Virtually all of the legal writing takes the position that the intention of the Directive is to make sure that the statements made in the advertisement will be binding on the guarantor.³⁰⁶ This reasoning is in line with recital 21 of the Directive, which sees the guarantees as a legitimate marketing tool and underlines the importance of the advertisement in the context of the guarantee. From that perspective, making the binding nature of the statements made in the advertisement contingent upon their confirmation in the guarantee document would simply contradict the idea behind the Directive's regulation. Linguistic inconsistencies of the Directive should be resolved in favour of making the advertisement in principle binding on the guarantor³⁰⁷ despite the fact whether its statements were repeated in the guarantee (document) or not.

The Directive offers one more route to reach this result. According to Article 6(5), an infringement of paragraph 2 does not affect the validity of the guarantee. So even if the full content (the advertisement statements) is not presented in the guarantee (document) the consumer may still require it to be honoured.

2.3.5.2 The advertisement

The introduction of a rule that secures the binding character of claims made in advertising has been welcomed.³⁰⁸ The Directive refers to advertising twice: in Article 1(2)(e) and in Article 6(1). Generally speaking, what the Directive states and repeats, is that the content of the guarantee is formed not only by the guarantee statement, but also by the statements made in the course of advertising. In other words, the advertising constitutes an integral part of the guarantee contents and binds the guarantor.

Although references to the advertising are rather modest, the wording did not escape discrepancies. Article 1(2)(e) refers to the relevant advertising, while Article 6(1) talks of the associated advertising. It seems, however, that both expressions refer to the same type of advertisement: an advertisement which refers to the guarantee, presenting conditions of the guarantee or specifications of the goods,³⁰⁹ that in any way refers to the existence of the guarantee, or at last – which “itself is a guarantee”.³¹⁰ Beale and Howells posed the question whether the limitation to associated advertising means that only the advertising, which mentions the guarantee document, has a contractual effect, so that advertising could not by itself lead to the creation of the guarantee.³¹¹ It seems, however, that such a limitation was not intended by the Directive. Twigg-Flesner mentions also advertisements that include a

³⁰⁶ Malinvaud 2002, p. 224, Twigg-Flesner 2003 (1), p. 173, Staudenmayer 2000, p. 559; Oughton, Willet 2002, p. 322.

³⁰⁷ On this point see also the next section.

³⁰⁸ European Consumer Law Group 1998, p. 95; Beale & Howells 1997, p. 38.

³⁰⁹ Malinvaud 2002, p. 224.

³¹⁰ Bradgate & Twigg – Flesner 2003, p. 173.

³¹¹ Beale & Bradgate 1997, p. 38.

reference to the guarantee, but at the same time the product being guaranteed does not refer to the guarantee, and presents, correctly in my eyes, the opinion that such a guarantee should also be binding.³¹²

2.3.5.3 Who stands behind the advertisement?

The Directive does not indicate who may be the author of the relevant or associated advertisement that binds the guarantor. It only says that the associated advertisement or the relevant advertisement forms part of the guarantee. Does it then mean that the guarantor should be liable for the advertisement that is associated with the guarantee, regardless of whether or not he is behind this advertisement, as Oughton and Willet³¹³ seem to suggest?

This problem is specifically dealt with under the conformity scheme, although it refers to a wider notion of public statements. On the one hand Article 2(2)(d) establishes that the seller is liable for public statements made by the seller, the producer or his representative concerning the specific characteristics of the goods. On the other, however, the Directive limits the scope of liability of the seller in Article 2(4), according to which the seller is not bound by the public statements if he (1) shows that he was not, and could not reasonably have been, aware of the statement in question; (2) shows that the statement had been corrected by the time the contract was concluded, or (3) shows that the decision to buy the consumer goods could not have been influenced by the statement. This scheme provides an answer to the question concerning the seller's liability for the statements made by others: for whose statements the seller is liable and how extensive that liability is.

It seems that the underlying assumption of the regulation in the case of guarantee was that it is always the guarantor who stands behind the guarantee, so the regulation does not have to consider the possibility that an entity other than the guarantor would refer to the guarantee in the course of advertising. That, however, is not always the case.

2.3.5.4 Relation between the conditions in the guarantee statement and in the advertising

The full content of the guarantee is formed by the conditions contained in the guarantee statement and in the advertising. The proportion between the guarantee statement and the advertising does not have to be balanced. A guarantee may exist without advertising and vice versa - the advertisement only may create a guarantee. In this case the advertisement must meet the conditions for the guarantee set out in Article 1(2)(e): the statement made in the advertisement must constitute an undertaking that the goods will meet certain specifications, and that the guarantor will provide a remedy if they do not do so.³¹⁴

2.3.5.5 Discrepancy between advertising and the guarantee statement

One of the biggest problems with regards to advertising in the guarantee is how to interpret the guarantee if the conditions in the advertising are in conflict with the conditions in the guarantee statement. Which terms should prevail and why? The Directive does not suggest any solution; it only indicates that the conditions contained in the advertisement and the guarantee statements are equally important.

³¹² Twigg – Flesner 2003, p. 153.

³¹³ Oughton, Willet 2002, p. 322.

³¹⁴ Twigg – Flesner, 2003, p. 153.

Two solutions have been proposed so far. The first one, by Malinvaud, suggests that the guarantee statement may correct the advertisement,³¹⁵ and that Article 2(4) should apply in such cases. This opinion is criticised by Twigg–Flesner,³¹⁶ who rightly claims that there is nothing in the Directive to support this view. It can be added that Article 2(4) is designed for public statements made in a commercial chain, and it gives the seller a possibility to avoid liability for statements made by other persons. Twigg-Flesner proposes an interpretation that allows the more favourable provision to prevail, based on Article 5 of the Unfair Contract Terms Directive, and it seems that this gives the proper solution to this problem. One could also think of establishing a link with the Unfair Commercial Practices Directive: if the guarantor ‘corrects’ an advertising statement in the published guarantee document, is then this whole procedure could be considered as an unfair commercial practice. The consumer could then be entitled to damages for any damage resulting from relying on the advertisement.

2.3.5.6 Is advertising always binding?

Another issue in this area is whether the advertising is always binding on the guarantor according to its contents. An example of an exception is given in the previous paragraph – in the case of a conflict between the guarantee statement and the advertisement, the content most favourable for the consumer should prevail. In most cases, however, it will rather be the situation to which Riesenhuber³¹⁷ refers that the advertising statements will be corrected by the means of information. Twigg – Flesner³¹⁸ points out: “Many advertising claims are jokey in tone and not intended to be taken seriously. It is submitted that some limitation must be imported to the effect that the statement must be promissory and must be such that a reasonable consumer would expect that it was intended to be taken seriously.” The problem of distinguishing between simple praising information without legal effect and precise factual (express or tacit) statements about certain qualities of the goods, which “must be considered as guaranteed” was brought up also in Denmark.³¹⁹

Some Member States regulate advertising in a greater detail. In the Netherlands a statement in the advertising amounts to a guarantee if it entitles the consumer to certain rights or claims when the promised qualities are lacking.³²⁷ Also it is not relevant, whether the statement is not included in the guarantee document, but is made only in the advertising.³²⁸ If at the same time a document exists, in which rights or claims are given to the consumer, and the statement made in advertising amounts to a guarantee, the rights and claims in the document may be invoked if the goods do not have the qualities that were guaranteed in the advertisement.³²⁹

³¹⁵ Malinvaud, 2002, p. 224.

³¹⁶ Twigg – Flesner, 2003, p.155.

³¹⁷ Riesenhuber 2001, p. 357.

³¹⁸ Bradgate & Twigg – Flesner 2003, p. 174.

³¹⁹ Fogt 2009, p. 240 and the literature referred therein.

³²⁰ SSGCR Reg. 2.

³²¹ Consumer Code L.211-6.

³²² Article 443 Civil Code.

³²³ Article 133(1) Consumer Code.

³²⁴ Article 13(1) Consumer Sales Act.

³²⁵ Article 620(5).

³²⁶ Consumer Sales Act article 11(1).

³²⁷ Article 7:6a(1) Civil Code.

³²⁸ Article 7:6a(5)(a) Civil Code

³²⁹ Article 7:6a(4) Civil Code.

In Austria, as explained by Augenhöfer,³³⁰ public statements do not need to refer to specific features of goods to be legally binding. Mere sales talk and statements that were obviously not meant to be serious are – as under § 922(2) ABGB - not binding under § 9 9b KSchG.³³¹ In the case of a contradiction between the statement of the guarantee and the statement made in advertisement the prevailing opinion is that it should be the guarantee statement that prevails, because a public statement is aimed at unspecified group of people.³³² According to Augenhöfer the public statement must prevail as long as it is advantageous for the consumer, in those situations when consumer cannot find about the written statement before buying the item because it is, for example, contained inside the packaging. In cases where the guarantee statement is made available outside the package or distributed before buying, the latter should prevail.³³³

In Belgium, even in the absence of any certificate of guarantee, a mere commercial statement may constitute guarantee and hence be binding for the consumer.³³⁴ In the case of conflict between the guarantee and the advertising according to Rutten, Straetmans and Wuyts the predominance of the advertising should be the basic assumption, however producers should be allowed to rectify or correct the terms used in adverts and should be allowed to prove that the decision to buy the consumer goods could not have been influenced by the statement, in line with the basic principles of the Unfair Commercial Practices Directive. They claim that the producer can free himself from liability if the rectification is expressly made in the guarantee certificate. However, if the scope of the guarantee specified in the certificate is significantly inferior to the guarantee of the advertisement, it is not excluded that this form of the advertising will be challenged as aggressive or misleading trade practice on the basis of the Unfair Commercial Practices Directive.³³⁵

Under Danish law a pure promise and a guarantee agreement are generally legally binding under the condition stated therein and under the information otherwise given to the beneficiary. According to Fogt³³⁶ any information given but not stated in the declaration of guarantee, can form part of the guarantee by way of the interpretation of the circumstances, if it originates from the guarantor or if the guarantor has either expressly or impliedly accepted that he is bound by it.³³⁷

2.4 Transparency requirements

2.4.1 Introduction

The rules on the guarantee in the Directive are almost entirely devoted to the issue of information that is to be provided to the consumer: its scope, form and the manner of presentation. This is easily understood taking into account the intentions that accompanied the drafters of the Directive, embodied in recital 21 of the Directive: (...) to ensure that consumers are not misled, guarantees should contain certain information, including a

³³⁰ Augenhöfer 2009, p. 180 and the literature referred to therein.

³³¹ 422 BlgNR 21.GP 25, as referred to in Augenhöfer 2009, p. 180.

³³² Augenhöfer 2009, p. 180 and the literature referred to therein

³³³ Augenhöfer 2009, p. 180 and the literature referred to therein.

³³⁴ Rutten, Straetmans and Wuyts 2009, p. 205.

³³⁵ Rutten, Straetmans and Wuyts 2009, p. 206.

³³⁶ Fogt 2009, p. 238 and the literature referred therein.

³³⁷ Fogt 2009, p. 238 and the literature referred therein.

statement that the guarantee does not affect the consumer's legal rights. What clearly flows from the reminder of the recital is that the Directive perceives the guarantee as a marketing tool that has an influence on the competition policy, and the biggest danger that the guarantee carries is that of misleading consumers (“Whereas, for certain categories of goods, it is current practice for sellers and producers to offer guarantees on goods against any defect which becomes apparent within a certain period; whereas this practice can stimulate competition; whereas, while such guarantees are legitimate marketing tools, they should not mislead the consumer; (...)”). The most important task of the rules on guarantee, according to the Directive, is therefore to prevent the guarantee from misleading consumers through assuring proper consumer information. The wording of the recital suggests that the Directive attributes a special role to the information that the consumer has legal rights and that guarantee does not affect these rights, and situates it in the centre of the informational duties.

Although the Directive itself recognises only one purpose of providing information – that of avoiding the possibility of misleading consumers by offering a guarantee, other functions of such an approach can also be identified. These include: granting the consumer a possibility of making an informed decision,³³⁸ providing the consumer the possibility of exercising his rights effectively (specific scope of the information that is to be presented to the consumer, the right to ask for a guarantee document, a “user-friendly” way of presenting the guarantee, achieved by, for example, posing certain language requirements), securing the efficiency of the guarantee (non-observance of the requirements does not affect the validity of the guarantee).

2.4.2 The transparency requirements - general remarks

Generally speaking, the informational requirements imposed by the Directive concern two issues: first - what should be presented - and second - how it is to be presented. The content of the required information is established in Article 6(2). According to this, the guarantee should state that the consumer has legal rights under the applicable national legislation governing the sale of consumer goods, and should make clear that those rights are not affected by the guarantee. Moreover, it should set out the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and the territorial scope of the guarantee, as well as the name and address of the guarantor. As for the requirements concerning the method of presentation, the Directive specifies that at the request of the consumer, the guarantee should be made available in writing, or feature in another durable medium available and accessible to the consumer (Article 6(3)). In addition, within its own territory, every Member State in which the consumer goods are marketed, may provide, in accordance with the rules of the Treaty, that the guarantee should be drafted in one or more languages determinable from among the official languages of the Community (Article 6(4)). Further, in Article 6(2) it requires the guarantee to be in plain intelligible language.

2.4.3 Scope of the information

2.4.3.1 Legal rights not affected

As already stated, the Directive gives its attention primarily to the information that the guarantee does not affect the legal rights of the consumer. To underline its importance, the Directive distinguishes this information from all the other information referred to in Article 6(2). The requirement that the guarantee should contain information that the legal rights of the

³³⁸ Riesenhuber 2001, p. 368.

consumer are not affected by the guarantee was introduced by the Parliament.³³⁹ The lack of this requirement in the earlier versions of the Directive was perceived as unfortunate.³⁴⁰ Recital 21 of the Directive suggests that providing the consumer with information that his legal rights are not affected by the guarantee will prevent the guarantee from misleading the consumer. In order to establish, whether this really is the case, it is necessary to determine, in which spheres the existence of a guarantee could be misleading for consumers, and how far providing the simple information regarding the existence of legal rights could remedy the problem.

2.4.3.2 Misleading areas - the existence of the statutory rights

Considering the generally low level of knowledge regarding legal rights amongst consumers, a guarantee, especially in the form of a document, as observed by Beale and Howells,³⁴¹ could suggest to them that the guarantee captures all the rights a consumer might have. The second option is that even when the consumer knows about the statutory rights, he may be convinced that the guarantee waives them. The typical situation that leads the consumer to this conclusion involves the seller informing the consumer about the guarantee at the time of purchasing the goods, in a way suggesting that no other rights exist. As opposite to the consumer's statutory rights, the guarantee is explicitly and directly offered to the consumer. It catches the attention of the consumer and in practice overshadows the consumer's other possibilities to exercise his rights.

The requirement imposed by the Directive means bringing to the attention of the consumer information that, in fact, carries no meaning for him as the consumer lacks the proper context (the knowledge regarding his legal rights). An opposite view, which assumes that a clear statement that the consumer has rights under sales law not affected by the guarantee could be enough to make it clear to the consumer that a guarantee does not present the full extent of the consumer's rights was, however, expressed by Twigg-Flesner.³⁴²

Another dimension of this issue was brought up by Beale and Howells who rightly argue that the Directive could help promoting awareness of the consumers regarding their legal rights by providing a summary of the legal rights of the consumer.³⁴³ This option was also put forward by the Green Paper of 1993.³⁴⁴ Of course, in this case the problem rests in balancing the form of wording the information on the legal rights to make it comprehensible to consumers, but at the same time not too superficial or misleading,³⁴⁵ especially given that the legal regime is often complex and cannot be stated in just a few words.³⁴⁶ This solution could certainly substantiate the shell-like requirement of the Directive.

The Directive is not completely silent with regards to promoting knowledge regarding statutory rights amongst consumers. In Article 9 it obliges the Member States to take appropriate measures to inform consumers of the national law transposing the Directive, and

³³⁹ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees (COM(95)0520 – C4-0455/96(COD), OJ C 104, 10.3.98, p. 38.

³⁴⁰ Deards 1998, p. 107.

³⁴¹ Beale & Howells 1997, p. 38.

³⁴² Twigg-Flesner 2003(1), p. 177.

³⁴³ Beale & Howells 1997, p. 38.

³⁴⁴ Green Paper of 1993, p. 96.

³⁴⁵ Beale & Howells 1997, p. 38, footnote 87.

³⁴⁶ Malinvaud 2002, p. 228.

to encourage, where appropriate, professional organisations to inform consumers of their rights. In this respect the Directive does not interfere with the relation of contract parties, but mainly relies on the self-responsibility of consumers and the private initiative of consumer organisations.³⁴⁷ It is quite symptomatic that the European Commission, in its report on the implementation of the Consumer Sales Directive,³⁴⁸ did not even mention the implementation of Article 9.

Another dimension of this problem is that, since the average consumer does not know the content of the rules on conformity, it is difficult for him to estimate the real value of the guarantee, because it is impossible for him to compare it with the legal protection already afforded. Since the Directive does not provide any requirements concerning the contents of the guarantee, the guarantor is free to set its own terms. The consumer is not provided with information on whether the guarantee “reproduces the legal regime, goes beyond it, or even remains below the level of legal protection.”³⁴⁹ Information concerning the contents of the guarantee is as important to the consumer as the information on the legal rights not affected by the guarantee. Only these two elements combined together give the consumer a clear picture of what the guarantee offers.

A possible solution to this problem could be introduced by establishing a requirement that the guarantee must offer more than statutory rights. On this see point Additional benefit below.

2.4.3.3 Second type of information: contents of the guarantee and particulars for making claims

The second category of information artificially distinguished by the Directive is the information concerning the contents of the guarantee and the essential particulars necessary to make a claim under the guarantee.

The rule establishing the scope of the required information, regarding the contents and the particulars relating to the claims-making procedure is rather imprecise.³⁵⁰ The Directive lists the duration and the territorial scope of the guarantee, as well as the name and the address of the guarantor. The list is not exhaustive, which follows from the expression “notably”.³⁵¹

2.4.3.3.1 Contents of the guarantee

The Directive does not specify what is understood by the contents of the guarantee.³⁵² In the context of the transparency requirements, it is worth remembering that the contents, as mentioned in Article 6(2), cover all specifications concerning the goods, conditions and remedies. These elements may also be included in the associated (relevant) advertisement and there is no need to repeat them in the guarantee (document).³⁵³

³⁴⁷ Riesenhuber 2001, p. 357.

³⁴⁸ Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated advertising including analysis of the case for introducing direct producer’s liability.

³⁴⁹ Malinvaud 2002, p. 228.

³⁵⁰ Twigg – Flesner 2003, p. 164.

³⁵¹ Malinvaud 2002, p. 229.

³⁵² This problem is discussed in the previous section.

³⁵³ See also section Presentation of the guarantee.

2.4.3.3.2 Essential particulars to make a claim

Another element that Article 6(2) refers to is the essential particulars to make a claim under the guarantee – the information that enables the consumer to exercise his rights arising under the guarantee. Article 6(2) lists the duration, the territorial scope and the name and the address of the guarantor. From the formulation of the article it is difficult to decide whether these are classified as the contents of the guarantee or as the essential particulars to make a claim. In fact, this information could easily be classified as both.

It is understandable why the drafters of the Directive decided to underline the essential particulars to make a claim. This is basic information that enables the consumer to use the guarantee in practice. However, the data, to which the Directive refers to, may turn out to be insufficient to make the claim effectively. During the legislative process, the Parliament proposed that the particulars necessary to make a claim under the guarantee should contain the name and address of the person to be contacted and the procedure to be followed in order to make a claim under the guarantee.³⁵⁴ Why the drafters of the Directive chose not to be precise about these requirements remains unclear and it is perceived as unfortunate.³⁵⁵ As the list of the essential particulars is not exhaustive – and the guarantor should provide all the essential particulars necessary to make a claim - it means that information such to whom and how notify the failure of the product, or whether to return to the goods to the seller or directly to the guarantor³⁵⁶ should definitely be included. Otherwise the most obvious problem of the consumer in the case of the goods' failure (whom to contact and how) remains unanswered.

2.4.3.3.3 The listed elements – the name and the address of the guarantor

As stated above, the listed elements – the duration, the territorial scope and the name and the address of the guarantor could be classified as constituting either part of the contents of the guarantee, or as particulars necessary to make claims under a guarantee.

The Directive does not pay attention to the question of the duration and the territorial scope of the guarantee. It only requires these two elements to be listed. It must be underlined, however, that the duration and the territorial scope of the guarantee are important not only from the point of view of the claim making procedure under the guarantee but also for establishing the scope of the guarantor's undertaking.

The identity of the guarantor is one of the most important informational aspects for the consumer as it reveals who stands behind the guarantee (which is not so obvious, as the consumer has a direct contact with the seller, while a party other than the seller offers the majority of guarantees). Moreover, in order to avoid misunderstandings, the guarantee should clearly state the name and the address of the person who should be contacted in the case of the good's failure, especially if it is not the guarantor itself. Malinvaud claims even further³⁵⁷ that, even though the Directive does not make it obligatory, the general idea is that any consumer who has bought goods, particularly in another Member State, has a contact address in his own country, which he can use in the case of non-conformity, and ideally the guarantor would have a representative in every Member State. This idea, however appealing, seems not to be backed by the Directive. Nevertheless, it does happen in the practice that local branches

³⁵⁴ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees; COM(95) 520 final – 96/0161 (COD), OJ C 104, 6.4.98, p. 38.

³⁵⁵ Bradgate & Twigg-Flesner 2003, p. 178.

³⁵⁶ Ibidem, p. 177.

³⁵⁷ Malinvaud 2002, p. 229.

of commercial chains operating cross border accept claims based on guarantees that accompany goods bought in other countries.

2.4.3.3.4 Approach of the Member States

2.4.3.4 Presentation of the guarantee

The second part of the transparency regulation consists in the requirements that refer to the presentation and accessibility of the guarantee. The word “document” is actually never used in the text of the Directive, it may, however, be presumed that the requirements of Article 6 apply to the document of guarantee.

2.4.3.4.1 Language of the guarantee

The Directive introduces a number of requirements concerning the way of drafting the guarantee. The first, general requirement is that the guarantee is to be drafted in plain and intelligible language. This requirement is placed in an unfortunate way, which suggests that it applies only to the part of the guarantee describing the contents and the essential particulars necessary to make a claim under the guarantee. Of course, it should be interpreted as relevant for all the elements of the guarantee document. Twigg – Flesner suggest that it is not entirely clear what this requirement means, however it should be read as imposing an objective standard of intelligibility.³⁷⁷

The plain and intelligible language requirement is a repetition of the requirement set in the Unfair Contract Terms Directive.³⁷⁸ The Unfair Contract Terms Directive contains an additional rule whereby the interpretation most favourable for consumer should be employed in the case of ambiguous contract terms. Malinvaud rightly claims that this interpretation should also be used while interpreting the contents of a guarantee.³⁷⁹

³⁵⁸ Article 9b(3) Consumer Protection Act.

³⁵⁹ Article 1649septies §2 Civil Code.

³⁶⁰ Article 12(2) Marketing Act.

³⁶¹ SSGCR Reg. 15(2).

³⁶² Article 231(1) Law of Obligations Act.

³⁶³ Article 5:15b(1) Consumer Protection Act.

³⁶⁴ Article L211-15 Consumer Code.

³⁶⁵ Article 16(2) Consumer Protection Act.

³⁶⁶ Article 477 Civil Code.

³⁶⁷ Article 7:6a(2) Civil Code.

³⁶⁸ Article 502(3) Civil Code.

³⁶⁹ Article 13a Marketing Act.

³⁷⁰ Article 133(2)(b) Consumer Code.

³⁷¹ Article 11(3) Consumer Sales Act.

³⁷² Article 620(3) Civil Code.

³⁷³ Article 620(4) Civil Code.

³⁷⁴ Article 3(1) Consumer Sales Act.

³⁷⁵ Article 18 Consumer Protection Act.

³⁷⁶ Article 9d Advertising Act.

³⁷⁷ Bradgate & Twigg-Flesner 2003, p. 177.

³⁷⁸ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ EC 1993 L 95/29.

³⁷⁹ Malinvaud 2002, p. 229, Twigg – Flesner 2003, p. 161.

The second requirement concerning the language refers to the language in which the guarantee is to be drafted. The Directive opted for the solution used in Article 13a of Directive 79/112 on the labelling of foodstuffs.³⁸⁰ According to Article 6(4), within its own territory, the Member State in which the consumer goods are marketed may require that a guarantee be drafted in one or more of the official languages of the Community, in accordance with the rules of the Treaty.

This language requirement has received a warm reception. The authors underline its value in protecting consumers that often know only their own national language.³⁸¹ At the same time, the requirement to present the guarantee in more than one language may be helpful in the case of cross-border shopping, and Malinvaud rightly proposes that it would be appropriate for any Member State to prescribe several languages and thus increased the chance of the maximum number of clients understanding the terms of the guarantee.³⁸² Also, it is particularly relevant for the Member States whose languages are not so widely used.³⁸³ At the same time, Twigg - Flesner underlines that there is no requirement that the guarantee should be provided in the consumer's own language, and he concludes that in the context of the single market it may be undesirable or even impossible to impose such a requirement.³⁸⁴

Most of the Member States introduced the requirement that the guarantee must be offered in the official language of the state:³⁸⁵ Bulgaria, Cyprus, Denmark, Estonia, Greece, Hungary, Italy, Luxembourg (choice between French and German), Malta (English or Maltese), Portugal, Slovenia, Spain (at least Spanish) and the United Kingdom. In Lithuania, the language requirement is settled in laws regulating the use of the language in general. In Belgium, on the other hand, the language of the region where goods are marketed must be used in guarantee documents.³⁸⁶ In Sweden the language requirement was not expressly introduced, though during the transposition process the government held that the requirement to provide the guarantee in a particular language (Swedish) follows from the wording of Article 6(2) ("plain, intelligible"). An exceptional regulation exists in the Netherlands, where the legislator found the restriction to the European languages too restrictive, especially in the context of Internet sales.³⁸⁷ Loos³⁸⁸ suggests that this approach was based on an assumption that the guarantee documents issued in the Netherlands, if not in Dutch, are probably expressed in a language that can be understood by many residents of the Netherlands. He criticises this approach as naïve, taking into account the huge quantities of goods imported from China, Japan, Thailand and Taiwan.

The Directive is not concerned with the technical side of the guarantee presentation (issues like, for example: the size of fonts or arrangement of the document). In Italy, however, the law provides that the font size of the Italian text must not be smaller than the font size of the

³⁸⁰ Council Directive 79/112/EEC of 18 December 1978 on the approximation of laws of the Member States relating to the labelling, presentation and advertising of foodstuffs OJ L 33, 8.2.1979, p. 1, as amended by Directive 97/4/EC of the European Parliament and the Council, OJ L 43, 14.2.1997, p. 21.

³⁸¹ Malinvaud 2002, p. 226.

³⁸² Malinvaud 2002, p. 226.

³⁸³ Twigg – Flesner 2003, p. 161.

³⁸⁴ Bradgate & Twigg – Flesner 2003, p. 177.

³⁸⁵ Consumer Law Compendium, p. 437.

³⁸⁶ Article 13 of the Act on trade practices and consumer information and protection.

³⁸⁷ *Bijlage Handelingen II* 200/01, 27809, no. 3, 10.

³⁸⁸ Loos 2004, p. 39-40.

text in any other language.³⁸⁹ In Poland,³⁹⁰ information may be provided also in commonly understood graphic form, if the type of information and the instrument of communication allows.

2.4.3.5 Guarantee on request

The last part of the transparency rule deals with the availability of the guarantee document. It reads that, at the request of the consumer, the guarantee should be made available in writing or featured in another durable medium available and accessible to him (Article 6 (3)).

Beale and Howells made a very apt observation on the ground of the draft Directive³⁹¹ that in fact it is difficult to say how many consumers would be so active as to look for a guarantee document. However, “even if the provision is symptomatic of a trend in EC consumer law to adopt an image of the active information-seeking consumer and to develop policies based on this utopian idea rather than on the far less calculating consumer behaviour of most EC citizens, and even if some consumers search out information on terms, they may perform a disciplining role on behalf of the whole consumer body.”

And indeed, the idea that underlines this provision seems to be that the consumer looks for information in order to make an informed choice concerning its purchasing decision.³⁹² In practice, the real need for the consumer to have the guarantee document will arise only if and when the goods fail. As Twigg-Flesner puts it:³⁹³ “Most consumers will, at best, be interested in whether a guarantee is offered at all”. This author gives examples of situations when the provision on the availability of the guarantee could nevertheless be relevant: when goods are advertised with a guarantee, or where product packaging refers to a guarantee but no further details are provided.³⁹⁴ However, in my opinion, the most important aspect of the availability of the guarantee document is to allow the consumer to make a claim under the guarantee,³⁹⁵ which will be definitely more difficult, if the consumer does not have easy access to the data necessary for making claims (the guarantor, the procedure, etc). Also, if the guarantee imposes maintenance requirements (or any other kind of requirements), the necessary instructions should be in the hands of the consumer. Another dimension of the problem is the transfer of the goods accompanied with the guarantee to a third person – in such a situation, if there is no guarantee document the guarantee will virtually cease to exist.

From this perspective, one could argue that the availability of the guarantee only at the request of the consumer does not sufficiently protect the interest of consumers, and the guarantee document should be attached to the sold goods. Regarding this point, the Member States have accepted various solutions. Most of the systems reproduced the solution of the Directive (Austria,³⁹⁶ Belgium,³⁹⁷ Estonia,³⁹⁸ Italy,³⁹⁹ Germany,⁴⁰⁰ and Spain⁴⁰¹). In England

³⁸⁹ Article 133(4) of the Consumer Code.

³⁹⁰ Article 3(5) of the act on particular terms and conditions of consumer sales.

³⁹¹ Beale & Howells 1997, p. 39.

³⁹² Twigg – Flesner 2003, p. 163; Malinvaud 2002, p. 229.

³⁹³ Bradgate & Twigg – Flesner 2003, p. 178.

³⁹⁴ Bradgate & Twigg – Flesner 2003, p.178.

³⁹⁵ Malinvaud 2002, p. 229.

³⁹⁶ Article 9(b) Austria Consumer Protection Act.

³⁹⁷ Belgium CC Art. 1649 septies § 3.

³⁹⁸ Estonia Art. 231(1) and (2) of Law of Obligation Act.

³⁹⁹ Italy Article 133 of Consumer Code.

⁴⁰⁰ Germany CC Articles 126b and 477(2).

⁴⁰¹ Article 11(2) of the Spanish Consumer Sales Act.

and Scotland⁴⁰² the law specifies that the guarantee should be available within a reasonable period of time. Moreover, in Scotland a guarantee, which is gratuitous and unilateral in nature, is required to be in writing, unless it is provided in the course of business.⁴⁰³ In some Member States the guarantee document is to be provided on request (Czech Republic,⁴⁰⁴ the Netherlands⁴⁰⁵ and Slovakia⁴⁰⁶). In Finland,⁴⁰⁷ at the request of the consumer the guarantee should be given in writing or in electronic form, so it cannot be unilaterally altered and it would remain accessible to the buyer. In Norway⁴⁰⁸ the guarantor should inform the consumer of the existence of the guarantee and of the consumer's right to receive the terms of the guarantee. There is, however, a group of Member States that went beyond the requirements of the Directive and require the guarantee to be provided to the buyer together with the sold goods (Poland,⁴⁰⁹ France⁴¹⁰). Sometimes, these legislations impose further specific requirements. In Latvia,⁴¹¹ a written guarantee should be freely accessible before the purchase of goods or the receipt of services. In Slovenia,⁴¹² at the time of concluding the contract, the guarantor hands over to the buyer a guarantee document with installation instructions and a list of authorised repair shops. In Sweden⁴¹³ the guarantee and information on how to invoke it must be provided in a document or in another readable and durable medium accessible to the buyer. It is up to the professional to hand the guarantee (as a document or in another durable form), regardless whether the buyer has asked for this.⁴¹⁴

Another aspect of the availability problem is the question when the guarantee should be presented to the buyer. If the aim of the Directive was to concentrate on assuring an informed choice of the consumer (like the Magnuson-Moss Warranty Act), then the guarantee document should be available before the purchase,⁴¹⁵ which would mean that the guarantee should be available in writing to every interested person.⁴¹⁶ Certainly, Article 6(3) does not apply only in a pre-purchase context⁴¹⁷ and the guarantee document should be made available to the consumer during the entire term of the guarantee. On the other hand, for example in Latvia,⁴¹⁸ the guarantee document must be freely available before the purchase.

2.4.3.6 In writing or in another durable medium requirement

The guarantor has to provide the guarantee in writing or in another durable medium. The wording "another durable medium" were taken from Article 5(1) of the Distance Selling

⁴⁰² Article 15(3) England and Scotland SSGCR.

⁴⁰³ Article 1(2)(a)(ii) Requirements of Writing Act (Scotland).

⁴⁰⁴ Article 620(3) Czech Civil Code.

⁴⁰⁵ Netherlands CC Article 7:6a(3).

⁴⁰⁶ Article 620 (4) Slovak Civil Code.

⁴⁰⁷ Article 5:15(b) Finish Consumer Protection Act.

⁴⁰⁸ Article 9d of the Norway Advertising Act.

⁴⁰⁹ Article 13(2) Consumer Sales Act.

⁴¹⁰ Article L.211-15(1) Consumer Code.

⁴¹¹ Article 16(2) Consumer Protection Act.

⁴¹² Article 16(1) Consumer Protection Act.

⁴¹³ Article 13 of the Marketing Act.

⁴¹⁴ Prop 2001/02:134, 64.

⁴¹⁵ Riesenhuber 2001, p. 354.

⁴¹⁶ Riesenhuber 2001, p. 354.

⁴¹⁷ Twigg – Flesner 2003 (1), p.178.

⁴¹⁸ Art. 16(2) of the Consumer Protection Act.

Directive.⁴¹⁹⁴²⁰ The “durable medium” has also been used in other directives: the Directive concerning the distance marketing of consumer financial services⁴²¹ and the Directive on Insurance Mediation⁴²² and recently in the draft of the Consumer Rights Directive.

The durable medium requirement is interpreted in the following way: the information has to be provided to the consumer in such a form that allows the retention of the information at least for a period during which the consumer needs the information in an unchanged form.⁴²³

There is a discussion concerning the electronic way of transmitting the guarantee. Malinvaud⁴²⁴ states that the durable medium requirement is met when the consumer is communicated of the seller’s or the producer’s web site, on which the guarantee is published. It seems, however, that the main problem relates to assuring continuous access to the web site whose contents remains unchanged during the period of the guarantee. In Finland, for example, the guarantee may be provided in an electronic form if it is secured in a way that it cannot be unilaterally altered by the guarantor and it has to remain accessible to the buyer.⁴²⁵

2.5 Infringements

2.5.1 No specific remedies

The Directive contains no specific remedies for infringements of Article 6. The consequence of the infringement envisaged by Article 6(5) is that a failure to comply with the requirements of Article 6(2), (3) or (4) does not affect the validity of a guarantee and the consumer may still rely on it.

During its work, the Council considered the introduction of a standard clause on sanction, but the debate was inconclusive. However, according to the ECJ, if the Community legislation makes no specific provision for a penalty in the event of a breach, Article 10 of the Treaty requires the Member States to take appropriate measures to guarantee the scope and effectiveness of Community law, among other things by making the chosen penalty effective, proportionate and dissuasive.⁴²⁶

The lack of indication of the enforcement mechanism to ensure that the guarantees are offered in the prescribed way is seen as a curiosity of the Directive.⁴²⁷ The only sanction⁴²⁸ the

⁴¹⁹ Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts (1997) OJ L144/19.

⁴²⁰ Staudenmayer 2000, p. 560.

⁴²¹ Directive 2002/65/EC concerning the distance marketing of consumer financial services, OJ L271/16.

⁴²² Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 009, 15/01/2003.

⁴²³ Twigg – Flesner 2003, p. 162.

⁴²⁴ Malinvaud 2002, p. 225.

⁴²⁵ Art. 1:15b(2) Consumer Protection Act.

⁴²⁶ C-315/05 Lidl; joined cases C-378/02 and C-403/02 Berlusconi and Others [2005 ECR I-3565, paragraph 65].

⁴²⁷ Beale & Howells 1997, 12, p. 39.

⁴²⁸ Staudenmayer, 2000, p 560.

Directive offers is the inclusion of this Directive in the annex of the Directive on injunctions.⁴²⁹

2.5.2 The Directive on Injunctions

Under the Injunction Directive, the Member States are required to enable qualified entities (public bodies, private associations involved in the consumer protection) to apply for an injunction to prevent the infringement by a trader of any of the rules included in the consumer protection directives. According to Article 1(2) of the Injunction Directive, every act contrary to the provisions of the listed Directives that harms consumer interests represents a violation. The injunction must seek to protect consumers against an action that endangers the collective interest of consumers. Collective interest means interests that do not include the accumulation of interests of individuals that have been harmed by the infringement (recital 2). It is claimed in the legal writing that such an action may only be undertaken if the infringement affects the interest of a sizable number of consumers.⁴³⁰ It is, therefore, not allowed in isolated cases. However, it is not clearly specified how many consumers have to be (potentially) affected by the infringement.

2.6 Omitted issues

2.6.1 Introduction

As already indicated, the scope of the rules on guarantees under the Directive is rather limited. Some problems related to the functioning of the guarantee on the market were either not taken into consideration at all, or were dropped during the legislative process. Beale and Howells called them the “missed opportunities”.⁴³¹ This part concentrates on discussing them.

The problems that have been considered for regulation but did not make it to the final draft are the following: the requirement that the guarantee must offer an additional advantage over and above the statutory rights, guarantees against payment (already discussed, in the part Free guarantee above) and guarantees that cover only part of the goods.

2.6.2 Guarantee offering an additional advantage

2.6.2.1 General

The initial draft of the Consumer Sales Directive⁴³² followed the path indicated by the Green Paper of 1993, which opted for introducing the additional benefit requirement. The draft Directive defined the guarantee in Article 1(2)(d) as any additional undertaking given by the seller or producer, over and above the legal rules governing the sale of goods, to reimburse the price paid, to exchange, repair or handle a product in any way in the case of non-conformity of the product with the contract. In Article 5(1) the draft Directive required the guarantee to place the consumer in a more advantageous position than that resulting from the rules governing the sale of consumer goods set out in the applicable national provisions. This provision aimed at preventing situations where the guarantee in fact took the consumer's rights away, for instance by making a remedy under the guarantee dependent upon the

⁴²⁹ Directive 98/27/EC of the European Parliament and of the Council of 19.5.1998 on injunctions for the protection of consumer interests, OJ 11.6.1998 L 166/51.

⁴³⁰ Twigg – Flesner 2003, p. 168.

⁴³¹ Beale & Howells 1997, p. 39.

⁴³² COM (95) 520.

consumer complaining within a very short period and excluding any other liability for non-conformity.⁴³³ The Economic and Social Committee gave a very positive appraisal of this rule.⁴³⁴ It stated: “The idea of ‘advantage’ propounded in Article 5(1) helps protect consumers from being misled and also enhances honourable trade practices. The obligation to provide a minimum level of legal guarantee once more enhances the status of the commercial guarantee not only merely as an advertising tool, but increasingly as a competitive tool.” The Council removed the additional advantage from the draft. No obvious explanation was given: “the Council concluded, after thorough discussion, that the criterion of the “more advantageous position” was not applicable and deleted it.”⁴³⁵ It is rather difficult to decipher from such a brief statement what were the reasons underlying the decision. This is especially intriguing considering the fact that introducing this requirement would, to a large extent, limit the possibility of misleading the consumer by offering a guarantee.

2.6.2.2 Additional advantage in the national legal systems

Most of the Member States accept the system proposed by the Directive and do not require that the guarantee go beyond the protection granted by the law. However, there are several exceptions. Norway⁴³⁶ and Estonia⁴³⁷ prohibit the use of the word guarantee or a similar expression in consumer sales when selling goods, services etc. in the course of business if the consumer is not given additional rights to those which he already had, or if such rights are limited. Also in Latvia, a guarantee must provide something in addition to the rights granted by the law⁴³⁸ and it is prohibited to use the word guarantee or other similar expressions if the guarantee does not conform to the conditions of Article 16 of the Consumer Rights Protection Law. Denmark goes one step further⁴³⁹ – the term guarantee may only be used in a consumer context if it provides the consumer with substantially better rights compared to his legal rights. Additionally, § 4 of the 1974 Danish Act on Marketing contains an interpretation of the term “guarantee”. Use of this term or a similar expression is prohibited unless the beneficiary’s legal was rendered more favourable than that accorded at common law (default Civil Law rules).⁴⁴⁰ This prohibition takes effect regardless who: the final seller, a previous seller or the producer makes a statement of guarantee.⁴⁴¹ A different regulation exists in Sweden, where the seller is always held liable according to the mandatory rules regulating conformity under the Consumer Sales Act. As a result, the consumer has a right to rely on all the remedies prescribed by law. Therefore the guarantor cannot limit the remedies available to the consumer according to the law. This rule applies also if the period of the guarantee exceeds the time-limits prescribed in the Consumer Sales Act (three years). The reasons for introducing such a solution were systematic: it was considered that a system, whereby different remedies apply, depending on whether the professional was liable under the

⁴³³ Beal & Howells 1997, p. 38.

⁴³⁴ Opinion of the Economic and Social Committee on the Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, (97/C/66/04), OJ C 66, 3.3.97, p. 10.

⁴³⁵ Common position (EC) No 51/98 adopted by the Council on 24 September 1998 with a view to adopting European Parliament and Council Directive 98/.../EC, of ...on certain aspects of the sale of consumer goods and associated guarantees (98/C 333/04) OJ C 333, 30.10.98, p. 54.

⁴³⁶ Article 9c of the Marketing Act.

⁴³⁷ Article 10 Consumer Protection Act.

⁴³⁸ Consumer Law Compendium, p. 446.

⁴³⁹ Article 12(1) Marketing Act.

⁴⁴⁰ Green Paper of 1993, p. 45.

⁴⁴¹ Fogt 2009, p. 237.

guarantee or the seller under the rules provided by law.⁴⁴² This was criticised by Herre,⁴⁴³ who claims that it goes too far, since providing the guarantee is voluntary and this measure dissuades traders from providing guarantees at all.

2.6.2.3 Additional advantage in the legal writing

The problem of additional advantage is met with a great interest in the legal writing. The appraisal of the removal of this requirement from the Directive is not homogenous, as is the approach towards the additional advantage requirement and its understanding. Twigg-Flesner assesses the removal as welcome.⁴⁴⁴ To support his view, he points to a number of arguments. First he claims that it would have involved the Directive into legislation of the substantive content of the guarantee and this would have contradicted the recognition of the guarantee as important for competition. He continues that the seller is bound by the conformity rules and cannot restrict their scope anyway by issuing a guarantee; and only the producer, who is not bound by the statutory rules, can issue a more restrictive guarantee. Within the scope of the guarantee regulation, the producer is bound by the transparency rules, i.e. he is obliged to inform about the statutory rules.

It should, however, be observed that the fact that the seller is bound by the conformity rules does not mean that he cannot issue a guarantee next to it, which will have a more limited scope than the rules on conformity, as long as the transparency requirements are met. One should also consider that in practice guarantee normally overshadows conformity, and at the end consumer settles for less than he is entitled.

The European Consumer Law Group⁴⁴⁵ on the other hand opted for the solution that required the guarantee to be more favourable in substance than the legal guarantee. Malinvaud⁴⁴⁶ claims that not including the additional advantage requirement is of no consequence, since the consumer remains free to rely upon national legislation in the event that this is more advantageous to him. Krümmel & D'Sa⁴⁴⁷ comment that the guarantee provisions of the Directive refer to guarantees that “exceed the statutory warranty rights applicable to sale of consumer goods (...)”.

Beale and Howells⁴⁴⁸ point out - and I share this opinion - that even if a guarantee does not restrict the rules on non-conformity or other rights, they may pose subtle dangers to consumers if they do not offer more than general sales law. Consumers may believe that they are getting – and are paying for - additional rights when in fact they are not being given any additional rights at all.

2.6.2.4 What constitutes the additional advantage?

The most difficult problem regarding the additional advantage is how to measure it. This problem is thoroughly examined in Chapter V, part Coverage. At this point, I would like to refer only to the opinions that were made on the ground of the Directive.

⁴⁴² Agell, SvJT 1991, 420.

⁴⁴³ Herre, 1999, p. 252.

⁴⁴⁴ Twigg - Flesner 1999, p. 186.

⁴⁴⁵ European Consumer Law Group 1998, p. 95.

⁴⁴⁶ Malinvaud 2002, p. 230.

⁴⁴⁷ Krümmel & D'Sa 2001, p. 321.

⁴⁴⁸ Beale & Howells, 1997, p. 38.

When commenting on the Draft Consumer Sales Directive, which required the guarantee to place consumer in a more advantageous position Dickie observed⁴⁴⁹ that its meaning is unclear. He asked whether a “no quibble” one-year guarantee of free repair would offer an actual advantage for the consumer. Thomas argued⁴⁵⁰ that the more advantageous position would require the guarantee to be for more than two years. Deards⁴⁵¹ rightly points out that it is not so, and as long as the guarantee provides for more rights than the legal regime, the more advantageous position requirement is met. He gives an example of a commercial guarantee that provides for the right of rejection or replacement or a full refund in the case of any defect, however minor, which appears within 18 months of the sale.

Deards⁴⁵² raises another very interesting problem. In the case of accepting the “more advantageous position” requirement, it is not clear whether the guarantee must provide rights greater than those available in the Member State with the highest level of consumer protection, or simply greater than those in the Member State where the consumer resides. Hondius claims that the guarantee is an advantage, even if it merely confirms the statutory rights because the guarantee improves the position of the consumer against the retailer and makes pursuing his rights easier.⁴⁵³

2.6.3 Guarantee only on specific parts of the product

During the drafting process, the Parliament proposed a rule concerning the validity of guarantees covering only part of the product: “A guarantee only on specific parts of the product must clearly indicate this limitation, otherwise the limitation will be invalid.”⁴⁵⁴ This provision was, however, rejected later in the drafting process. This perhaps is not the most important or controversial problem, but including it would certainly have improved the transparency of the guarantee. It seems, nevertheless, that This problem could be addressed through the interpretation of the guarantee: if the limitation concerning the scope is not clearly indicated in the guarantee document, the limitation is to be interpreted restrictively or even invalid (cp. the *contra proferentem* rule.)

2.6.4 Problems not considered for a regulation

As already underlined, the Directive adopted a minimum approach - it deals only with a very few issues that can be identified in relation to the guarantee. Therefore, discussing all the issues that can potentially be relevant for the guarantee regulation and are not mentioned in the Directive here is pointless, as Chapters V and VI present them in great detail. At this point I would like to devote some attention only to the problem of the default contents of the guarantee, because this subject has been brought forward at many occasions during the academic dispute on the guarantee, and probably this is the most important among the issues not considered for the regulation.

⁴⁴⁹ Dickie 1997, p. 170.

⁴⁵⁰ Thomas 1996, p. 22-23.

⁴⁵¹ Deards 1998, p. 107.

⁴⁵² Ibidem, p. 108

⁴⁵³ Hondius 1996, p. 17.

⁴⁵⁴ Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees; COM(95) 520 final – 96/0161 (COD), OJ C 104, 6.4.98, p. 38.

2.6.4.1 Default contents of the guarantee

In my opinion one of the biggest disadvantages of the Directive is that it does not offer any practical assistance to the consumer if the guarantor fails to specify certain aspects of the guarantee. In the most extreme cases a question may appear, whether a guarantee has been created at all, considering that the guarantor did not establish some (important) parts of the guarantee content. The Directive is not concerned with such a situation and this problem remains entirely within the scope of the national legal systems.

The Green Paper of 1993 identified this problem very clearly: “The fundamental problem facing the consumer spring from the general absence of a legal framework applicable to the commercial guarantees (...). The absence of a legal framework also means that gaps in the guarantee document cannot be filled and diminishes their legal value. Moreover, this legal vacuum leaves commercial guarantees at the mercy of unconstrained economic liberty and invites abuse and fraud on the part of less scrupulous operators, to the detriment of consumers and healthy competition.”⁴⁵⁵ A detailed analysis of this problem is contained in Chapter V, part Coverage.

The Directive’s approach received mixed evaluation in the legal writing. On the one hand it is seen as a confirmation of a competition oriented approach of the Directive, and as such, highly welcomed.⁴⁵⁶ On the other hand – some authors underline that it stripes the regulation off the practical value.⁴⁵⁷

Also the legislations of the Member States do not accept a homogenous position towards this. Some Member States provide certain guidelines as to the default content of the guarantee in their legislation, while others (majority) remain silent. As presented in the PELS⁴⁵⁸ in Greece it is provided that the guarantee must be consistent with good faith and should not be devoid of significance by excessive exemption clauses.⁴⁵⁹ In the Netherlands if the guarantor neglects to determine what defects the guarantee is to cover, the construction of the guarantee contract will determine its content and coverage. The construction of the guarantee will take place using the Haviltex formula,⁴⁶⁰ according to which the reasonable expectations of the parties, given among other things, the social circle to which the parties belong and the knowledge of the law that may be expected of such parties.⁴⁶¹ Moreover, given the fact that the guarantee must state in a clear and comprehensible manner what is covered by it, a failure to indicate what the guarantee covers may lead the courts to interpret the guarantee as covering the whole good or all of the goods (interpretation *contra proferentem*).⁴⁶² In Norway if the defects covered by the guarantee in consumer sales are fewer than the defects in the Consumer Sales Act, such a limitation is invalid since the consumer’s rights may only be extended and not limited by a guarantee.⁴⁶³ In Polish non-consumer sales Article 577 of the Civil Code establishes that in the case of doubt, the guarantor is obliged to rectify the physical defects of the thing. In Estonia Law of Obligations Act Article 231(4) includes a presumption that unless the guarantee document provides otherwise the guarantee entitles the buyer to claim,

⁴⁵⁵ Green Paper of 1993, p. 79.

⁴⁵⁶ Twigg-Flesner 2005, p 201.

⁴⁵⁷ Beale & Howells 1997, p. 39

⁴⁵⁸ PELS 2008, notes pp. 378-379.

⁴⁵⁹ Act 2251/1994 Article 5(3).

⁴⁶⁰ HR 13 March 1981, NJ 1981, 635 (Ermes/Haviltex).

⁴⁶¹ PELS 2008, p. 378.

⁴⁶² Article 7:6a(2) of the Civil Code.

⁴⁶³ Marketing Act Article 9c(1).

free of charge, a repair or replacement of the goods if any defect is discovered during the guarantee period. In Slovenia it is expressly established that the content of a guarantee is the proper functioning of the goods during a guarantee period, which applies to both obligatory (statutory) and voluntary guarantees.⁴⁶⁴ In Sweden, the consumer will have access to all remedies prescribed by law for lack of conformity in the Consumer Sales Act, i.e. repair, replacement, a price reduction, termination and damages.⁴⁶⁵ Similarly under Czech⁴⁶⁶ and Slovak⁴⁶⁷ law, the guarantee established by an agreement or a declaration by the seller may not be narrower than the statutory guarantee, meaning that the buyer will at least have access to the normal remedies for lack of conformity.

One of the rejected proposals – the additional advantage requirement – could be of some help in this case. If the guarantee were to provide an advantage over and above the statutory rights, it would at the same time constitute the minimum requirement for the guarantee to meet. According to such a solution the conformity requirements would provide a structural support for the guarantee.⁴⁶⁸

3. Conclusions

3.1 General evaluation

The most important general effect of the Consumer Sales Directive is perhaps the recognition of the existence of the guarantee at the European level. In this sphere, the Directive has proved to be a success. At the same time, however, the provisions of the Directive that deal with the guarantee are very limited.

The impact of the Directive on the national legal systems varies, depending on the state of the regulation in a given legislation before implementation. The Directive introduced rules on guarantees in the Member States where there were none, and systematised them in the Member States where the guarantee was barely mentioned in the written law. Introducing the Directive in those legislations where an elaborated system of guarantees existed before might have resulted in simplifying theoretical considerations behind the guarantee, its functions, construction and relations with other legal institutions (as it happened in Poland). This, generally speaking, would be a reflection of the problems that Member States have to face when introducing the Directive into their legal systems in areas where there is already comprehensive legislation.

The limited attention given to the guarantee in the rules of the Directive suggests that there is not much to regulate. The truth, however, is surprisingly different as the next two chapters prove. The guarantee, as approached by the Directive, is underestimated and oversimplified and yet, it is recognised.

Despite the very limited scope, the Directive is still regarded as “considerable added value in practice.”⁴⁶⁹ Twigg-Flesner⁴⁷⁰ states, “It is nevertheless welcome that the issue of guarantees has now been addressed. The approach by the EC has struck the balance between consumer

⁴⁶⁴ OC Article 481.

⁴⁶⁵ Article 6:103 under 5.

⁴⁶⁶ Article 620(5) of the Civil Code.

⁴⁶⁷ Article 502(2) of the Civil Code.

⁴⁶⁸ For more detailed analysis see Chapter V, in 3. Coverage of the guarantee.

⁴⁶⁹ Staudenmayer 2000, p. 559.

⁴⁷⁰ Twigg-Flesner 1999, p 187.

protection and maintenance of the free competition in the right place.” The National Consumer Council, on the other hand, concluded that it is surprising that there are no rules as to what guarantees should do or how they should operate. The NCC states that such an approach not only confuses consumers, but it also deters business from competing in quality, as there are no rules ensuring fair competition and few incentives for the efficient. This confusion about guarantees is accepted as undesirable by almost all those who gave evidence, including business interest.⁴⁷¹

3.2 Assumptions of the Directive concerning the guarantee: are they correct?

The Directive assumes that the main and only role the guarantee plays is the role of competition and marketing tool. Based on this assumption, the Directive recognises that the danger posed to consumers by the use of guarantees on the market is that of misleading consumers as to their rights.

It is impossible to disagree with the statement that the guarantee is a marketing and competition tool, given that it signals the quality of the goods to consumers. It is also evident that the guarantee has a great potential to mislead consumers as to their rights, considering that consumers generally speaking do not know the content of their rights.

Nevertheless, one has to ask the question whether a guarantee, even if perceived only in the context of sales, plays only the role of a marketing tool? The marketing tool is the perspective of the guarantor, whereas from the consumer’s perspective it may play other, equally important functions: securing against loss, maintaining the value of the goods and providing maintenance services, not related to defects.

As to the assumption that the guarantee first off all misleads consumers about their rights, it can also be said that this is only a fraction of a larger problem – i.e. that the consumer does not know what the guarantee offers and, on top of that the consumer thinks that the guarantee (with unknown content) covers all the entitlements he has under the law. Another problem, which is crucial from the consumer’s point of view, is the effective enforcement mechanism.

3.3 Assumptions of the Directive concerning the guarantee: are they fulfilled?

In evaluating whether or not the assumptions of the Directive are properly addressed, a question should be asked whether concentrating on ensuring the formal transparency of the guarantee (meaning imposing certain obligations on the guarantor, but without providing effective remedy) is sufficiently effective? Can a consumer effectively and in an uncomplicated manner seek a remedy if the guarantee does not provide information about its content? Is simple information that the guarantee does not infringe a consumer’s legal rights sufficient in order to make the guarantee comprehensible to the consumer? Does the Directive provide an effective enforcement mechanism?

The answer to all of these questions is no. The conclusion is that not only does the Directive set its aims, to a large extent ignoring market reality, but it also does not properly address the modest aims it sets for itself.

⁴⁷¹ NCC 1999, p. 13.

Chapter IV Analysis of the consumer sales guarantee – general part

1. Introduction

1.1 General introduction

According to the Green Paper of 1993,⁴⁷² the fundamental problems that consumers have to face in relation to guarantees “spring from the general absence of a legal framework applicable to them.” The Green Paper continues that “the absence of a legal framework also means that gaps in guarantee documents cannot be filled and diminishes their real value,” and concludes that “this legal vacuum leaves commercial guarantees at the mercy of unconstrained economic liberty and invites abuse and fraud on the part of less scrupulous operators, to the detriment of consumers and healthy competition.”⁴⁷³

Chapter IV and Chapter V, which analyse respectively the general and the specific problems that might appear in the guarantee used in the course of consumer sales, accept these assumptions. In order to determine where imposing rules in the area of consumer sales guarantees could prove to be beneficial, they discuss the structure of the guarantee and seek to identify problems that may appear with respect to various aspects of the guarantee. Chapter IV and Chapter V create one unit of the thesis as they pursue common aims. They both take a wider perspective on discussing the guarantee. It is an approach that accepts a similar standing with regard to the guarantee as the Consumer Sales Directive: the guarantee as a device that constitutes a part of the regime of liability for defects in sales contracts, where it primarily provides relief to a consumer in the case of defect and as such it can mislead consumers, and at the same time plays mainly the function of a marketing tool. At the same time, Chapters IV and V are free from the restraints introduced by the perception of the existing minimal level of regulation of the guarantee on the European level, accepted in particular in the Consumer Sales Directive.

The division of the analysed issues between Chapters IV and V reflects the nature of the discussed areas. At the moment, certain aspects of consumer sales guarantees are regulated on the European level (mostly by the Consumer Sales Directive, but also to a certain degree by competition law), whereas others remain mostly in the sphere of interest of national legislations. Sometimes the European legislation deals only with parts of the regulated areas which necessitates action of the national legislator, in order to make it work in the national legal system. For example: the Consumer Sales Directive declares the guarantee binding but remains silent as to its legal form. Chapter IV deals with matters that currently belong to the domain of national legislations. Chapter V analyses the issues, for which the relevance for the practice is more obvious, and as such they are better fit for a regulation on the European level. It should be observed that if the European legislation took another form, i.e. it would aim at creating a complete self-standing system of law, then such a distinction would probably lose its relevance.

⁴⁷² Green Paper of 1993, p. 79.

⁴⁷³ Ibidem, p. 79.

1.2 The scope of the analysis

As already indicated, Chapter IV is devoted to the analysis of the more general and theoretical aspects of the guarantee: the name, the dual nature of the guarantee, the possible sources of the guarantee, the legal form of the guarantee and the relations between the guarantee and the statutory regime of liability for sold goods in a legal system. At the moment they are not of fundamental importance in the EU dimension. The EU legislation deals mainly with issues that are seen as relevant for assuring the transparency of the guarantee, perceived as a marketing tool. The EU legislation does not aim at producing a fully operational, complete and coherent legal system. Hence, it remains silent (or almost silent) with regards to the issues that decide about the way the guarantees are anchored in national legal systems, which in turn has an impact on the way they operate in the EU dimension.

This arrangement (dealing on a national level with theoretical problems that influence the way the guarantee functions on the EU level) makes the analysis in this chapter challenging. In this place, the aim of this chapter, as well as the entire thesis, must be underlined. The thesis does not aim at producing a comparative analysis of the guarantee regulation in selected legal systems of Member States. Rather, it aims at discussing the problems and considers the options of effective regulation of the consumer sales guarantee on the EU level. In particular, Chapter IV concentrates on presenting and structuring the possible problems that may appear within the area of the name, the legal nature, the sources and the legal form of the guarantee, as well as the relations between the guarantee and the statutory regime of liability in sales contracts. The analysis aims at ordering and structuring these areas, as well as indicating where the most problematic issues are located. It clearly does not aspire at providing a detailed and in-depth analysis of the solutions employed in particular legal systems. Such an analysis only within the scope of Chapter IV could easily produce a self-standing thesis, taking into account how deep a researcher would have to dive into a legal system in order to analyse what tools a given legal system uses and in what manner to deal with a guarantee that lacks legislative support. This Chapter simply tries to set the background, normally hidden in the shadow of national legal systems, when a problem is approached from the EU perspective.

2. The name

2.1 Introduction

The problem one must face, when first plunging in the variety of issues related to the guarantee in consumer sales, is the problem of the name. Although the Consumer Sales Directive has introduced one common denominator – guarantee – it did not bring about clarity regarding terminology related to this legal construction. The lack of consistency in this area leads to difficulties that surface on various levels, and which cannot be simply reduced to linguistic issues, as they have deeper practical consequences. It is worth noting that the Consumer Sales Directive imposes no limitation or obligation to use a specific name regarding the guarantee it refers to.

A clearly distinguishable name to which certain content can be easily attributed is very important for creating a transparent market on which consumers may feel confident. Once the notion of a guarantee is well established in consumers' consciousness and there is a clear association between the name and the potential content of the instrument, consumers are better equipped to manage their own affairs, for example to decide whether it is in their best interest to pay a higher price for goods, because it is offered with a guarantee, or even to pay for the guarantee separately. This of course requires also knowledge of consumers concerning their rights in general.

2.2 Order of the analysis

This part of the analysis begins with presenting an overview of the situation and the reasons why the terminology causes so many problems. Next, it shows the consequences of the situation, and finally it poses a question about the possible solutions. Of course, it should be underlined that discussing the question of terminology in the situation when the EU has 23 official languages and more than 60 indigenous regional or minority language communities is extremely difficult. It is therefore very important to underline that the problems indicated in this part of the thesis are probably similar in all Member States, as they relate not only to the sphere of terminology, but deal with more fundamental issues relating to the structure and operation of the legal system as well as the possibility of distinguishing between various legal constructions. It must also be noted that such similarities are not limited to the area guarantees, but this problem has a very general character.

2.3 A guarantee: what does it mean?

The basic question that should be asked is whether the average consumer clearly associates the name “guarantee” with a concrete legal institution, particularly within the area of sales law? In other words: does the name ‘guarantee’ ring the correct bell for consumers in the EU?

As already indicated in Chapter I,⁴⁷⁴ a ‘guarantee’ is a legal construction that may be found in many areas of law. It may take quite a specific form, as in the case of consumer sales guarantee or bank guarantee, or it may play a general function of assuring the performance of obligations arising under a contract. Therefore, in order to be distinguishable, the guarantee must be presented in a particular context. However, even if considerations are limited to consumer sales law, the lack of clarity is evident.

2.4 The problems

In consumer sales there are two major problems regarding terminology. The first is created by the multiplicity of guarantee-related names existing on the market, which makes distinguishing between various legal constructions very problematic. The second problem is the lack of a clear distinction between conformity and guarantee (the legal guarantee and the commercial guarantee), which *de facto* leads to diminishing the practical value of the conformity regime from the consumer’s perspective. This problem was noticed in the UK already in 1984, when the British Office of Fair Trading recommended the standardisation of terminology as a means of reducing the confusion surrounding the various types of guarantee.⁴⁷⁵

2.5 Variety of names

From the legal point of view the question under what name the guarantor presents his undertaking to the consumer is normally immaterial, whether or not it actually is a guarantee will be decided on the basis of its content. However, from the point of view of the system functioning, if the name guarantee is to be associated with a certain concept and a certain pre-established content a coherent terminology is probably a *sine qua non* condition. Yet, at the moment the EU market is far from being coherent in this respect. Normally guarantors offer

⁴⁷⁴ See: Chapter I, part 5.2 Fields of guarantee application.

⁴⁷⁵ OFT 1984, p. 2.

certain protection and do so under a name they deem proper. There are plenty of options to be found on the market: a guarantee, a consumer guarantee, a commercial guarantee, a warranty, an extended warranty, a back-up guarantee, an extended guarantee, extended warranty insurance, an extension guarantee, breakdown insurance, a post-guarantee insurance, extended warranty, an extended insurance guarantee, a mechanical breakdown insurance scheme, a long-term guarantee, technical breakdown insurance (the term used for insurance-backed extended warranties for cars) constitute only a part of it.

When studying the official European sources, one cannot find coherency in this respect either, although the term guarantee, sometimes with additional descriptions, is employed most often. The term “guarantee” is used in the Competition Policy Reports⁴⁷⁶ (which sometimes use also the name consumer guarantee⁴⁷⁷), in Commission decisions⁴⁷⁸ and in judgements of the European Court of Justice,⁴⁷⁹ while the name “warranty” appears only in the Commission decisions.⁴⁸⁰ The Green Paper of 1993 refers to a “commercial guarantee”, but the Consumer Sales Directive simply speaks of a “guarantee”, whereas the Green Paper of 2006 returns to the name “commercial guarantee” but uses it alternately with “consumer goods guarantee”. The Proposal for a Consumer Rights Directive also refers to a “commercial guarantee”. Finally, the Principles of European Law on Sales as well as the Draft Common Frame of Reference use the name “consumer goods guarantee”.

Legal writing did not come up with a unified way of referring to guarantee either. Generally speaking, most authors use the term guarantee or commercial guarantee.⁴⁸¹ There are, of course, exceptions to that approach, as for example Howells and Bryant refer to trade guarantees,⁴⁸² Calais-Auloy uses the name contractual warranty.⁴⁸³ Norros employs warranty interchangeably with guarantee,⁴⁸⁴ Kingisepp at the same time distinguishes between legal guarantee and commercial guarantee.⁴⁸⁵ Malinvaud⁴⁸⁶ refers interchangeably to contractual and commercial guarantee, whereas Van den Bergh and Visscher refer to commercial warranties.⁴⁸⁷ Kull uses guarantee, commercial guarantee and warranty interchangeably.⁴⁸⁸

⁴⁷⁶ Tenth Report on Competition Policy (Annexed to the Fourteenth General Report on the Activities of the European Communities), point 727, Seventeenth Report on Competition Policy 1987 Annexed to the Twenty-First General Report on the Activities of the European communities, points 67 and 68.

⁴⁷⁷ Sixteenth Report on Competition Policy (Annexed to the Twentieth General Report on the Activities of the European Communities), point 57.

⁴⁷⁸ Commission Decision of 23 October 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/1.576 – Zanussi), OJ L 322, 16.11.1978, p. 36. If this is the only one, then change (in the main text) the plural into the singular.

⁴⁷⁹ Judgement of 13 January 1994, Metro SB-Großmärkte GmbH & Co.KG SA (1994) (Metro-Cartier) C-376/92; Judgement of 21 February 1984, Hasselblad (GB) Limited v Commission of the European Communities, C-86/82.

⁴⁸⁰ Commission Decision of 16 November 1983 relating to a proceeding under Article 85 of the Treaty (IV/30.696 – Distribution system of Ford Werke AG), OJ L 327, 24.11.1983, p. 31, Commission Decision of 10 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.261 – Ideal-Standard’s distribution system, OJ L 20, 24.1.1984, p. 38.

⁴⁸¹ See for example: Cranston 1995, p. 112.

⁴⁸² Howells & Bryant 1993, p. [xxx].

⁴⁸³ Calais-Auloy 1985, p. 59.

⁴⁸⁴ Norros 2009, p. 296.

⁴⁸⁵ Kingisepp 2006, p. 1.

⁴⁸⁶ Malinvaud 2002, p. 220.

⁴⁸⁷ Van den Bergh & Visscher 2009, p. 127

⁴⁸⁸ Kull 2009, p. 282.

2.6 Reasons for the differentiation in terms

It is difficult to find a reason that would justify the distinctiveness of most of the names used on the market, as for example traders use guarantee and warranty interchangeably.⁴⁸⁹ Sometimes the choice of the name has very practical aspects as it indicates some of the features of the offered guarantee. Deards offers the following explanation to the differentiation between the commercial and the legal guarantee:⁴⁹⁰ “commercial guarantee” is so called because it is a commercial decision whether to offer it at all, whereas the “legal guarantee” must, by law, be offered. The PELS⁴⁹¹ and the DCFR⁴⁹² explain their choice of terminology (consumer goods guarantee) in a twofold way. First, by linking the guarantee to consumers and to goods it sets the border of application of the rules on guarantees to the goods sold in the course of consumer sales. Second, the definition that refers to the object of the transaction strongly underlines the connection between the guarantee and the goods it accompanies (under both the PELS and DCFR as a default rule the guarantee is attached and follows the consumer goods).

It seems that the terminological differences are at the end caused by quite practical reasons: first of all in practice, or in a quasi-legislative project, the distinctive name aims at underlining specific features of the guarantee. Second, there is no rule that would require uniform terminology.

2.7 Legal and commercial guarantees

The second sphere where problems might appear is the more specific problem of distinguishing between the guarantee and the statutory liability regime. As shown above,⁴⁹³ sometimes both of the regimes are referred to as guarantee, which can lead to a very peculiar situation where the “commercial guarantee” in practice replaces the “legal guarantee”, most often to the detriment of the consumer. It seems that the enactment of the Consumer Sales Directive did not change much in this respect, as the Directive failed to effectively address the problem. If the consumer does not know his statutory rights well, the guarantee may create an impression that it is all that is offered.⁴⁹⁴

An even more complicated situation exists in national legislations, where the system of guarantees, which is parallel to the statutory regime of liability for the defects in the sold goods, includes voluntary as well as obligatory guarantees, as for example under Hungarian law. There the meaning of the term “guarantee” is somewhat ambiguous, since it can be either legal (mandatory) or commercial (voluntary, contractual).⁴⁹⁵ In addition to commercial guarantees undertaken by the producer, the seller, or anyone else in the business chain who concludes a contract with consumer, is obliged to give the obligatory guarantee.

⁴⁸⁹ OFT 1984, p. 4.

⁴⁹⁰ Deards 1998, p. 107.

⁴⁹¹ PELS 2008, p. 354.

⁴⁹² DCFR Book IV, p. 1391.

⁴⁹³ See for example: Deards 1998, p. 107.

⁴⁹⁴ On this problem see also: Chapter V, part 9. Transparency requirements.

⁴⁹⁵ PELS 2008, p. 357.

2.8 The proposed solutions

The Green Paper of 1993 was not concerned with the question of terminology. Although the Consumer Sales Directive did not target the terminology issue either, its introduction has certainly positively influenced the possibility to distinguish the consumer sales guarantee, because after its transposition all the Member States introduced basic rules on guarantees into their legal systems. The Consumer Sales Directive did establish a foundation for the term guarantee throughout the European market, which could allow a further development into a distinct legal construction. For the moment, however, the problem of associating a clear and distinctive meaning with the term guarantee remains, as the Consumer Sales Directive failed to establish a clear definition of the guarantee and its default content, did not provide for a clear scope of application of the rules on guarantees and did not bring about clarity in distinguishing between conformity and guarantee.⁴⁹⁶ The situation did not change much in the initial draft of the proposal for a Consumer Rights Directive, although it introduced a new name and tried to improve the situation regarding the possibility of distinguishing between conformity and guarantee by requesting that information about a consumer's specific entitlements under the conformity regime is included in the guarantee document (Article 29 (2) (a)).

It is quite interesting to note that a terminology scheme was proposed by the European Commission with regards to the Euroguarantee in (already) the Green Paper of 1993.⁴⁹⁷ The Green Paper, silent regarding the general problem of terminology, mentions the potential of the possible pan-European instrument of the Euroguarantee and the terminological challenges in this respect. It briefly explains the notion of the Euroguarantee by saying that it would require economic operators wanting their guarantees to be considered as European to meet two requirements: first the application of standard guarantee conditions in all Member States for the same type of goods of the same brand, and second the real possibility of implementing the guarantee in all Member States, no matter where the goods were purchased, but without the obligation to market the goods in all Member States.⁴⁹⁸ Regarding the terminology relating to the Euroguarantee, the Green Paper indicated two necessary conditions:⁴⁹⁹ first the creation of a label or protected designation indicating the specifically "European" character of the guarantees, and second the prohibition on the use of all designations or claims that might lead to any confusion with "Euroguarantee", such as European guarantee, EEC guarantee, etc.

2.9 Conclusions: how to avoid confusion?

In my opinion, considering the pan-European consumer character of the guarantee terminology problem assuring the transparency of the guarantee scheme should be promoted.

A very interesting discussion in this respect took place in Great Britain, where the problem of multitude of names gave rise to many controversies. The Consumer Guarantees Bill proposed for example that the use of the term "consumer guarantee" should be reserved for guarantees that meet the minimum requirements laid down in the bill concerning the duration and the scope of the guarantee, the obligations of the producer relating to repairs and replacements, the right of the consumer to reject the goods if three unsuccessful attempts at repair had been made, or if the goods were out of action for more than 30-days in any 12-month period. The OFT suggested use of the term "consumer guarantee" only in circumstances in which traders

⁴⁹⁶ On that see: Chapter III, part Conclusions and Chapter V, part Transparency requirements.

⁴⁹⁷ The Euroguarantee is discussed in a more depth in Chapter II, part 3.5.5.

⁴⁹⁸ Green Paper of 1993, p. 99.

⁴⁹⁹ Ibidem, p. 99.

wish to confer legally enforceable rights, and “promise”, “undertaking” or similar expression when the offer is to be binding in honour only. According to the Law Society of Scotland,⁵⁰⁰ the term “consumer guarantee” should only be used where the rights of the consumer are against the manufacturer or other guarantor; it considered the term consumer warranty appropriate where the rights are against the seller of the goods or provider of the services. After research conducted in 1986,⁵⁰¹ the OFT made the recommendation that the number of expressions used should be curtailed, in most cases “consumer guarantees” would suffice, with the word “insurance” added where the arrangement involves an insurance policy.

To conclude, first of all, in principle only one name should be promoted throughout the EU, which is partly done by now by the application of the Consumer Sales Directive. Probably it would be better if the term “guarantee” would be supplemented with an additional description that would place the guarantee in the proper context, i.e. consumer sales or consumer goods, although a general regulation of guarantees would presumably cover services as well. Next, a clear meaning should be attributed to the name. There are various possible ways to establish that, for example by allowing the use of the designated name (but also a name that could give a similar impression) only if the offered guarantee gives more rights than the statutory regime or by establishing a default content of the guarantee.⁵⁰² A good direction is set by the approach accepted in Scandinavia, where it is prohibited to use the word guarantee or similar expressions in consumer sales unless the consumer receives rights additional to the rights already enjoyed by law.⁵⁰³

A necessary condition is also the promotion of transparency, in two senses. First, it should aim at promoting the knowledge of consumer rights among consumers, and second by factually increasing the consumers’ chances of distinguishing between the statutory rights and guarantee.⁵⁰⁴

3. The dual nature of the guarantee

3.1 General introduction

The next three issues, i.e. the legal nature, the source and the legal form of the guarantee belong almost exclusively to the domain of national legal systems and as such are quite complex to analyse from the EU perspective. They are rather theoretical, and are only scarcely supported by legislation. The EU legislator opts for a voluntary binding instrument with an undefined legal form. It does not elaborate on the issues of the legal nature (the legal character), the source or the legal form of the guarantee, which makes it evident that these issues are not of a primary importance in the European dimension. Also the national legal systems, generally speaking, only rarely deal expressly with these matters, although solutions adopted on these matters in fact decide how the guarantee is incorporated into a given legal system and set its legal framework. Additionally, there is only a very limited amount of legal writing and case law that deal with these problems. Moreover, as the importance of these areas is not very evident in practice, real life guarantees are of little help here.

⁵⁰⁰ Law Society of Scotland, Memorandum 1984, p. 2.

⁵⁰¹ OFT 1986, p. 2.

⁵⁰² These issues are further analysed in Chapter V, part 3. Coverage of the guarantee.

⁵⁰³ Norway Mfl. § 9c, Sweden Agell, SvJT 1991, p. 420.

⁵⁰⁴ On that see Chapter V, part 9. Transparency requirements.

The next layer of complexity relates to the fact that these issues are very intimately related. At first sight the division lines are clear to draw: (1) voluntary and obligatory guarantees, (2) guarantees created by the will of the party (parties) and created *ex lege* and (3) guarantees in the form of a contract, a contractual stipulation and unilateral obligation (promise). However, in the course of the analysis it becomes clear that the close relation between the nature, the source and the legal form of the guarantee makes it very difficult to analyse them separately and without reference to each other.

Considering the general lack of legislation in this area, establishing how the guarantee functions in practice in a given legal system would require a very careful study of how other legal constructions and instruments are applied in order to solve problems arising on the grounds of the guarantee. This, however, is not the aim of this chapter. This chapter (and this entire book) strives to present the possible problems, their structure and whether legislation at the EU level could be of use in solving them.

3.2 The scope of the analysis

The analysis in this part begins with the dual nature of the guarantee dealing with voluntary and obligatory guarantees, followed by a short summary on the source of the guarantee. The next part discusses the subject of the legal form of the guarantee. It begins with considering the question why deciding the legal form of the guarantee is important, then discusses the options of the legal form and follows with a brief analysis of the elements that should be considered when deciding on the legal nature of the guarantee.

3.3 The dual nature of the guarantee: voluntary and obligatory guarantees

Taking a broad perspective, the very fundamental division in the area of guarantees in my view is based on the nature of the guarantee. The division line is very clear and depends on whether or not the law (understood widely and encompassing written law, custom, and expectations of consumers recognized by law) requires the creation of a guarantee. If the law does not impose obligatory guarantees on the participants of the distribution chain, the possibility of offering the guarantee is left to the eventual guarantor and the guarantee is voluntary. If the law imposes an obligation to offer a guarantee or a guarantee is offered *ex lege* – the guarantee is obligatory.

In practice, the division is not symmetrical – the vast majority of guarantees on the market are given on a voluntary basis. The domination of the voluntary guarantee goes so far that the obligatory guarantees, especially in the context of the present European discussion, seem somehow odd, even as a concept. However, they do exist, and have a history of presence in quite a few European legal systems. Commenting on the Green Paper of 1993, Tenreiro describes this approach as one of the myths of the Green Paper: the “purely voluntary” myth.⁵⁰⁵

3.4 Voluntary guarantees

The typical guarantee is a voluntary guarantee, i.e. a guarantee that is provided without a legal obligation on the part of the party offering it. This is also the choice of the European legislator. This form of the guarantee has been present in some of the European legal systems

⁵⁰⁵ Tenreiro 1995, p. 87.

since well before the introduction of the Consumer Sales Directive, and after its implementation all Member States expressly recognise voluntary guarantees.⁵⁰⁶

3.5 Content of the voluntary guarantee

Although the voluntary guarantee is based on the concept of party autonomy and the guarantor is free to make the decision whether or not to offer one, the law may potentially interfere with the content of the obligations created by the guarantee or impose certain duties on the guarantor related to the process of offering the guarantee, or the form in which the guarantee has to be provided.

From a theoretical point of view, the one extreme is set by a complete lack of legislation specifically dealing with guarantees. Such a situation existed for example in Belgium before the introduction of the Consumer Sales Directive.⁵⁰⁷ In such a case, the general rules of law, and in particular general contract rules (i.e. rules on unfair contract terms), apply. These norms set the limits of the guarantor's freedom concerning the process of offering the guarantee, its form, content and the scope of obligations arising under the guarantee.

Next, a legal system may impose certain requirements regarding the guarantee on the potential guarantor. Such requirements may have a twofold character: they may refer to issues not related to the content of the guarantee, or they may, directly or indirectly impact the content. The best example relating to the first category is perhaps the legislation introduced by the Consumer Sales Directive. According to this legislation, the guarantor does not have to meet any conditions relating to the content of the guarantee, but is obliged to meet certain transparency requirements.

Legislative intervention regarding the content may take at least two different forms. There might be a minimum content of the guarantee established, i.e. the guarantor may not offer the consumer less than what is set by law.⁵⁰⁸ Normally, such a minimum level is established by referring to the statutory protection granted to the consumer by law. This solution is characteristic for Scandinavian countries. In Norway it is prohibited to use the word guarantee or similar expressions in consumer sales upon selling goods in the course of business, if the consumer is not given additional rights to the rights already granted by law or if such rights are limited.⁵⁰⁹ A similar solution is adopted in Finland⁵¹⁰ and in Sweden.⁵¹¹ Comparable rules (although not always of a binding character) can be found in Denmark and in the Netherlands.⁵¹² Another possibility is that the law itself sets the minimum content of the

⁵⁰⁶ Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producer's liability, Brussels, 24.04.2007, COM (2007) 210 final.

⁵⁰⁷ Green Paper of 1993, Annex 1, p. 105.

⁵⁰⁸ This problem is further elaborated in Chapter V part 3. Coverage of the guarantee.

⁵⁰⁹ Mfl. § 9c.

⁵¹⁰ Ämmälä 1996, p. 138 -139.

⁵¹¹ Agell, SvJT 1991, p. 420.

⁵¹² For details see: Chapter V, part Coverage.

guarantee, which can only be extended. This solution was adopted⁵¹³ and developed by the case law⁵¹⁴ in Poland up to the 1990s.

Another form of content intervention, much less intrusive from the guarantor's point of view, is constituted by adopting default rules on the content of the guarantee. Such intervention substantiates only if the guarantor does not establish the content, or if the content or its parts are found to be invalid. A perfect example is the solution adopted in Article 577 of the Polish Civil Code, presently not applicable in the case of consumer sales within the scope of the Consumer Sales Directive, whereby if the buyer received from the seller a guarantee document concerning the quality of the sold goods, in the event of any doubts, it means that the issuer of the document (the guarantor) is obliged to remove the physical defects of the goods or deliver goods free from defects, if the defects manifest themselves within the period established in the guarantee. Moreover, if the guarantee does not specify otherwise, the guarantee period is one year, counted from the day when the goods were delivered to the buyer.

The second extreme is the legislative intervention in the form of *ius cogens*. It means that if the guarantor offers a guarantee, the contents are set by law. Such an approach, however, is rather associated with the obligatory guarantee.

3.6 Obligatory guarantees

As already stated, obligatory guarantees, while exceptional, are not unheard of. It must, however, be underlined that the concept of obligatory guarantees is very confusing in itself, especially for the legal systems that have never had a regulation of a guarantee as such. If a legal system recognises the obligatory guarantee it means that the system in fact has two parallel regimes of liability that exist with regard to the sold goods. First, it is the regime of liability that is constructed specifically for the sales contract, which in the vast majority of cases burdens the final seller (for example the rules on conformity in the Consumer Sales Directive). Second, it is the system of the obligatory guarantee, which burdens the person indicated in the rules (normally the seller, producer or importer) who is responsible for certain qualities of certain categories of goods. The category of goods, which are granted the protection, is either established generally (for example: new durable goods like in Greece) or is specifically indicated (a list of goods that are furnished with an obligatory guarantee existed in Poland).

Such a structure in the legal system seems not to be very logical, as it introduces two parallel regimes. The reasons that explain the introduction of the obligatory guarantee are normally deeply rooted in a given legal system. In Poland, for example, such a decision was motivated by the fact that the statutory regime of liability did not grant the participants of the market proper protection. The aim of introducing the obligatory guarantee was to make it easier for the buyers to obtain fully functional goods.

At the moment, obligatory guarantees exist under Slovenian and Hungarian law,⁵¹⁵ as well as in Spain⁵¹⁶ and in Greece.⁵¹⁷ In the past they were present also in the Polish legal system.⁵¹⁸

⁵¹³ § 2(2) Resolution 71 of 1983 and § 24 of the general conditions of the retail sale in the area of guarantee, as indicated in Łętowska 1990, p. 185.

⁵¹⁴ Judgement of the Supreme Court of 21.03.1975, OSN CP 3 item 33, as indicated in Łętowska 1990, p. 185.

Under Slovenian law, the system of obligatory guarantees is parallel to the statutory liability of the seller in consumer sales. According to Article 15b CPA and the Regulation of the Minister for Trade⁵¹⁹ a very wide range of products can only be sold with an obligatory guarantee of proper functioning that lasts, in principle, for one year. In Spain, Article 11(2) of the Consumer Protection Act of 19 July 1984 requires the producer or the supplier of durable goods to deliver a written guarantee.⁵²⁰ In Hungary, according to Article 248(1) of the Civil Code, the guarantee is created in respect to the party that enters into a contract with a consumer, which usually is the final seller (the obligor).⁵²¹ There is also special legislation on mandatory guarantees regarding certain products and services: Government Decree 151/2003 of 22 September 2003 on the mandatory guarantee concerning durable consumer goods, Government Decree 249/2004 of 27 August 2004 on mandatory guarantee concerning repair and maintenance services to consumers and Government Decree 181/2003 of 5 November 2003 on mandatory guarantee concerning housing (house construction). They define the lowest measure of the obligatory guarantees, which can be extended to the benefit of the consumer by agreement of the parties.⁵²²

3.6.1 The source of the obligation to create an obligatory guarantee

Generally speaking, the obligation to create a guarantee may be imposed by written law, usage as well as the consumer's expectations or request. The most common form of obligatory guarantee is the guarantee imposed by written law. The obligation to create a guarantee may arise with respect to a certain category of persons engaged in the distribution chain, or/and with respect to a certain category of goods offered on the market. For example Article 33 of the Greek Consumer Protection Act⁵²³ established a mandatory commercial guarantee to be provided by the seller with respect to new consumer durables. In Spain, Article 11(2) of the Consumer Protection Act of 19 July 1984 requires the producer or the supplier of durable goods to deliver a written guarantee. Under Slovenian law,⁵²⁴ a very wide range of goods can be sold only with the obligatory guarantee of proper functioning. A very elaborate system of such obligatory guarantees existed also in Poland. Regulations issued by the Ministers of Material and Fuel Management and Internal Trade and Services in 1983⁵²⁵

⁵¹⁵ Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producer's liability, Brussels, 24.04.2007, COM (2007) 210 final, p. 10.

⁵¹⁶ Green Paper of 1993, Annex 1, p. 108.

⁵¹⁷ Article 5(4) Law 2251/1994.

⁵¹⁸ For example: Zarządzenie Ministrów Gospodarki Materiałowej i Paliwowej oraz Handlu Wewnętrznego i Usług z dnia 15 lipca 1987 r. w sprawie wykazu towarów produkcji krajowej objętych gwarancją producenta (M.P. 8 August 1987).

⁵¹⁹ Official Journal Nr. 73/2003.

⁵²⁰ Lete 2001, p. [xxx].

⁵²¹ Fazekas & Sós 2009, p. 359.

⁵²² Fazekas & Sós 2009, p. 359.

⁵²³ Green Paper of 1993, p. 46.

⁵²⁴ Article 15b CPA and Regulation of Minister for Trade, Official Journal Nr. 73/2003.

⁵²⁵ Zarządzenie Ministrów Gospodarki Materiałowej oraz Handlu Wewnętrznego i Usług z dnia 1 grudnia 1983 r w sprawie wykazu towarów produkcji krajowej objętych gwarancją konsumenta (M.P. z dnia 31 grudnia 1983 r.).

and in 1987⁵²⁶ formulated lists of goods produced in Poland, covered by an obligatory guarantee from the producer. These regulations were rather detailed – the list issued in 1983 contained 250 different products, and the list of 1987 even 275.

The even less known and quite specific type of obligatory guarantees is the guarantee imposed by a custom or at the customer's request. According to the Italian Civil Code (Article 1512: *Garanzia di buon funzionamento*), usage may establish that a guarantee for good functioning is applicable even without the explicit agreement of the parties. Article 921 of the Portuguese Civil Code stated that if the seller is obliged by contract or usage of commerce to guarantee the good functioning of the sold item, it must repair or replace the item, when replacement is necessary and the item is fungible. Regardless of the seller's fault or the buyer's mistake, the guarantee existed and could be relied on by the user once it was provided by the seller or requested by the user.

3.6.2 Content of the obligatory guarantees

If the law forces the guarantee upon the guarantor, a question concerning the contents of such a guarantee arises. There are several possible options. First, the law in such a case can fix the content of the guarantee. A good illustration of the mandatory guarantee regulation is the former Polish regime. Regulations issued in 1983⁵²⁷ and 1987⁵²⁸ by the Ministers of Material and Fuel Management, and Internal Trade and Services indicated the minimum duration of the guarantee, counted in months, with differentiation for a total guarantee period and the guarantee period for the user. The total guarantee period varied from 24 to 36 months, while the guarantee period for the user amounted from 12 to 24 months. For some categories of products, the guarantee period was also indicated in the use (the guarantee lasted only for a specified amount of use). Moreover, the orders indicated the number of the repair attempts, after which the producer could not refuse to exchange the product, which varied from one to seven, although for some products exchange would be allowed without any attempt to repair. The lists included machines, household appliances, engines, means of transport, cars, computers, and so on. The lists applied only in the case of sales and delivery contracts between entities of the nationalized economy. These rules had a *ius cogens* character and could therefore not be changed by the parties.⁵²⁹

In Hungary, according to Article 248(5) of the Civil Code, the remedies in the case of the obligatory guarantees are identical with the remedies, which are offered to the consumer in the case of the statutory liability of the seller.⁵³⁰ First the consumer may ask for repair or replacement and if they are impossible or disproportionate the consumer can seek price reduction or rescission of the contract. The details of the enforcement of the guarantee remedies are dealt with in Regulation 49/2003 of 30 July 2003 issued by the Hungarian

⁵²⁶ Zarządzenie Ministrów Gospodarki Materialowej i Paliwowej oraz Handlu Wewnętrznego i Usług z dnia 15 lipca 1987 r. w sprawie wykazu towarów produkcji krajowej objętych gwarancją producenta (M.P. 8 August 1987).

⁵²⁷ Zarządzenie Ministrów Gospodarki Materialowej oraz Handlu Wewnętrznego i Usług z dnia 1 grudnia 1983 r w sprawie wykazu towarów produkcji krajowej objętych gwarancją konsumenta (M.P. z dnia 31 grudnia 1983).

⁵²⁸ Zarządzenie Ministrów Gospodarki Materialowej i Paliwowej oraz Handlu Wewnętrznego i Usług z dnia 15 lipca 1987 r. w sprawie wykazu towarów produkcji krajowej objętych gwarancją producenta (M.P. z dnia 8 sierpnia 1987).

⁵²⁹ Łętowska 1990, p. 185.

⁵³⁰ Fazekas & Sós 2009, p. 360.

Ministry of Economy and Transport. This regulation contains practical advice for the guarantor how to handle the consumer's demand, sets the guarantor's administrative duties such as keeping minutes and regulates the procedure once the subject-matter of the obligatory guarantee has been taken in for the repair etc.⁵³¹

Another possible option is that the content of the guarantee is left up to the forced guarantor, and the law interferes only if the guarantor does not regulate certain issues, or regulates them in a way that the legal system does not accept (i.e. unfair contract terms). An example of such an approach is Article 33 of the Greek Consumer Protection Act,⁵³² establishing a mandatory commercial guarantee by the seller. It burdened the seller with an obligation to provide a commercial guarantee for new consumer durables. Also, it required the guarantee form to reveal the name and business address of the vendor and the beneficiary of the guarantee, as well as to indicate the product in question, the content of the guarantee and its duration, which had to be reasonable. Under Slovenian law,⁵³³ if the seller does not provide the required obligatory guarantee, or it does not have the required content or form, the buyer has the same rights as he would have under conformity *ex lege*, and the seller is additionally punishable (fines are set in Articles 77-78 CPA).

3.7 The source of the guarantee – a summary

The question of the source of the guarantee in fact deals with creating the guarantee, which in turn is inseparably linked with the nature of this institution. Żukowski calls it the source of the obligation of the guarantor.⁵³⁴ In the case of voluntary guarantees, the problem is relatively simple: a statement of intent of the guarantor is required, and if the guarantee takes the form of a contract, also certain form of acceptance, as required by national law. For example in Poland, on the ground of the provisions of the Civil Code rules, professor Żuławska, who is the leading expert in the area, expressed the opinion (shared for example by Skąpski in System Prawa Cywilnego⁵³⁵) that a valid offering of a guarantee takes place by handing over to the consumer together with the goods a document (so called book or card) of guarantee. Such a correlation between the guarantee and the document answers the practice of the consumer relations.⁵³⁶ However, in the situation when the card is not handed over to the consumer or more extremely when it is not even issued it does not make the guarantee contract invalid, because the guarantee document is only a sign of legitimation (*znak legitymacyjny*).⁵³⁷

In the case of obligatory guarantees, the situation is more complicated, as here the guarantee may either be created *ipso iure* or a certain person – the producer or the seller – may be obliged to create a guarantee. The obligation to create a guarantee may arise because the law imposes it on the guarantor (for example, under Slovenian law), but also because there is a custom in this respect (Italy), or the consumer requests it (Portugal).

Table 1
The source of the guarantor's obligations

⁵³¹ Fazekas & Sós 2009, p. 360.

⁵³² Green Paper of 1993, p. 46.

⁵³³ Article 15b CPA and Regulation of Minister for Trade, Official Journal Nr. 73/2003.

⁵³⁴ Żukowski 2002, p. 41.

⁵³⁵ Skąpski 1976, p. 153.

⁵³⁶ Żuławska 1999, p. 82.

⁵³⁷ Skąpski 1976, p. 153.

Guarantor's statement of intent – law – custom – consumer request

Table 2

Creation of the guarantee by a statement of intent

Voluntary – obligatory – by law – custom – consumer request

Table 3

Creation of a guarantee

On the basis of an act in law (two types: a voluntary act in law, an act in law required by the law), created *ipso iure*

4. The legal form of a guarantee

4.1 What is the legal form?

The legal form of a guarantee is, in my opinion, one of the most complicated areas in any analysis of a guarantee. Establishing the legal form of the guarantee means classifying the guarantee according to the legal constructions accepted by a given system. This is a sphere that remains outside the interest of the EU legislator and belongs almost exclusively to the national legal system. It is usually dealt with by case law and legal writing rather than through legislation. The express classification of a guarantee as a certain legal form in law has only been done in a few legislations, for example⁵³⁸ in Estonia (LOA § 230) or Slovakia (CC §§ 502 and 620-621). At the same time, the question of the legal form has a very fundamental meaning for every legal system. It touches upon the most basic issues of national legal systems: how to classify and qualify actions and undertakings of the market participants? What is a contract? How is it concluded? What other forms of legal relations does a legal system recognise? How are tripartite relations created and qualified?

4.2 The European approach

Generally speaking, there are three options available:⁵³⁹ a separate self-standing contract, a contractual clause (stipulation) included in the sales contract and a unilateral promise (unilateral legal act). The EU legislation does not determine the legal form of the guarantee and it is left entirely to the discretion of national legislators. Initially the Green Paper of 1993 opted for a solution whereby the guarantee should be considered as a contract between the producer and the holder of the goods,⁵⁴⁰ which Tenreiro described as “the contractual myth” of the guarantee.⁵⁴¹ The Consumer Sales Directive limited itself to declaring the guarantee binding, in Article 6 paragraph 1, and this approach was followed by a number of Member States during the transposition process: Belgium, Italy, France, Finland, Germany, Spain and Sweden.⁵⁴²

Neither the PELS (Article 6:101) nor the DCFR (Article IV.A.-6:101) gave a clear position as to what is the legal form of the guarantee, so to a certain degree they have followed the path established by the Consumer Sales Directive. Like the Consumer Sales Directive, the PESL declares the guarantee a binding undertaking, but adds that the binding effect takes place

⁵³⁸As in DCFR, Book IV, p. 1399.

⁵³⁹Zukowski 2002, pp. 38-40, PELS 2008, p. 354, DCFR, Book IV, p. 1391.

⁵⁴⁰Green Paper of 1993, p. 96.

⁵⁴¹Tenreiro 1995, p. 80.

⁵⁴²DCFR, Book IV, p. 1398.

without acceptance (Article 6:102(1)). The comment to Article 6:101 explains⁵⁴³ that “the legal qualification of the consumer sales guarantee may depend on many factors, the most important being the intention of the party who offers a consumer goods guarantee. Depending on the situation, a guarantee may take the form of a contract, a contractual clause or a unilateral promise.” This, of course, creates a problem similar to the one that might appear on the grounds of the Consumer Sales Directive: the guarantee theoretically may be classified as a contract, albeit without the possibility to require acceptance in the process of its creation. The national law, however, may require acceptance for creating of a contract. It must be underlined, however, that the problem might appear on the basis of the Directive’s rules (subject to interpretation), whereas it is rather certain that it will appear on the grounds of the PEELS. The DCFR goes a step further and provides an answer to this problem by stating that the guarantee may be either contractual or in the form of a unilateral undertaking, and in the case of a unilateral undertaking is binding without acceptance, nothing standing to the contrary in the guarantee document or the associated advertising. At the same time, the comments⁵⁴⁴ of the DCFR repeat the argument raised already in the PESL⁵⁴⁵ that making a legal qualification of the guarantee, while of “utmost importance”, could have “an undesired, restrictive result”. This statement is certainly true for rules of directives, which require implementation into a legal system, and so the rules on guarantees must be flexible enough in order to fit into the structure and constructions of a given legal system. However, if the rules that regulate the guarantee constitute part of a system of rules, which is meant to be a complete one, the restrictive result of establishing the legal form in the rules (especially if the rules do make the creation of a valid guarantee subject to fulfilling formal requirements that apply to contract creation, for example) does not have to be of great importance. Furthermore, a system like the one created by the DCFR is to a certain degree artificial, as its creation is not a result of natural processes that take place in a given legal sphere, but it is created in a top-down manner. Therefore, it could prove to be beneficial for the DCFR to be more conclusive on the problem of the legal form.

In addition, it is worth to mention that the initial draft of the Directive on Consumer Rights (Article 29) has introduced no changes with regards to the question of the legal form and repeated the Consumer Sales Directive solution, but it did not make it to the final version of the Directive. A functional approach was likewise accepted in the *Metro/Cartier* case, where the ECJ concluded that a contractual obligation to restrict the guarantee to dealers within the network and to refuse to grant it in respect of goods sold by third parties leads to the same result and has the same effect as contractual terms that reserve the right to sell to members of the network. Like such terms, the restriction of guarantees is a means whereby the manufacturer can prevent anyone outside the network from marketing products covered by the system.⁵⁴⁶ The ECJ did not elaborate on the legal status of the guarantee, it simply approached the guarantee as a part of the legal relationship between the guarantor and the distributor and concentrated on the effect it produces.

4.3 Why is it important to make such a classification?

Considering the evident lack of interest of the EU legislation regarding the legal form of the guarantee, it is legitimate to ask whether it has any importance at all. The answer, in my

⁵⁴³PELS 2008, p. 354.

⁵⁴⁴DCFR, Book IV, p. 1391.

⁵⁴⁵PELS 2008, p. 354.

⁵⁴⁶Judgement of 13 January 1994, *Metro SB-Großmärkte GmbH & Co. KG SA* (1994) (*Metro/Cartier*) C-376/92.

opinion, is that the legal nature of the guarantee, despite its very theoretical background, is important and relevant for the practice. Generally speaking, the decision to qualify the guarantee as a certain legal construction determines what rules are applicable to the guarantee, and establishes the rules whereby the guarantee functions in a given legal system. There are several instances when it becomes evident. First, is the process of creating the guarantee: is the guarantee binding without acceptance, or is some form of acceptance required in order to create a guarantee? Second, if, for any reason, the sales contract collapses, does the guarantee collapse automatically with it, or does the collapse of the sales contract impact the guarantee in a different way? Third, in the case of interpreting the guarantee, if a legal system provides specific rules for interpreting contracts, which rules of interpretation apply to the guarantee? Last, what remedial system applies to supplement the content of the guarantee if the guarantor did not establish it and the legal system does not contain specific rules for guarantees in this respect?

4.4 Plan of the analysis

The analysis in this part distinguishes between the guarantees offered by the sellers and the guarantees offered by other participants of the commercial chain. It deals respectively with all options regarding the legal form of guarantees offered by sellers and other participants of the commercial chain. It tries to outline the possible problems and questions that arise on the basis of the concrete options.

It must again be strongly underlined that the aim here is not to provide a comparative analysis of the solutions accepted in specific legal systems. These are so deeply rooted in national legal systems that presenting them would actually mean presenting the structure and operation of the national law of obligations. The objective of this part, therefore, is to present the available options regarding the legal form of the guarantee and the problems related thereto. At the same time, it must be observed that “Contract is a concept which has evolved over time and which, from a comparative point of view, does not take a uniform model.”⁵⁴⁷ It makes the analysis somehow defective since the assumption in this regard must be that the concepts are homogeneous.

4.5 Sellers vs. other participants of the commercial chain

In this part of the analysis it is necessary to differentiate between guarantees offered by the sellers, and guarantees provided by other persons engaged in the commercial chain. The underlying reason for making this distinction is that the guarantees provided by sellers might be inscribed into the bilateral relationship created by the sales contract, while guarantees provided by other participants of the commercial chain introduce a third party into the sales scheme, although the resulting relationship can also be bilateral. Additionally, the guarantee provided by a third party, in most cases by the producer, was in the past problematic for the common law system, which encountered difficulties in establishing the binding force of such a guarantee (this problem will be referred to separately).

4.5.1 Seller's guarantees – general

Where the seller offers a guarantee, this is done in the framework of a contractual relationship,⁵⁴⁸ since the seller is already bound by the sales contract. The new legal

⁵⁴⁷Beale, Fauvarque-Cosson, Rutgers, Tallon, Vogenauer 2010, p. 39.

⁵⁴⁸Tenreiro 1995, p. 87.

relationship created between the seller, acting as the guarantor, and the buyer, as the guarantee holder, rests on the skeleton of the sales contract. In other words, the framework of the sales contract establishes a solid ground for the guarantee scheme. The parties involved are exactly the same as in the case of the sales contract (at least at the moment when the guarantee is offered, at a later time the goods accompanied by the guarantee may be transferred to a third person together with the guarantee⁵⁴⁹).

4.5.2 The main problem – how to distinguish between statutory liability and a guarantee?

Despite the seemingly uncomplicated structure, guarantees provided by the seller raise many questions, making a clear qualification regarding the legal form complicated. The crux here is the close and intimate relationship between the guarantee and the obligations created under statutory law. The main problem in this case relates to the question how to distinguish between the seller's statutory liability regime and the obligations created by the guarantee. Only once this distinction has been made can the question of the legal form of the seller's guarantee be answered.

In my opinion, the possibility to distinguish between the statutory regime and the guarantee depends on two factors. The first is how the statutory regime of liability is constructed in relation to the guarantee in a given legal system. The second relates to whether there are any requirements concerning the form in which the guarantee is to be provided to the consumer.

Concerning the relation between the statutory regime and the guarantee, Article 558 paragraph 1 of the Polish Civil Code provides very good grounds for discussion. According to its wording, the parties may extend, limit or exclude the statutory liability of the seller. This Article does not apply to consumer sales after the transposition of the Consumer Sales Directive into the Polish legal system, within the scope covered by the Directive's rules. According to Żukowski,⁵⁵⁰ on the basis of this article, depending on the intention of the parties, the seller's guarantee can either exclude or limit the rights arising from the statutory regime, or it create a parallel liability regime under the guarantee. I agree with Żukowski's observation. In my view, the interdependency between the statutory legal regime and the guarantee might be described in general terms, in the context of discussing the legal form of the guarantee, in the following way. The question comes down to whether the guarantee may interfere directly with the content of the statutory regime, and ultimately it does not matter from the legal construction point of view whether the guarantee limits or extends the rights of the consumer. If the guarantee can change the content of the statutory regime, it is virtually impossible to distinguish between the statutory legal regime and the guarantee, as the two regimes *de facto* merge and the guarantee constitutes only a tool of varying the statutory regime. The prohibition on interfering with the content of the statutory regime means that the guarantee cannot limit or exclude the rights the consumer enjoys under the statutory regime, as it would be rather surprising if a legal system prohibited extending consumer rights through the guarantee (although it may be different in the case of mandatory guarantees). The best example of such an approach is the Consumer Sales Directive. At the same time, it should be noted that it might sometimes be very difficult to distinguish whether the seller's guarantee directly changes the content of the statutory regime, or whether it merely creates a parallel system.

⁵⁴⁹ See Chapter V, Parties of the guarantee.

⁵⁵⁰ Żukowski 2002, p. 39.

If the guarantee cannot exclude or limit the content of the statutory regime, it means that the statutory regime remains intact, no matter what is the content of the guarantee. If a given legal system does not require the guarantee to offer more than the statutory protection (again, like the Consumer Sales Directive), it can also purport that the guarantee, which is in such a case parallel to the statutory regime, offers less, but at the same time it does not impact the content of the statutory rights. Nevertheless, distinguishing between the two will be very difficult, especially for the consumer, and it will very much depend on the guarantee transparency requirements. Using the example of the Polish Civil Code Article 558 again, before the transposition of the Consumer Sales Directive paragraph 1 of this article expressly dealt with consumer sales. In the case of such a sale, the exclusion or limitation of liability was allowed only if a specific rule stated so. That was interpreted as giving the consumer a free choice between the statutory regime and the parallel guarantee.⁵⁵¹

If the guarantee extends the rights of the consumer, the situation is at first glance less complicated. However, unless there is a clear understanding of what it means to extend the rights,⁵⁵² the situation will be similarly confusing. In other words, if the seller decides only to extend some or all (as is allowed for example in Sweden⁵⁵³) of the entitlements of the consumer, it will be quite easy to distinguish between the guarantee and the statutory regime. However, if at the same time the seller is able to add to and to restrict certain entitlements of the consumer – the situation gets blurred.

A second aspect that should be taken into consideration when discussing the possibility to distinguish between the statutory regime and the guarantee are the transparency requirements. Basically – the more transparency in presenting the guarantee, the more chance there is to successfully distinguish it from the statutory regime, or to limit the impression that the guarantee is all that the seller offers to the consumer.⁵⁵⁴ Here two features are of particular importance. First, it is the obligation to provide the guarantee in writing, even more effective if the guarantee is to be provided without the consumer's request.⁵⁵⁵ Second, it is a question how the guarantee document should explain the content of the guarantee and its relation with the statutory regime.⁵⁵⁶ Even if these two requirements are met properly, i.e. the guarantee document attached to the sold goods clearly explains the content of the guarantee in the context of the statutory entitlements, this does not mean that all doubts regarding the scope of the guarantee are solved, but it definitely lends support.

4.5.3 Seller's guarantees – the possible options

Considering what has been said about the seller's guarantee, it seems that the most probable solution here is that the guarantee will be incorporated into the structure of a sales contract in the form of a contractual clause. This opinion is supported by Singleton⁵⁵⁷ and by Żukowski,⁵⁵⁸ who also claims that it is difficult to classify such a guarantee as an independent obligational relation, and the guarantee should be considered in the wider context of the sales

⁵⁵¹Żukowski 2001, p. 39.

⁵⁵²For more details see Chapter V, part 3. Coverage of the guarantee.

⁵⁵³PELS 2008, p. 374

⁵⁵⁴Beale & Howells 1997, p. 38.

⁵⁵⁵For a more detailed discussion see: Chapter V, part 9.9.1 Presenting consumer with the guarantee document.

⁵⁵⁶For a more detailed discussion see: Chapter V, 9.6 Putting the guarantee in the proper context.

⁵⁵⁷Singleton 1994 p. 135.

⁵⁵⁸Żukowski 2002, p. 43.

contract and relations existing between the seller and the buyer.⁵⁵⁹ The PELS argue that generally, if the parties have agreed that the seller will undertake additional obligations towards the buyer, then by definition the seller who has given any kind of extension of the remedies has given a consumer guarantee. However, for instance a guarantee for more than 2 years will not automatically result in any prolongation of the period during which the buyer has remedies for non-conformity.

At the same time, one cannot rule out the possibility that the seller could offer a guarantee in the form of a self-standing contract or a unilateral promise. If the obligations of the seller under the guarantee are substantially extended, or if the buyer is burdened with certain obligations under the guarantee, and/or the guarantee is offered against payment, the guarantee could be seen as a separate legal relationship. Its existence would depend on the conclusion of the sales contract, but the guarantee itself could also take the form of a contract. In such a case the seller must secure that the requirements of a given national legal system are met and the guarantee contract or promise is valid and binding. The final qualification as a contract or a unilateral promise depends on the national law.

4.5.4 Approach of the Member States

With a few exceptions, the question of the legal nature of the guarantee only rarely comes up in the academic debate, even less so if one talks specifically about the legal nature of the seller's guarantee. On the grounds of the Polish rules of the Civil Code, Żuławska expressed the opinion⁵⁶⁰ that if the seller offers a guarantee, a contract accessory to the sales contract is concluded by handing over the guarantee document to the buyer. This implies that the guarantee would have a legal effect only if the sales contract is valid and effective.⁵⁶¹ Such a contract may have an impact on the relation created by the sales contract.⁵⁶² It can be concluded together with the sales contract or at a later time.⁵⁶³ Austrian law distinguishes between a genuine guarantee contract (*echter Garantievertrag*) and a guarantee promise within a contract (*unechter Garantievertrag*). The *unechter Garantievertrag* is a unilateral contract (*einseitigverpflichtender Vertrag*) that burdens only the guarantor (the seller) who has made the promise.⁵⁶⁴ As a contract, it requires acceptance by the other party, which can be done by handing over the producer guarantee card to the consumer. The *unechter Garantievertrag* constitutes a part of the main contract (a contractual stipulation), which on the basis of § 9 KSchG can only add to the entitlements of the consumer. Therefore, a promise by the seller creates a commercial guarantee only if the promise contains more than the buyer would be entitled to under §§ 922 et seq. ABGB.⁵⁶⁵ No separate legal relation is created⁵⁶⁶ as such guarantee binds the parties of the sales contract – i.e. the seller and the buyer. Under German law⁵⁶⁷ creating a commercial guarantee requires the conclusion of a contract, however, an express acceptance of the buyer is not necessary. The buyer accepts the guarantee simply by purchasing the goods.⁵⁶⁸ Under Greek law, if the guarantee is provided

⁵⁵⁹ Ibidem, p. 38.

⁵⁶⁰ Żuławska 1999, p. 81.

⁵⁶¹ Skapski 1976, p. 153.

⁵⁶² Żuławska 1999, p. 81.

⁵⁶³ Skapski 1976, p. 153.

⁵⁶⁴ Dittrich/Tades 1999, p. [xxx.]

⁵⁶⁵ Augenhöfer 2009, p. 180, footnote 74.

⁵⁶⁶ Glantschnig 2002, p. 10.

⁵⁶⁷ Bittner & Rott 2009, p. 330.

⁵⁶⁸ BGH, 24.6.1981, 2248 as referred to in Bittner & Rott 2009, p. 330, footnote 47.

by the seller it will be usually a contract consequential to the sales contract, which alters the extent or prerequisites of the rights already provided by law to the benefit of the buyer.⁵⁶⁹ In Italy a guarantee given by the seller is always of a contractual nature⁵⁷⁰ although it is disputed whether it may be regarded as a separate, accessory agreement to the main contract or a specific contractual term forming an integral part of the contract.⁵⁷¹ Lithuanian law does not distinguish between the guarantee by the seller and by other participants of the commercial chain.⁵⁷² A guarantee is generally qualified as a unilateral transaction, imposing obligations only on the person who issues it. The law on obligations and contract law apply to unilateral transactions to the extent that they do not contradict the laws and the essence of unilateral transaction. The Commentary of the Civil Code clearly indicates that the provisions on conclusion, termination and execution of contracts are not applicable to unilateral transactions when the actions are based on quality guarantees.⁵⁷³ In the Netherlands Article 7:6a (1) of the Civil Code refers to promises (*toezeggingen*) concerning the product, which the guarantee must make, but that is not a decisive factor, when it comes to the qualification of the legal form. The preparatory documents of the revision of Book 7 BW for the implementation of Directive 99/44⁵⁷⁴ suggest that the guarantee takes the form of a contract, as it talks of offer and acceptance. Duivenvoorde and Hondius share the opinion of Hijma⁵⁷⁵ that the contractual qualification of the guarantee is somewhat unnatural, because in practice consumers often do not realize that a guarantee is given at the moment of purchase. They also argue that there is no reason to require the guarantee to be contractual as the rights of the consumer cannot be affected and because it does not fit within the broad definition of a guarantee statement in the Consumer Sales Directive. Therefore it would be better to qualify a guarantee as a promise, rather than as a contract.⁵⁷⁶ Under English law, all guarantees (which includes the guarantees by the seller) are contractual in their nature,⁵⁷⁷ which means that the buyer must accept the offer. The acceptance, however, may tacitly be inferred from the acceptance of the goods themselves, so this requirement becomes merely formal in nature.⁵⁷⁸ The Sale and Supply of Goods to Consumer Regulations Reg. 15(1) classifies a consumer guarantee as a contractual obligation, but says nothing about the nature of any acceptance of such a contractual obligation by the consumer. It can be argued either that the terms of reg. 15(1) are intended to give effect to such contractual guarantees without the need of any acceptance, or that the offer of a guarantee contract is tacitly accepted by the consumer. In Scots law, all guarantees may have the form of contract, though it is also possible to view some of them as unilateral promises (a separate form of obligation that is binding without acceptance). A unilateral promise must be made in formal writing in order to be valid, unless it is done in the course of business (as, for example, in the case of consumer guarantees).⁵⁷⁹ In Estonian law a guarantee

⁵⁶⁹ Karakostas & Voulgari 2009, p. 346.

⁵⁷⁰ Troiano & Bisazzara 2009, p. 403.

⁵⁷¹ Rabitti 2006, p. 515, as referred to in Troiano & Bisazzara 2009, p. 404, footnote 54.

⁵⁷² Pranevicius 2009, p. 420.

⁵⁷³ Lietuvos Respublikos civilinio kodekso komentaras 2001, Art. 1.63 § 20, as referred to in Pranevicius 2009, p. 420, footnote 7.

⁵⁷⁴ Preparatory documents of the revision of Book 7 BW for the implementation of Directive 99/44 Tweede Kamer, vergaderjaar 2000-2001, 27 809, no.3, 17, as quoted in Duivenvoorde & Hondius 2009, p. 450.

⁵⁷⁵ Hijma 2007, no. 89a, as referred to in Duivenvoorde & Hondius 2009, p. 450.

⁵⁷⁶ Duivenvoorde & Hondius 2009, p. 450-451.

⁵⁷⁷ PELS 2008, p. 361.

⁵⁷⁸ DCFR, Book IV, p. 1399.

⁵⁷⁹ MacQueen and Thomson, Contract law in Scotland, 63-69; Hogg Obligations REF, as referred to in DCFR, Book IV, p. 1399.

is a contract concluded between a buyer and the producer or other guarantee provider.⁵⁸⁰ § 230(1) LOA provides that a guarantee is a promise, made by a seller, previous seller or producer. It constitutes an offer that must be accepted by the buyer. The acceptance does not have to be direct or in any particular form. The guarantee contract is concluded usually together with the conclusion of the sales contract or at the moment when the goods are handed over to the buyer. If the guarantor is not the seller, the seller acts as an intermediary between the buyer and the guarantor or as a representative of the guarantor.⁵⁸¹

In Slovakia, according to Articles 502 and 620-621 of the Civil Code, a voluntary guarantee is binding upon the seller either as a contractual or declaratory guarantee. The guarantees established by contract or by a unilateral declaration bind the seller if they give the buyer more rights than the CC or specified statutes (Article 39 CC). Similar principles apply under Czech law.⁵⁸² In Spain, in the case of a guarantee provided by the seller the guarantee is inserted into the contract of sale as an additional clause.⁵⁸³ In Irish legal system the analysis of the legal form of the guarantee led to the conclusion that the possibility to offer a guarantee by the seller should be limited. According to the Sale of Goods and Supply of Services Act, the seller cannot provide a guarantee because any undertaking given by him would form part of the contract or collateral contract.⁵⁸⁴ The Law Society of Scotland,⁵⁸⁵ commenting on the proposal published in 1984 by the British Office of Fair Trading, pointed out that there is a difference between a “guarantee” provided by a seller and one provided by a third party. It concluded that, by definition, a party to a contract cannot himself give a guarantee, as such is “an accessory contract whereby one party undertakes to be answerable for the default of another, who is primarily liable to a third party.” Therefore, in the opinion of the Law Society the term “consumer guarantee” should be used only where the rights of the consumer are against the producer or another guarantor, and the term consumer warranty would be more appropriate where the rights of the consumer are against the seller of the goods or provider of the services.

4.5.5 Guarantees by producers and other parties

The guarantee offered by the producer of the goods is the most popular form of a guarantee. As mentioned above, the existence of such a guarantee (or the possibility to offer it) normally depends on the prior conclusion of the sales contract. If the producer (or any person other than the final seller) provides the guarantee, even though the guarantee is created because the sales contract was concluded, it is not supported by any prior formal relationship between the guarantor and the guarantee holder (unless the producer is the seller).

From a legal construction point of view, the difference between a guarantee offered by the producer and any other person down the commercial chain is insubstantial, as in both cases a third person – external to the sales contract – enters into a legal relationship (unless of course the producer is the seller). Tenreiro described the problem (referring to the producer’s guarantee only) by saying⁵⁸⁶ that a consumer who receives the producer’s guarantee card with his product does not have a contractual relationship with the producer. His only contractual

⁵⁸⁰ Kull 2009, p. 282.

⁵⁸¹ Kull 2009, p. 282.

⁵⁸² Knappová, Svestka 2002 as referred to in PELS 2008, p. 361.

⁵⁸³ Navos Navarro 2009, p. 532.

⁵⁸⁴ Grogan, King and Donelan 1983, p. 29.

⁵⁸⁵ The Law Society of Scotland 1984, p. 2.

⁵⁸⁶ Tenreiro 1995, p. 84.

relationship is with the immediate seller, who nevertheless enters into no obligation with regard to the guarantee. However, when considered more closely, a major practical difference between the producer's guarantee and the guarantee offered by any other third party appears. The producer, as the party who actually produces the goods, is best able to evaluate the goods and hence, establish the terms and conditions of the guarantee. Any intermediary, who buys the goods in order to resell or distribute them, is not able to do so as precisely as the producer.

4.5.6 Difference as compared with the seller's guarantee

Although at first sight it seems that guarantees offered by third parties are more problematic than the seller's guarantees (tripartite relation, difficult position of the seller in the scheme, etc.), in certain respects such guarantees are less complicated from a theoretical point of view. As a party external to the sales contract, a producer (or any other possible guarantor) will not be able to modify the content of the sales contract concluded between the seller and the buyer.⁵⁸⁷ Therefore, its liability will rather tend to be structured parallel to the statutory liability of the seller under the sales contract. At the same time, in the eyes of the consumer, the guarantee offered by the producer may overshadow the statutory obligations of the seller. If the consumer so views the guarantee, the practical consequences of the difference between the seller's guarantee and the producer's guarantee will be rather similar.

4.5.7 Legal form of the guarantee by the producer

From a theoretical point of view, one can consider for the producer's guarantee all three options: i.e. the contract, the contractual clause and the unilateral promise. As the person who offers the guarantee is external to the sales contract, the natural tendency would be to classify the manufacturer's guarantee as a separate self-standing contract. And indeed, some legislations classify the guarantee as a contract accessory to the sales contract.⁵⁸⁸ However, when making the final decision, other factors, such as the will of the parties (or more realistically – the will of the party that offers it), the requirements of the national legal system concerning the creation of a contract, or the content of the undertaking, should also be taken into account. At the same time, it seems that the option of a contractual clause, although it cannot be totally excluded, is the least probable, as it would create an extremely complicated situation from a legal point of view. It would mean that under one contract, the terms of which are regulated by mandatory or semi-mandatory rules of law concerning liability for the quality of goods sold, the liability of a third party is introduced, which in most cases cannot waive the entitlements of the buyer, arising under the statutory regime. Therefore, the more sensible solutions are a separate contract or a separate unilateral act in law.

4.5.8 Contract or unilateral legal act?

The Green Paper of 1993 concluded that the basic problem in relation to the producer's guarantee is the nature of the producer's obligation towards the consumer.⁵⁸⁹ Even if the considerations are limited to the distinction: contract and unilateral promise, the situation is, as Tenreiro put it, far from being as simple.⁵⁹⁰ This problem belongs exclusively to the national law sphere, and relates to requirements that the given legal system sets for creating a

⁵⁸⁷Zukowski 2002, p. 40.

⁵⁸⁸Skapski 1976, p. 153.

⁵⁸⁹Green Paper of 1993, p 75.

⁵⁹⁰Tenreiro 1995, p. 87.

contract as opposed to a unilateral promise (if recognised by a given legal system at all), and qualifying the consequences of the situation when these requirements are not met.

4.5.9 Approach of the Member States

In Poland, the problem of the legal form of the producer's guarantee gave rise to vivid controversies in legal writing. Two opinions have been presented. The first, expressed by Żuławska⁵⁹¹ and Włodyka,⁵⁹² is that the obligations of the guarantor result from a unilateral legal act (unilateral promise). The other opinion, supported by Skąpski,⁵⁹³ Radwański,⁵⁹⁴ Czachórski⁵⁹⁵ and the case law,⁵⁹⁶ is that a contract between the producer and the consumer is concluded, when the seller hands over the guarantee document to the buyer. The seller plays the role⁵⁹⁷ of a messenger⁵⁹⁸ or an authorised representative.⁵⁹⁹ Żukowski⁶⁰⁰ classifies the producer's guarantee as a separate obligational relationship, although it is rather difficult to understand his view precisely. It is worth recalling the reasoning that was presented in order to classify the producer's guarantee as a unilateral act in law. The main protagonist of this option claimed⁶⁰¹ that creating a contractual relation between the guarantee holder and the producer leads to excessive and unnecessary complicacy in the legal relationship, especially given the function that is to be played by the final seller or the chain of intermediary sellers. Therefore, the easier route is to classify the guarantee as a unilateral legal act that gives rise to an obligation. Once the producer issues a guarantee document, it is equal to establishing an obligation towards the potential buyer. Such an obligation is created under the suspensive condition that the goods furnished with the guarantee will be sold and delivered to the buyer together with the guarantee card. Such a guarantee is classified as a legal act that must be directed to a specific addressee and must be accepted (either directly or *per facta concludentia*). A guarantee becomes valid when the seller delivers the goods to the buyer and the buyer accepts the goods furnished with the guarantee, together with the guarantee document.

The seller plays the function not only of a messenger (*posłaniec*) who transfers the obligation of the producer, but also, as commissioned by the producer, it fills in and individualises the content of the guarantee document (by, for example, indicating the date of purchase, the address of the entity who performs under the guarantee, etc.). Such activities of the seller may be qualified as the actions of an intermediary in so far as they shape the scope of liability of the producer (for example as to the period of liability). The obligation itself, however, is created earlier when the guarantee document is issued. Under German law⁶⁰² a commercial guarantee takes the form of the contract, however the acceptance requirement is slightly modified. In the case of a producer's guarantee usually the seller transmits the offer, and in doing so he acts as a messenger. The buyer accepts the guarantee simply by purchasing the

⁵⁹¹Żuławska 1975a, p. 41.

⁵⁹²Włodyka 1979, p. 130.

⁵⁹³Skąpski 1976, p. 153.

⁵⁹⁴Radwański & Olejniczak 2010, p. 337.

⁵⁹⁵Czachórski 1994, p. 294.

⁵⁹⁶Judgement of the Supreme Court of 21.03.1975, OSPiKA 1976, item 171, judgement of the Supreme Court of 5.01.1978, OSPiKA 1979, item 27.

⁵⁹⁷More about the function of the seller in the producer's guarantee in Chapter V, in the part Parties engaged in the guarantee relation.

Skąpski 1976, p. 154.

⁵⁹⁹Sołtysiński as referred to in Skąpski 1976, p. 154.

⁶⁰⁰Żukowski 2001, p. 45.

⁶⁰¹Żuławska 1975a, p. 41.

⁶⁰²Bittner & Rott 2009, p. 330.

goods. Under the normal rules on conclusion of a contract (§ 151 BGB) communication of acceptance is not necessary where the offeror would not expect such communication, which is the case with the producer's guarantee.⁶⁰³ Under German law, a pure advertisement, when there is no guarantee card or similar attached to the product, can also constitute an offer to conclude a guarantee contract.⁶⁰⁴ This is qualified as an offer to the entire world, however, limited to the persons who bought the goods. Objective interpretation in each individual case decides whether or not the statement constitutes a guarantee and who is the guarantor. Under Austrian law, the *unechter Garantievertrag* is a unilateral contract (*einseitigverpflichtender Vertrag*) that burdens only the guarantor who has made the promise.⁶⁰⁵ As a contract, it requires acceptance of the other party, which can be done by handing over the producer guarantee card to the consumer, where the seller is seen as an intermediary or as a messenger (*Bote*).⁶⁰⁶ It is not necessary that the consumer accepts the guarantee in a formal way – it can be done implicitly, also if the guarantee contract is made in advertising.⁶⁰⁷ Either a two party or three party relationship can be created. If a guarantee document that relates to a guarantee offered by a person other than the seller is handed over to the buyer then a two party relationship is created between the consumer and the guarantor. The seller acts as an intermediary and the consumer accepts the terms of the guarantee contract by accepting the guarantee card. However, if there is only a statement that the guarantee exists (for example in a catalogue), then the guarantee contract will be established between the producer and the seller (*Herstellergarantie*), because the consumer cannot accept the guarantee in such a case. In order to enable the consumer to benefit from the guarantee, such a guarantee contract is regarded as a contract for the benefit of a third party. Its legal basis is § 880 a of the ABGB: "If one party has promised to the other any performance by a third person, it must be considered as a promise of his intercession with the third person; however, if the promise guaranteed the success of his intercession, he is liable to the promise for full satisfaction if the third party does not perform." A similar construction has been accepted by the German BGH in the Isolar-Glas decision.⁶⁰⁸ Also in the Netherlands⁶⁰⁹ in the case of a guarantee provided by another party than the seller a separate contract is concluded, on the basis of Article 7:6a(5)(a) of the Civil Code.

Under Greek law,⁶¹⁰ if the guarantee is given by a third party, it has been accepted that the third party (e.g. the producer) makes a declaration of will, an offer "to whom it may concern". The seller acts as a conduit for this declaration to the buyer, who usually accepts it tacitly.⁶¹¹ In case the buyer is required to fill in his personal details and send the guarantee card to the producer, the contract is concluded when the guarantee document arrives to the producer.⁶¹² The statement of the guarantee provision is informal and does not require manifest expressions, as long as the relevant intention of the guarantor to be legally bound by his offer is evident, even through interpretation of the relevant declaration of will.⁶¹³ Under Belgian

⁶⁰³ BGH, 24.6.1981, 2248 as referred to in Bittner & Rott 2009, p. 330, footnote 47.

⁶⁰⁴ Bittner & Rott 2009, p. 330.

⁶⁰⁵ Dittrich/Tades 1999, p. [xxx.]

⁶⁰⁶ OGH 3.12.1974 = SZ 47/138.

⁶⁰⁷ Augenhöfer 2009, p. 181, footnote 78, 79.

⁶⁰⁸ Lehmann/Dürschmidt, Haftung für irreführende Werbung über Garantien, GRUR 1997, 549 (552) mwN.

⁶⁰⁹ Loos 2004, p. 37-38.

⁶¹⁰ Karakostas & Voulgari 2009, p. 347.

⁶¹¹ Paparseniou 2008, p. 267.

⁶¹² Karakostas & Voulgari 2009, p. 347.

⁶¹³ Kornilakis 2002, p. 300-301, as referred to in Karakostas & Voulgari 2009, p. 347, footnote 21.

law, the binding force of the producer's guarantee is based on the offer made by the producer and accepted by the seller, which gives rise to a direct contractual relationship between the producer and the consumer.⁶¹⁴ The consumer's acceptance is automatic and follows from the conclusion of the sales contract with the final seller, the contract is implicitly concluded and the guarantee constitutes a contract parallel to sales contract. In Italy a guarantee offered by the producer (or previous reseller) constitutes an autonomous juridical act, separate from the contract between the seller and the consumer.⁶¹⁵ The nature of this act is disputed in the legal writing. According to the view presented by Ghidini such a guarantee should be regarded as a unilateral promise, which means that the guarantee statement is considered immediately binding on the producer on the basis of Article 1989 of the Civil Code, although its obligatory consequences could be postponed.⁶¹⁶ The opposite view, presented by Sbisà is that a guarantee requires an agreement between the guarantor and the final buyer.⁶¹⁷ The guarantee statement should therefore be considered as an offer addressed to the public. According to Article 1336 of the Civil Code such an offer should contain all the essential elements of the contract, which the offeror wants to conclude. An acceptance is required⁶¹⁸ for a binding undertaking to arise,⁶¹⁹ however since the guarantee is given without any charge and the offer aims at concluding a contract under which only one undertakes a promise (unilateral contract) Article 1333 of the Civil Code applies. According to its wording a contract is concluded without an acceptance unless the offeree refuses the offer within the time limit indicated by the offeror. Therefore, at least in the case of gratuitous guarantees, the guarantee is a contract, but its formation does not require a specific acceptance, the failing refusal being legally equivalent to an express tacit acceptance by the consumer, which brings the producer's guarantee very close to the category of unilateral promise. In Spain if the guarantor is the producer, then it is understood that a contract of guarantee has been formed at the moment of the formation of the contract of sale.⁶²⁰ In Estonian law a guarantee is a contract concluded between a buyer and the producer or other guarantee provider.⁶²¹ § 230(1) LOA provides that a guarantee is a promise, made by a seller, previous seller or producer. It constitutes an offer that must be accepted by the buyer. The acceptance has not to be direct or in any particular form. The guarantee contract is concluded usually with the conclusion of the sales contract or at the moment when the goods are handed over to the buyer. If the guarantor is not the seller, the seller acts as an intermediary between the buyer and the guarantor or as a representative of the guarantor.⁶²²

Under Irish law, the situation is quite specific as, according to section 19 of the Sale of Goods and Supply of Services Act, a guarantee can only be offered by the manufacturer or any supplier, other than the retailer, in connection with the supply of any goods. Sections 15 to 19 Sale of Goods and Supply of Services Act established a quasi-contractual relationship between the buyer and the manufacturer or intermediate supplier of the goods.⁶²³ Liability of the guarantor is contractual in nature and the court may order the guarantor to take such

⁶¹⁴ Rutten, Straetmans & Wuyts 2009, p. 205.

⁶¹⁵ De Cristofaro 2002, p. 1174 et seq., 1182, as referred to in Troiano & Bisazza 2009, p. 404.

⁶¹⁶ Ghidini 1970, p. 129 as referred to in Troiano & Bisazza 2009, p. 404, footnote 56.

⁶¹⁷ Sbisà 1974, p. 262 as referred to in Troiano & Bisazza 2009, p. 404, footnote 58.

⁶¹⁸ Troiano & Bisazza 2009, p. 405.

⁶¹⁹ Troiano & Bisazza 2009, p. 404.

⁶²⁰ Bercovitz Rodriguez-Cano 1987, p. 218, Fenoy Picón 1996, p. 357, Reyes López 2005, p. 201 as referred to in Navas Navarro 2009, p. 532.

⁶²¹ Kull 2009, p. 282.

⁶²² Kull 2009, p. 282.

⁶²³ Grogan, King and Donelan 1983, p. 29.

actions as is necessary to observe the terms of the guarantee or to pay damages.⁶²⁴ Under Scots law, a guarantee is classified as a contract or unilateral promise.⁶²⁵ If a guarantee is offered for no consideration, it is classified as a unilateral promise, which constitutes an independent obligation under Scots law. A guarantee offered for consideration would be governed by the law of contract, and so a guarantee offered by the manufacturer who was not the seller could be considered, whether as a promise or as an offer (which the buyer might accept by, for example, returning a card to the manufacturer.⁶²⁶)

4.5.10 The Problem in the UK

Before the implementation of the Consumer Sales Directive, English law experienced problems with the enforcement of producers' guarantees on the grounds of lack of consideration. In 1986, research conducted by the Office of Fair Trading showed that one of the problems in the area of guarantees was related to the lack of legal enforceability of many manufacturers' guarantees.⁶²⁷ Cranston very accurately described the situation by saying that the legal status of manufacturers' guarantees was uncertain and unsatisfactory.⁶²⁸

The most famous English case that dealt with the problem of the producer's guarantees was *Carlill v. Carbonic Smoke Ball Company*.⁶²⁹ The defendant was a manufacturer of smoke balls, which was claimed in newspaper advertisements, would prevent influenza if taken in the prescribed manner. The company offered £100 to anyone contracting influenza after using the smoke ball, and £1000⁶³⁰ was placed on deposit at the Alliance Bank to show sincerity. Mrs Carlill used the smoke balls as directed but caught influenza and she successfully brought an action against the manufacturer. The most important part of this case was that the smoke ball was not purchased from the manufacturer but from a druggist; and yet the privity point was not argued.⁶³¹ Another example of enforcement of a guarantee, on the basis of the collateral warranty theory, is *Shanklin Pier Ltd. v. Detel Products Ltd.*⁶³² This case involved a manufacturer being held liable after having induced the owners of a pier to prescribe that the decorating contractors use their paint by erroneously representing that it was suitable for use on the pier.

Different opinions have been expressed as to the possibility of enforcing a guarantee. According to Bradgate and Twigg-Flesner, under common law a guarantee was enforceable, if at all, as a contract, so it must have satisfied all the requirements necessary for the creation of a valid contract: an offer by one party accepted by the other, consideration for undertaking in the guarantee and the intention for the guarantee to be legally binding.⁶³³ According to Cranston, a commercial guarantee offered by a retailer could be binding if incorporated into the contract of sale.⁶³⁴ In addition, the commercial guarantee of a manufacturer could constitute a collateral contract with the ultimate consumer, which has been recognised by the

⁶²⁴ White 2000, p. 6.

⁶²⁵ Hogg 2001, p. 338.

⁶²⁶ Hogg 2001, p. 338, Cusine 1980, p. 185.

⁶²⁷ OFT 1986, p. 17.

⁶²⁸ Cranston 1995, p. 112.

⁶²⁹ [1892] 2 Q.B. 484.

⁶³⁰ Howells & Bryant 1993, p. 7.

⁶³¹ Simpson 1985, p. 345.

⁶³² [1951] 2 K.B. 954.

⁶³³ Bradgate, Twigg-Flesner 2003, p. 182.

⁶³⁴ Cranston 1995, p. 112.

Unfair Contract Terms Act 1977.⁶³⁵ For Whincup,⁶³⁶ who said that “it is perhaps best to regard manufacturers’ guarantees as expressions of good public relations,” the conclusion that follows from *Carlill v. Carbolic Smoke Ball Co.* is that a buyer who can show that he bought or used goods knowing they were guaranteed might persuade the court that he bought or used them at least partly because and in return for that promise. In his opinion,⁶³⁷ another way to give consideration included stamping the guarantee card and returning it or buying the guarantee separately at the time of the purchase. If the guarantee was given after the completion of the sale contract and there was no requirement to return it to the manufacturer, or the buyer became aware of the guarantee at that time, the problem of enforceability would appear. Howells & Bryant claimed⁶³⁸ that there are two ways in which the producers’ guarantee may be binding even if the goods were bought from a retailer. First, the guarantee may be the subject of a second parallel contract, which requires some consideration on the part of the consumer. They introduced a gradation: consideration will exist where the consumer pays a separate amount for the guarantee; will almost certainly exist where the consumer has to return a questionnaire to qualify for the guarantee; and could probably be found to exist where the consumer has to merely register his guarantee. Second, it is possible to see the guarantee as a collateral contract, under which the consumer’s consideration is the entry into the contract with the retailer, which of course indirectly benefits the manufacturer, as in *Carlill v. Carbolic Smoke Ball Company*. According to Dickie,⁶³⁹ consideration on the part of the consumer could be established, because part of the price paid goes to the manufacturer. Concerning the claimed lack of intention to create a contractual relationship, Dickie claims⁶⁴⁰ that it arguably is an irrelevance, because the manufacturer should not be able to benefit from the consumer’s purchase without bearing the corresponding burden, by claiming the lack of intention to create a contract. Dickie argues that the consumer certainly thinks that he is getting something when he buys a product with a manufacturer’s guarantee, and therefore the manufacturer should not be able to escape these legitimate expectations of the consumer.

Similar practical problems relating to the question of privity of contracts and consideration were suffered before introduction the Sale of Goods and Supply of Services Act by Irish law. Grogan, King and Donelan provide examples,⁶⁴¹ like the issue of whether the buyer signing and returning to the manufacturer the slip attached to the guarantee would create a contractual relation, and what if the buyer did not know about the existence of the guarantee at the time of concluding the sale contract.⁶⁴²

4.5.11 *The peculiar case of obligatory guarantees*

The problem of obligatory guarantees is currently not very pressing at the EU level. It is, however, perhaps worth mentioning for the sake of clarity. The case of obligatory guarantees is quite specific, as the person indicated by law must create the guarantee or the guarantee is established *ipso iure*. It means that even if the law requires certain formalities for a valid offer or the conclusion of a contract, they will be irrelevant in the case of an obligatory guarantee

⁶³⁵ Ibidem, p. 112.

⁶³⁶ Whincup 1999, p. 19.

⁶³⁷ Ibidem, p. 19.

⁶³⁸ Howells & Bryant 1993, p. 7.

⁶³⁹ Dickie 1997, p. 170.

⁶⁴⁰ Ibidem, p. 170.

⁶⁴¹ Grogan, King and Donelan 1983, p. 29.

⁶⁴² Ibidem, p. 29.

that is going to be created *ex lege*. Such a scheme is present in Slovenia,⁶⁴³ Greece⁶⁴⁴ and used to be present in the Polish legal system.⁶⁴⁵

5. Legal guarantee and commercial guarantee – internal and external relationships between two regimes

5.1 Introduction

5.1.1 General

The relationship between the statutory regime of liability under the consumer sales contract and the guarantee offered in relation to such a sale constitutes one of the fundamental areas in the analysis of the guarantee. Since the existence of the consumer sales guarantee is based on the prior conclusion of the sales contract, the interdependence between statutory liability under the contract of sales and the guarantee always exists, be it legal or factual. As the Green Paper of 1993 rightly pointed out,⁶⁴⁶ in the situation when the two types of the guarantee co-exist they are complementary and juxtapose to a certain extent. In addition, the PEELS in the comments admitted⁶⁴⁷ that the borderline between the conformity regime and a consumer sales guarantee is not evident. The unclear relation between the two regimes is one of the greatest (if not the greatest) problems created by the guarantee in the consumer context.⁶⁴⁸

The interdependence may be discussed from two different perspectives. First, it is the relation between the guarantee and the statutory regime, considered from an external perspective, i.e. the reciprocal position of the two regimes in the legal system. This involves answering questions such as: do the two regimes co-exist, can they be invoked in parallel, or does one of them have priority over the other, etc. The second level has to do with the internal relationship, which deals with the influence the two institutions may exert on each other's content.

5.1.2 Why is this mutual relation so important?

Setting clear borders between the statutory liability regime and the guarantee introduces certainty into legal relations. It makes it easier for the consumer to establish what rights he has in a given situation, and to evaluate whether the guarantee offers him any benefits at all. However, as already indicated in Chapter I and other parts of this book,⁶⁴⁹ making this distinction is at least problematic and sometimes not really possible in practice, especially for consumers. The problems that appear as a result of the unclear position of the two regimes against each other are very accurately characterised by the Green Paper of 1993,⁶⁵⁰ according to which neither legal literature nor case law are able to clearly explain the relationship between legal and commercial guarantee. The Green Paper underlines that the difficulty in distinguishing the statutory regime from the guarantee is especially visible in the “public mind”, where, as a rule, the consumer is unaware of the existence of the legal guarantee and knows only of the commercial guarantee. The Green Paper of 1993 underlines also certain

⁶⁴³ PEELS 2008, p. 362.

⁶⁴⁴ Article 5(4) Law 2251/1994.

⁶⁴⁵ Żuławska 1975a, p. 38

⁶⁴⁶ Green Paper of 1993 p. 13.

⁶⁴⁷ PEELS 2008, p. 375.

⁶⁴⁸ Bradgate, Twigg-Flesner 2003, p. 170,

⁶⁴⁹ See for example Chapter IV part 2. The name or part 4. The legal form of a guarantee.

⁶⁵⁰ Green Paper of 1993, p. 13.

characteristic problems, which are associated with the use of a guarantee.⁶⁵¹ First, when there is no guarantee, or when it cannot be invoked, the consumer believes he has no rights. Second, if there is a guarantee, in many cases the consumer believes that his rights are limited to the contents of the guarantee.

The references to the relationship between the guarantee and the statutory liability regime appear throughout the entire thesis in greater detail, so this part only aims at presenting a structured overview of the problems that could be observed in this particular area.

5.2 The external relationship between the statutory liability regime (conformity) and guarantee

5.2.1 The external relationship – general

Tenreiro describes the relationship in a general manner by saying that “the commercial guarantee does not, in principle, replace the legal guarantee, but supplements it, which raises complicated problems of coexistence when the consumer makes a claim under both of them simultaneously or in succession in order to obtain complete satisfaction.”⁶⁵² The Green Paper of 1993⁶⁵³ identifies two “principles” that characterise the relationships between the statutory regime and the guarantee.

1. The principle of complementarity: the consumer’s right to demand the simultaneous application of the legal guarantee and the commercial guarantee with a view to granting full compensation (example: the right to invoke the commercial guarantee in order to demand the repair of the product, and the legal guarantee in order to demand compensation for other damage caused by the defect in the product).
2. The principle of subsidiarity of the legal guarantee: when the consumer has chosen to invoke the commercial guarantee, this should not prevent him (by virtue of time limits, for example) from invoking the statutory regime when he has not obtained satisfaction (example: termination of the sale under the terms of the statutory regime after the seller has genuinely attempted to repair the goods under the terms of the commercial guarantee).

To sum up, there are several options available. First, the two regimes can be situated parallel to each other, which in principle gives the consumer a possibility to decide, which system to choose. Second, the legislator can expressly indicate which of the two regimes should be referred to as the first one.

5.2.2 Parallel regimes

The situation where the conformity regime and the guarantee exist next to each other is the typical one. At the EU level, the Consumer Sales Directive does not deal with this problem explicitly, though it clearly states in Article 6(2) that the consumer has legal rights under the applicable national legislation governing the sale of consumer goods, and that those rights are not affected by the guarantee. The initial version of the Draft Consumer Rights Directive also repeated this solution – Article 29(2)(a) requires a clear statement in the guarantee document that the legal rights of the consumer are not affected by the guarantee. Also the DCFR (Article 6:103(1)(a)) required that the guarantee document must contain a statement that the

⁶⁵¹ Ibidem, p. 13.

⁶⁵² Tenreiro 1995, p. 81.

⁶⁵³ Green Paper of 1993, p. 92.

buyer has legal rights not affected by the guarantee. The same requirement is repeated in the DCFR (IV.A.-6:103). The comments to both, the PELS and the DCFR, do not however, elaborate on the problem of the reciprocal relationship between the guarantee and conformity.

The parallel scheme means that conformity and the guarantee exist next to each other, and the consumer has a free choice as to which of the regimes to invoke. The fact of offering the guarantee cannot suspend or have any negative impact on the possibility to pursue remedies under conformity by the consumer.

5.2.3 Problems of the parallel regimes

The parallel scheme, despite its apparent simplicity, gives rise to many questions. The practical problems, which relate to the parallel placement of the two regimes, are dealt with elsewhere.⁶⁵⁴ Here, it suffices to say that one of the most important problems raised by the guarantee is that it tends to hide (in the eyes of the consumer) the fact that the statutory regime exists.

A theoretical problem (but one with a very strong practical relevance) that appears instantly is whether the choice of the regime is utterly unlimited or whether certain restrictions do exist in this respect. It is evident that the consumer is bound by the scope of each of the regimes, concerning the liable party as well as the goods' deficiency or defects covered by the given regime and the fact that the claim must be within the scope of the relevant regime. If the guarantor is at the same time the seller, it will be very important to clearly indicate to which regime the claim refers to, as the scope of protection, as well as the remedies, might differ.

However, once the consumer has made a choice, a number of questions appear, which are difficult to answer *in abstracto*. If the consumer chooses one of the regimes, can he later switch to the other one? At and until what point should the change of the regimes be allowed? Can the consumer choose to pursue some claims under the conformity regime, and at the same time some under the guarantee regime, as the Green Book of 1993 seems to suggest – in other words can the consumer pursue his rights under two regimes simultaneously? Can the consumer claim under the second regime before he exhausts all possibilities under the first regime? Can the consumer seek the same recourse as is available under the regime initially chosen under the other regime? If the consumer is not entirely satisfied with the result he has achieved under one regime, can he claim the remainder under the second one? Can the consumer pursue the claims under the guarantee if the sales contract collapses?

The crux of the problem here is that the consumer, on the one hand should be able to fully explore and use the possibilities granted by the two regimes, and on the other hand should not be able to abuse his rights and remedy the same problem twice. And so, if the remedies offered by the conformity regime and the guarantee are different or the scope of the offered protection is different, the consumer should be able use both avenues. The question, whether the consumer should be able to apply it simultaneously or one after the other, although at the first site it looks rather technical it may be a source of major problems. For instance, the consumer claims repair under the commercial guarantee, and the repair is unsuccessful. The consumer may then want to claim repair from the seller. However, the seller may then argue that the problem was actually caused by the producer's unsuccessful repair. The problem is even bigger if the producer has replaced the goods, as then the defective goods are not the ones provided by the seller. In this latter case it could be argued that the seller is not liable

⁶⁵⁴ See: Chapter V, part 9. Transparency requirements.

anymore since the consumer has accepted the replacement by the producer. Next, the consumer should not be able to remedy the same problem twice, if the first attempt to remedy was completely successful. For example if the goods were successfully repaired under the conformity regime the consumer should not be allowed to claim a price reduction under the commercial guarantee (unless the commercial guarantee expressly says so). In such a case, the situation is much more complicated when the guarantee is given by the producer, because in such a case the possibility of monitoring the actions of the consumer is much more limited and co-operation between the seller and the guarantor could be required. Moreover, if the guarantee by the producer introduces special maintenance requirements, or the goods are protected with some kind of protective seals, performing repairs under the conformity regime may lead to the nullification of the guarantee, because the terms of the guarantee are not observed.

After the implementation of the Consumer Sales Directive, all Member States accepted the scheme introduced therein. So far, it has not given rise to many controversies, although the subject was mentioned before the introduction of the Directive, for example in Great Britain. The DTI⁶⁵⁵ expressed the opinion, supported by Howells and Bryant,⁶⁵⁶ that the consumer should not be forced to choose between their right under guarantee and statutory rights, and claimed that it is at least arguable that time taken up in pursuing rights under a guarantee should not prejudice the consumer's right to reject.

Some of the Member States did have a regulation concerning this particular problem before the introduction of the Directive. For example, according to section 16 of the Irish Sale of Goods Act, the rights arising under guarantee are additional to the buyer's rights under common law and under statute, and these rights cannot be excluded or limited by the guarantee.⁶⁵⁷ A good illustration of this situation is also Article 579 of the Polish Civil Code, which, however, does not apply to consumer sales. According to its wording, the buyer may exercise his rights under the warranty for physical defects independently from the entitlements arising under the guarantee. On the grounds of this rule, three different ways of reasoning were created.⁶⁵⁸

Firstly, if the person entitled under the guarantee makes a choice concerning the regime of liability, this choice is definite, which means that it eliminates the possibility to refer to the other regime. So, for example, if the beneficiary of the guarantee decides to claim under the guarantee, then the beneficiary is not able to refer to the statutory entitlements. The first choice of the consumer is, in other words, decisive in establishing the regime of liability.⁶⁵⁹ There are some cases decided by the Supreme Court that are referred to as confirmation of the correctness of this interpretation.⁶⁶⁰ However, the Court dealt with a quite specific situation when the contract of sale is terminated and the guarantee, as accessory, collapses as a result, which might hardly be applied as a general rule.

Second, there is an opinion whereby the parallel placement of the statutory regime and the guarantee applies throughout the entire period covered by them, and the consumer has a

⁶⁵⁵ DTI 1992, pp. 7-8.

⁶⁵⁶ Howells & Bryant 1993, p. 10.

⁶⁵⁷ White 2000, p. 6.

⁶⁵⁸ As referred to in Żuławska 1999, p. 91

⁶⁵⁹ Krauss 1997, p. 16

⁶⁶⁰ Judgement of the Supreme Court of 26 November 1997, OSP 1998, item 12; judgement of the Supreme Court of 12 February 1997, OSNC 1997, item 85.

(separate) choice in relation to every defect that appears.⁶⁶¹ In this case, the choice of the regime once made with regards to a certain defect is binding, unless the defect was not properly remedied under the chosen regime.

Third, there is an opinion whereby the beneficiary of the guarantee may rely on both of the regimes independently, at the same time and without limitations, until the required effect is reached.⁶⁶²

5.2.4 Priority of one of the systems – guarantee to be invoked before the legal regime can be activated

The most extreme structure is constituted by a rigid separation of the two regimes, with priority given to the guarantee, once it is provided. In such a situation, the consumer is bound to claim under the guarantee first, and the statutory regime comes into play only as the second choice. The question instantly appears: when exactly can the consumer refer to the statutory regime? There are several possible solutions: first, when the claim he has made under the guarantee was not successful, i.e. the result that the consumer wanted to achieve was not achieved. Second, considering that there might be a difference between the scope of protection offered by the statutory regime and the guarantee, it might be that the guarantee will not offer the recourse the consumer is looking for. However, the priority of the guarantee usually comes hand in hand with the fact that guarantees are obligatory in the legal system in question, and in this situation the content of the guarantee is in most cases regulated by law.

An example of such a structure can be found under the former Polish regime in force from 1965 to 1996. The wording of Article 579 of the Civil Code, which dealt with this matter, was very explicit. A buyer who received a guarantee could exercise his rights under the warranty for physical defects (statutory liability) only if the seller did not comply in due time with his obligations resulting from the guarantee. This restriction did not apply to the obligation to redress the damage suffered as a result of a defect. In practice this rule did not work properly. The scope of guarantees offered was normally more restrictive than the scope of the buyer's entitlements arising under the statutory regime. This led to severe abuses – guarantees offered very long protection periods, and many, often unsuccessful, repair attempts were accepted. It was meant to separate the buyer from claims under the statutory regime. The situation was met with severe criticism,⁶⁶³ leading to reform in 1996. The new rule (Article 579 of the Civil Code) states that the buyer might exercise his entitlements under the statutory regime for physical defects in the sold goods independently from the entitlements arising on the basis of the guarantee.

5.3 The internal relationship

5.3.1 General

With regard to the internal relationship between the statutory regime and the guarantee, there is a need to distinguish between guarantees provided by the seller and by third parties (primarily – the producer). The most important difference between them is that the seller, as a party to the sales contract, can theoretically change the content or the scope of the statutory

⁶⁶¹ Brzozowski 2008 p. 85, Radwański, Panowicz-Lipska 2009 p. 44, Żuławska 1999, p. 91, Łętowska 1999 p. 439.

⁶⁶² Mazurkiewicz 1997, p. 15, as quoted in Żuławska 1999, p. 91.

⁶⁶³ Skąpski 1976, p. 152, Żukowski 2002, p. 42.

liability under the sales contract by guarantee, whereas the producer (or any other third party), as a party external to the sales contract, is unable to do so.

When discussing the impact that the statutory regime and the guarantee might have on each other's content, various scenarios can be distinguished. One can talk about a direct or an indirect potential impact. In the case of the direct impact, two options may be envisaged. First, the statutory entitlements may constitute the minimum guarantee content, in other words the guarantee must offer more than conformity. Second, if the statutory regime is not mandatory, the guarantee may be used as a tool to change the content of the statutory regime. Referring to the indirect impact, it takes place when the statutory liability regime includes the expectations of the consumer as an element that shapes the scope of liability, and the expectations are elevated as a result of the fact that the goods are furnished with a guarantee.

5.3.2 The direct impact

As already stated, the direct impact may take place in two different situations. The first is when the statutory regime of liability constitutes the minimum standard for the guarantee content. As the problem of the additional advantage is thoroughly discussed elsewhere in the book,⁶⁶⁴ a mere reference to this matter is sufficient here.

The second situation is when the guarantee might change the content of the statutory regime, which has a non-mandatory character. This problem is discussed in the previous part of the chapter.⁶⁶⁵ Additionally it can be mentioned that the direct impact may also concern specifically the duration of the statutory regime. Under the former Polish regime, according to Article 581 Paragraph 3 of the Civil Code, the time limit for exercising the rights under the warranty for physical defects could not terminate earlier than three months after the lapse of the time limits of the guarantee.

5.3.3 The indirect impact

As indicated in the introduction to this part of the analysis, the indirect impact of the guarantee on the statutory regime of liability depends on the construction of the liability system. If the scope of the seller's liability under the statutory regime depends on the expectations of the consumer (reasonable, justified, etc) then the simple fact of offering the guarantee by the producer may intensify the expectations of the buyer. The guarantee in this case signals the good quality of the goods to the consumer (in accordance with the signalling theory), and so it is reasonable on the part of the consumer to expect a good quality (above average⁶⁶⁶) of the goods sold. In this case, by influencing the expectations of the consumer, the guarantee influences the content of the statutory regime.

The system of liability under the Consumer Sales Directive is based on the principle that the expectations of the consumer constitute one of the elements that should be taken into account when establishing the scope of conformity. Article 2(2)(d) of the Directive clearly states that consumer goods are presumed to be in conformity with the contract if they show the quality and performance which are normal in goods of the same type, and which the consumer can reasonably expect, given the nature of the goods and taking into account any public

⁶⁶⁴See Chapter III, part **Guarantee offering an additional advantage** and Chapter V, part **Establishing the content by reference**.

⁶⁶⁵See Chapter IV, part **The internal relationship**.

⁶⁶⁶Riesenhuber 2001, **p. 350-351**.

statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

The influence then, in fact, can have two sources: first the bare fact that the guarantee accompanies the goods raises the expectations of the consumer in general, concerning the quality of the goods. Second, it could be argued that the guarantee constitutes a public statement (in particular taking into account the reference to advertising and labelling). Therefore, the specific statements relating to the content of the guarantee will also have an impact on the content of conformity. It is, however, difficult to say how direct the impact will be in such a case. In other words, it is difficult to evaluate, on the basis of the wording of the Directive, whether statements contained in advertising or on labelling should be read expressly – i.e. the guarantee of the producer, as far as it is publicised, should constitute a part of the conformity content, or whether it simply elevates the expectations of the consumer concerning the goods in general. On the one hand the Directive places stress on the reasonable expectations – i.e. elevation of the general standard. On the other hand it refers *expressis verbis* to public statements on the specific characteristics of the goods, which suggests rather concrete qualities of the goods, to which the statements refer. At the same time, the Directive introduces a way to limit the seller's liability. According to Article 2(4), the seller will not be bound by public statements referred to in paragraph 2(d) if he: (1) shows that he was not, and could not reasonably have been, aware of the statement in question, (2) shows that, at the time of conclusion of the contract, the statement had been corrected, or (3) shows that the decision to buy the consumer goods could not have been influenced by the statement.

The PELS approach this problem in a slightly different way. According to Article 2:202(f) PELS, the goods must possess such qualities and performance capabilities as the buyer may reasonably expect. The comments explain⁶⁶⁷ that this is a general quality standard that depends on the buyer's expectations. However, the comments do not refer explicitly to the source of the consumer's expectations. At the same time, Article 2:203 PELS introduces a rule that deals with statements of third persons. Paragraph 1 of this article reads that the goods must possess the qualities and performance capabilities held out in any relevant statement on the specific characteristics of the goods made about them by a producer, professional distributor or person in earlier links of the business chain. There are two differences that can be observed. Firstly, Article 2:203 PELS deals with all statements, not only public ones. Secondly, PELS is very explicit about the consequences of such statements, namely that the goods must possess such qualities. So, if a guarantee could be classified as a statement within the meaning of Article 2:203(1) PELS, it could influence the content of conformity even in a more direct way. The Article introduces a similar limitation of liability as the Consumer Sales Directive. According to Article 2:203(2) PELS, the seller is not bound by any such statement if: (a) the seller was not, and could not reasonably be expected to have been, aware of the statement, (b) the statement had been corrected by the time of the conclusion of the contract; or (c) the buyer's decision on whether to buy the goods or on what terms could not have been influenced by the statement.

The second type of situation is when the liability of the seller is based on standards set out in an objective manner, which means that the subjective expectations of the consumer do not have any impact on the scope of the seller's liability. The rules in the Polish Civil Code on the seller's liability are constructed rather objectively, so on their basis the bare fact that the producer offers a guarantee cannot in any way impact the scope of liability of the seller under

⁶⁶⁷ PELS 2008, p. 194.

the statutory regime.⁶⁶⁸ The situation might be different if it is the seller himself who offers the guarantee, but in this case a direct impact is also possible.

6. Conclusions

6.1 General

As stated in the introduction, the aim of this chapter was to outline and structure the general problems that exist with regard to the consumer sales guarantee, i.e. the name of the guarantee, the voluntary and obligatory nature of the guarantee, its legal form and the relationship between the guarantee and the statutory regime of liability in the sales contract.

The way the indicated areas are regulated decides how the guarantee functions in a given legal system. At the moment, these problems remain mostly in the competence of the national legislators, which follows from the concept of harmonisation (or approximation) of the legal systems of the Member States in the area of private law through directives. There are two main reasons that explain this. First, the directives require transposition into the legal systems of the Member States. Second, the directives regulate only certain aspects of the legal institutions they deal with. In principle they are not concerned with the rules that anchor the regulated institutions in the national legal system.

In the case of the consumer sales guarantee, the regulation contained in the Consumer Sales Directive, as shown in Chapter III, is rather scarce, and all the questions relating to the functioning of the guarantee in the legal system are left for the transposition and implementation process – i.e. for the national legislator. Only rarely does the Directive touch upon certain aspects of these matters – it gives the name to the guarantee, establishes the guarantee as a binding undertaking, and declares that the guarantee cannot waive consumer rights. As long as there is no interest in creating a fully functional legal system at the EU level this approach is correct and there is no need to regulate the general issues more comprehensively at that level (although some clarity could be beneficial, as follows from the analysis in Chapter III).

However, if development at the EU level takes another direction, i.e. aims to create a coherent system that does not need support from national legal systems in order to function (or this support will be marginal) then the general issues establishing the guarantee in the system will have to be taken into the account.

6.2 Specific areas

This chapter has shown that the general issues relating to the guarantee are not in the centre of attention of the national legislator. The lack of regulation may cause practical problems, especially as the EU rules do not provide much guidance as to the interpretation. In principle, the case law and the legal writing may solve these problems. However, assuming that all problems can be solved in this way might be overly optimistic. Consumer cases have a tendency not to reach the courts, so the problems rarely surface (the lack of cases in this area should not be interpreted as a lack of problematic areas).

To sum up the findings of this chapter:

⁶⁶⁸Żukowski 2002, p. 40.

1) Regarding the name, it could probably be more effectively regulated on the EU, bringing greater coherency to the way the guarantee is perceived across the EU.

2) The legal character: voluntary vs obligatory guarantees. The issue of the legal character of the guarantee is normally expressly regulated by the laws of the Member States. Moreover, EU law provides guidance in this regard – the archetype of the guarantee is hence a voluntary guarantee. If the Member States want to maintain the rules on obligatory guarantees – they must clearly indicate the scope of the obligation with regards to the object as well as the parties obliged by them. It is worth noting that obligatory guarantees are allowed because of the minimal character of harmonisation accepted in the Consumer Sales Directive. If the minimal harmonisation were to be replaced by full harmonisation, the possibility of maintaining such rules would be highly questionable.

3) The legal form. The question of the legal form is decisive for establishing the rules applicable to the guarantee (formation, validity, interpretation etc.). Although EU law touches upon this problem (guarantee is a binding undertaking according to the Consumer Sales Directive), it is definitely not precise enough to allow effective functioning of the guarantee in practice. Not all of the Member States have explicit rules in this regard, which could probably be explained by the fact that the need for legislative intervention in the area of guarantee before the Consumer Sales Directive was not recognised in many Member States (which is one of the paradoxes of the guarantee). I do not think that it would be legitimate to say that every legal system should have rules in this regard, because in my opinion, these issues could easily be solved through case law or legal doctrine (although – legislative intervention could prove to be more effective, certainly in terms of effective timing). As long as the EU regulation remains fragmented, there is no need for further regulation.

4) If it comes to the question of the relationship between the statutory regime and the guarantee, the EU rules touch on the problem, but do not go into sufficient depth. Since some of the problems that appear in this area (those relating to the process of claiming under the statutory regime and the guarantee and the possibility of changing from one regime to another) have a strong impact on the way the guarantee functions in practice, it could turn out to be beneficial to bring about more clarity. The question of whether legislative intervention would be required remains open.

Chapter V Analysis of the consumer sales guarantee – specific part

1. General introduction

This chapter analyses in principle the areas considered for the EU regulation in the Green Paper of 1993, that is: the defects covered by commercial guarantees, the parties honouring the guarantee and the beneficiaries of the guarantee, the consumer's rights as regards invoking the guarantee, the duration of the guarantee, the formal conditions for invoking the guarantee, other services, the presentation of the commercial guarantee as compared with the legal guarantee, and the territorial scope of the guarantee.⁶⁶⁹ This chapter therefore discusses aspects of the guarantee that have a clearly practical dimension. They do not deal directly with the way the guarantee is embedded in the national legal system, but they are concerned with the way the guarantee functions on the market. As such, the practical aspects are interesting from the point of view of the legislation at EU level, which is focused on practical matters rather than on the theoretical considerations.

Such an approach is correct if the model of the EU regulation is based on a directive as the tool that transmits the EU-made rules into the national legal system. In such a model, the Member States decide internally on how the rules of directives are embedded into the structure of national legal systems. The approach of the Green Paper, therefore, goes much deeper than the scope of Article 6 of the Consumer Sales Directive, and it covers both the issues that were expressly dealt with or mentioned by the Consumer Sales Directive, as well as the issues that were omitted.

This chapter divides the analysed matter into three parts. It begins with the parties engaged in the guarantee relation, where the subjects that may participate in the guarantee relation are discussed. The next part investigates the issues related to the content of the guarantee, which means the widely understood guarantee cover (the covered defectiveness, the remedies, the payment for the guarantee, the guarantee duration and the limitations of liability). The third part concentrates on the transparency requirements. It deals respectively with: different perspectives of assuring the guarantee's transparency, information allowing an informed choice by the consumer, putting the guarantee in the proper context, information that allows the enforcement of the guarantee, the guarantee document, language and formulation of the guarantee document, situation when the transparency requirements are not met and at the end it briefly mentions the problem with advertising.

2. Parties engaged in the guarantee relation

2.1 Introduction

The approach adopted in this part of the analysis accepts a wide perspective on discussing the "parties" of a guarantee. It takes into consideration all the entities that directly participate or might be engaged in offering, accepting or performing under the guarantee. I do not use the expression "parties of a guarantee" intentionally. To begin with, one can only talk about

⁶⁶⁹ Green Paper of 1993, pp. 72-78.

parties if there is a contract, and, as has been already shown in the previous chapter,⁶⁷⁰ the legal nature of the guarantee is not limited to contracts. The formula “parties engaged in the guarantee relation” is flexible enough to cover not only the relation that exists directly between the issuer and the recipient of the guarantee, but also other parties that may meet certain functions in the relation created by the guarantee, for example the seller as the party who transmits the guarantee of the producer (or of another third party) to the consumer, a third party who performs the guarantee services on the basis of a contract with the guarantor, etc. Adopting this approach gives an opportunity to present the entire system of legal relations that might be created by the consumer sales guarantee. Additionally, it shows that the guarantee is not as simple a legal construction as one might think on the basis of the very modest regulation in the Consumer Sales Directive.

In this part, the analysis deals with two main questions: first, the parties that could be engaged in the relations created by a guarantee, and second: how this engagement could look. The analysis divides the area into three parts: (1) the party who offers the guarantee and the party who transmits the guarantee to the buyer; (2) the party who receives the guarantee and the party who benefits from the guarantee; (3) the party who is liable under the guarantee and the party who performs under the guarantee. This division follows the life cycle of the guarantee and the potential engagement of various parties during the different stages of the guarantee. Here, the analysis is not concerned with the precise scope of the duties and obligations of the parties, unless it is necessary to explain their position, as this subject is discussed in further parts of the chapter.

2.2 The party who offers the guarantee and the party who transmits the guarantee to the buyer

2.2.1 Introduction: who can be a guarantor?

Who can be a guarantor? Taking a broad perspective – there are no subjective limitations regarding the person that could offer a guarantee to the consumer. In practice, the person who offers the guarantee most often has some kind of connection with either the goods or the sales contract. Fogt⁶⁷¹ presents four possible guarantee schemes: (1) a guarantee from the final seller to the final buyer; (2) a guarantee from the producer, importer or distributor to the final seller; (3) a third party guarantee from the producer or any other person in the chain to the final (commercial or consumer) buyer; and (4) no party guarantee or third party guarantee, where any legal basis for a specific or general party and/or third party guarantee is absent. As Fogt spotted, there is a tendency to offer a guarantee in situations when the connection between the guarantor and the goods is less direct, for example intermediaries or parties engaged in the payment process offer a guarantee. Already in 1986 the Director General of Fair Trading observed that guarantees in their various forms are found associated with a wide variety of goods and services offered to consumers. In some cases, the availability of a guarantee is used specifically to promote the goods or services on offer; in others it may be only loosely connected with the transaction (...).⁶⁷² It might be for example, that the credit card issuer offers a guarantee.

⁶⁷⁰ On that see Chapter IV, legal form of the guarantee.

⁶⁷¹ Fogt 2009, pp. 242 - 243.

⁶⁷² OFT 1984, p. 4.

This tendency might relate to two different development directions in the area of the guarantee.⁶⁷³ Firstly, there is a tendency to use the guarantee as an advertisement tool, employed, as the example above shows, not only by producers or sellers but also by other parties. This avenue has been already explored by EU legislation in the Consumer Sales Directive. Secondly, there is the guarantee development in the direction of a self-standing service contract.

2.2.2 The producer's guarantee

A guarantee offered by the producer is the most common type of guarantee on the market at the moment.⁶⁷⁴ This is quite understandable, given that the guarantee is (among other things) an expression of the belief in the quality and the performance capabilities of the goods. This fact also confirms the theory of the guarantee as an instrument of competition (competing on quality). The producer, as the party who actually produces or makes the goods, is the best suited to define how deep such belief is or should be. It is in the producer's interest to make the goods attractive to the final buyer, and a guarantee is an excellent sign of his confidence in the goods. As the British Department of Trade and Industry stated in its consultation paper on guarantees,⁶⁷⁵ producers compete on quality, and guarantees remain one measure of that.

2.2.3 The main problems created by the producer's guarantee⁶⁷⁶

The producer normally has no direct contact with the final buyer, which may generate certain problems for the guarantee scheme as such,⁶⁷⁷ as well as for the parties involved. If the producer acts as the seller, the situation is positively clear, although also it simultaneously creates space for abuse. The producer may easily hide its statutory liability as a seller, arising under the conformity regime with the guarantee it offers, to the disadvantage of the consumer. Such a situation might be very confusing for the consumer, who may encounter problems separating the two liability regimes, which refer to the same goods and involve the same parties. At the same time, a very similar problem exists when, in the eyes of the buyer, the producer and the seller constitute one economic entity, as underlined by the Green Paper of 1993, or even when the consumer distinguishes clearly between the seller and the producer.⁶⁷⁸

When the producer who offers the guarantee is not the seller of the goods, the problems that appear flow mostly from the lack of a direct contact between the producer (the guarantor) and the final buyer (the consumer).

First of all, if the seller provides the guarantee document, there could be a misunderstanding as to the person who actually offers the guarantee. This becomes even more intensive if it is the seller who should be contacted upon a failure of the goods. At the same time, using the seller as a contact point between the guarantor and the consumer is a convenient and practical way of organising the scheme of claiming under the guarantee, as the consumer has to follow the "natural way" – he returns to the place where he purchased the product (if that is possible, of course). The bond between the seller and the consumer is also strengthened if the consumer

⁶⁷³ More on that subject see Chapter VI.

⁶⁷⁴ Twigg-Flesner 2003, p. 1; Żuławska 1999, p. 82.

⁶⁷⁵ Department of Trade and Industry 1992, p. 6.

⁶⁷⁶ This subject is discussed from a slightly different perspective in Chapter IV, part 4.5.5 Guarantees by producers and other parties.

⁶⁷⁷ See Chapter IV problem with the binding force of the producers' guarantees.

⁶⁷⁸ Green Paper of 1993, p. 74.

has to undertake some kind of administrative actions, such as registering the guarantee with the seller, stamping the guarantee document at the place of purchase, etc. Normally, it should be in the best interest of the seller to underline that it is the producer, rather than the seller, who provides the guarantee and is responsible under the guarantee. The drawback for the consumer is that it might be quite difficult (especially for a consumer that does not know his statutory entitlements) to understand the seller's statutory obligations in such a case. The producer may also use the internet as a device to establish a link with the consumer, for example when the consumer has to validate the guarantee through its registration on the producer's web page. In such a case, however, there is still a need for co-operation on the part of the seller (for example, the consumer must be informed of the existence of the guarantee and the need to validate or activate the guarantee, which must sometimes be done within a specified period).

The situation where the guarantee document is not attached to the goods and only has to be provided at the request of the buyer, is somehow more confusing for the buyer, because there might be no express information from the seller concerning the fact that there is a guarantee, so the consumer does not know of the right to demand that its terms are observed. The result will be that the consumer is not aware of the existence of the guarantee. From an economic point of view, it is in the best interest of the seller to inform the buyer about the guarantee, because in that case his own liability is defused. Accepting the same line of reasoning based on rational arguments, sellers should be the most active protagonists of the obligation to attach a written guarantee to the goods.

Some requirements set by the guarantor himself may clarify the situation from the perspective of the consumer. For example, if the buyer is obliged to register the guarantee with the producer, despite the fact that it could sometimes be burdensome for the consumer, it provides clarity as to who offers the guarantee.

For example: in Poland it is customary for certain categories of goods to offer a producer's guarantee, which is embodied in a guarantee document that must be stamped by the seller at the time of the purchase. Using the opportunity of direct contact with the buyer, the seller may clarify to the buyer who is liable under the guarantee. If the seller fails to provide such clarification, the buyer may assume that it is the seller who offers the guarantee.

From this point of view, the requirement to register the guarantee is beneficial for both the guarantor, who receives data concerning the guarantee holders and establishes a closer personal link with them, as well as for consumers, who can receive clear information as to the identity of the guarantor. At the same time, the obligation to register might involve substantial problems for the guarantors as well as for the consumers.⁶⁷⁹

2.2.4 Distinguishing the guarantee in the commercial chain

The Green Paper of 1993 underlined the importance of another problem related to the recognition of the guarantor for the practice, which gives it a wider context. The Green Paper stated that it is sometimes difficult to say who exactly the guarantor is, especially if the importer has the same name as the producer. For the consumer it might be quite confusing, because it is hard to know whether the guarantee is from the producer or from the importer, who is legally an independent entity. The Green Paper rightly concluded that this state of affairs calls for greater transparency, as regards the links that exist between the various

⁶⁷⁹On this see part 9.8 The requirement to "activate" the guarantee of this chapter.

participants in the product-marketing network. Especially when the product is sold through a selective distribution network or a franchise, the consumer should be informed, because his expectations vis-à-vis the different participants in the network may be higher than in the case of non-integrated networks.

2.2.5 Position of the Member States

With the introduction of the Consumer Sales Directive, all Member States recognised the possibility that a guarantee may be offered by the producer or the seller.⁶⁸⁰ The producer is perceived wider than the literal understanding of the word would suggest, and covers some of specifically indicated intermediaries.⁶⁸¹ However, before the introduction of the Directive, some Member States had certain limitations in their legal systems as to the entities that can offer a guarantee. This mention is sufficient here as a detailed presentation is contained in Chapter III.

2.3 The seller's position in a guarantee offered by the producer

In most cases, when the producer offers a guarantee, the guarantor has no direct contact with the consumer, unless it is the producer who sells the goods. Concerning the position of the seller in such a scheme, there are two major problems. First, this is the scope of the seller's duties and obligations, which is related to the legal qualification of the seller's position in the guarantee scheme. Second, as a natural consequence, this is the potential scope of the seller's liability arising from the engagement in the guarantee scheme.

2.3.1 The seller's duties and obligations

The basis of the seller's involvement in the producer's guarantee scheme can be established either by a contract, which the final seller concludes with the party that offers the guarantee (also in the form of a contract for the benefit of a third party), or it may be established by law.

The seller might be engaged in the guarantee scheme during various phases of the guarantee's life: the process of transmitting the guarantee to the consumer (which can include concluding a contract), as well as the process of claiming under the guarantee.

Regarding the process of transmitting the guarantee and establishing the legal relationship between the guarantor and the buyer, there are many potential actions on the side of the seller. First, they may concern the need to observe the transparency requirements. In particular, the seller might be obliged (by the contract with the guarantor or by the law) to inform the consumer about the existence of the guarantee, to provide the consumer with the guarantee document, or to inform the consumer about the requirement of the guarantor regarding, for example, the registration of the guarantee. In Poland, according to Article 13 paragraph 2 of the Consumer Sales Act, the seller is obliged to deliver to the buyer the guarantee document together with the goods. Moreover, the seller is expressly obliged to check the compliance of the labels on the goods with the data contained in the guarantee document as well as the condition of seals and other securing devices on the goods. Such an arrangement raises the question of how the seller can fulfil the obligation to deliver the guarantee document if he does not receive one from the guarantor? Should he then bear liability for not fulfilling his obligations? If so, how should such liability be constructed? Similar problems could have

⁶⁸⁰ The situation in the Member States as regards the guarantor is described in Chapter III, part 1.5.

⁶⁸¹ See Chapter III, part: 2.1.5 Guarant.or

arisen in Spanish law before the transposition of the Consumer Sale Directive, although the regulation suggested certain solutions regarding the liability of the seller. Article 11(2) LCU required the producer or the supplier of durable goods to deliver a written guarantee containing the object of the guarantee, the guarantor, the holder of the guarantee, the rights of the holder of the guarantee and the period of the guarantee. Article 12(3) paragraph 2 LOCM stated that the seller must deliver the document of the guarantee on behalf of the producer or importer or, in their absence, under his liability, as well as to provide the consumer with instructions for the correct use and the installation of the item.⁶⁸²

Second, the seller might be engaged in the process of validating the guarantee or concluding the guarantee contract. Here the seller may fulfil certain requirements, as requested by the guarantor in order to make the guarantee work (whether or not a contract is concluded depends on the requirements of national law). The Metro/Cartier case,⁶⁸³ analysed in Chapter II, is a good example. Cartier watches were sold with a producer's guarantee. The guarantee was in the form of a certificate that had to be filled in at the time of purchase. On the basis of a clause in the international guarantee that was provided with each watch, Cartier undertook to honour the guarantee on the condition that the certificate bears the stamp and the signature of an authorised Cartier licensee.

The seller may also be directly engaged in concluding a guarantee contract. Under Austrian law, the acceptance required for concluding a contract can be expressed by handing over the producer's guarantee card to the consumer. In such a case, the seller is seen as an intermediary or as a messenger (Bote).⁶⁸⁴ The situation is similar in Polish law where, according to the legal writing, the contract between the producer guarantor and the buyer⁶⁸⁵ is concluded through the seller handing over the guarantee document to the buyer. There is a dispute as to the function played by the seller in such a scheme: a messenger⁶⁸⁶ versus an authorised representative.⁶⁸⁷ Qualifying the role of the seller as a messenger comes from the fact that he merely transmits the producer's statement of intent contained in the guarantee document, and does not make any statement of intent on its own, which would have a result for the represented principal (establishing details of the guarantee service, the time limits, etc.).⁶⁸⁸

The seller may also be involved in the process of claiming under the guarantee. Very often the guarantee document indicates that it is the seller who is to be contacted, despite the fact that the guarantee was given by the producer or importer.⁶⁸⁹ According to such an arrangement, the seller might be obliged to accept the guarantee claim from the consumer and to send the faulty goods to the guarantor or another entity indicated by the guarantor.

⁶⁸² Lete 2001, p. [xxx].

⁶⁸³ Judgement of 13 January 1994, Metro SB-Großmärkte GmbH & Co.KG SA (1994) (Metro/Cartier) C-376/92.

⁶⁸⁴ OGH 3.12.1974 = SZ 47/138.

⁶⁸⁵ On the controversies concerning the legal form of the guarantee see Chapter II, part legal form.

⁶⁸⁶ Skąpski 1976, p. 154, Judgement of the Supreme Court of 28.12.1994, IIICZP 163/94, OSP 1995.

⁶⁸⁷ Sołtysiński as quoted in Skąpski 1976, p. 154.

⁶⁸⁸ Skąpski 1976, p. 154.

⁶⁸⁹ Green Paper of 1993, p. 73.

2.3.2 The seller's liability

The next question that appears in relation to the obligations of the seller within the guarantee scheme relates to the seller's liability: its basis, scope and the person against whom the seller is liable.

As stated earlier, given that the producer's guarantee in practice limits the liability of the seller, it would be irrational for him not to bring clearly to the attention of the buyer that there is another person liable for the faults in the sold goods. Polish legal writing mentions extreme instances where sellers refused to sell the goods, if the buyer refused to accept the guarantee card, provided that the producer offered it.⁶⁹⁰ However, considering that faith in reason might be overrated, and at the same time in order to maintain the completeness of the analysis, it is worth asking about the consequences of the sellers' failure to meet the obligations arising under the producer's guarantee scheme, towards the consumer or the guarantor. Generally speaking, this would relate to situations where, as a result of action – or more probably omission – by the seller, the buyer is not able to benefit from the guarantee offered by the producer. For example, the seller did not inform the consumer about the existence of the guarantee, or the seller did not undertake steps necessary to validate the guarantee.

The first question that must be asked in this situation is the legal basis of the seller's involvement. As already concluded, the seller may be obliged either *ex lege* or on the basis of a contract concluded with the guarantor. The contract between the seller and the guarantor can create obligations of the seller, which follow from the fact that it sells the goods produced by the producer and delivers them to the final buyer, who is supposed to receive (or conclude a contract of) guarantee. The contract concluded between the producer and the seller could also be qualified as a contract to the benefit of a third party (as, for example, under Austrian law).

If the seller is obliged *ex lege*, it would be most convenient from the consumer's point of view if the consequences of a failure to perform statutory obligations would be established by law. However, this is hardly the case. The Polish Consumer Sales Act, for example, formulates specific obligations of the seller in relation to the guarantee (Article 13(2)), as well as certain general informational requirements, but it fails to address the situation where the seller does not fulfil them. It is then legitimate to ask whether the seller bears any liability in practice, for breaching statutory obligations? The courts might encounter difficulties in establishing the seller's liability on such a basis, as it might turn out to be rather difficult to establish the damage sustained by the guarantee holder and to base the claim on the general rules of non-performance. A solution could be found if the lack of action on the seller's part, as required by the law, could be qualified as a lack of conformity (because, as a result of the seller's omission, the buyer does not receive goods of the expected quality, that is goods for which a proper producer's guarantee applied).

Similarly, if the legal basis of the seller's duties and/or obligations is established by a contract, and the consequences of breaching the contract are not established in the contract itself (subject to any rules of a mandatory nature), then they will follow from the general rules on a breach of contract.

The last question refers to the party against whom the seller could be liable for not fulfilling its obligation. Subject to the content of the law or contract, this could be either the beneficiary – i.e. the buyer (the guarantee holder) or the issuer (i.e. the producer). The interests of both

⁶⁹⁰ Skapski 1976, p. 154.

these parties can be injured by the actions and omissions of the seller. The damage on the producer's side is that the offer of the producer does not reach the addressee, i.e. the consumer. In such a case if the guarantee is against payment the producer may suffer financial detriment, and the price for the guarantee is not separately established, the producer may lose in terms of not establishing a relationship with consumers, not gathering data, etc. On the side of the consumer, the damage could be that the producer would not be bound by the guarantee if, for instance, a copy of the invoice/guarantee form is not submitted to him on time, meaning the loss of the possibility to claim from the producer (either in theory, on the basis of the theory of loss of a chance, or in practice when a defect occurs that would have been covered by the guarantee). Moreover, especially if the price of the guarantee is calculated as a part of the price for the good, the consumer does not receive what he has paid for.

Some legal systems go a step further and declare the seller liable for the guarantee of the producer. It can be argued that such systems reach out to the consumers' expectations as, according to the survey evidence, consumers want sellers to be clearly identified as responsible for redress under both the legal and the commercial guarantee.⁶⁹¹ In Ireland, for example, according to the Act of 1980, the seller and producer are jointly liable under guarantees and similar undertakings, but the seller may avoid liability under the guarantee, according to section 17(1) of the Act, by expressly excluding himself at the time of delivery of the goods. The court may order a seller or a producer to take such action as necessary to observe the terms of the guarantee and to pay damages. Where a seller gives its own written undertaking that it will service, repair or deal with the goods after purchase, it is presumed that the seller is not liable under the guarantee supplied.⁶⁹² Such an approach places a heavy burden on the sellers to be familiar with all guarantees offered by producers. From a consumer perspective, however, the Irish legislation is more favourable to the consumer than the Consumer Sales Directive,⁶⁹³ as it makes it easier for the consumer to invoke his rights arising under the producer's guarantee.⁶⁹⁴ It should however be kept in mind that the seller's liability under the conformity scheme remains intact. If one looks on it from the perspective of the legislative scheme, such solution may be seen as unclear, since the seller may avoid one type of liability, but not another. A very similar regulation exists in Finland where, according to Article 15a paragraph 2 of the Consumer Protection Act,⁶⁹⁵ the seller is presumably bound by the guarantee given by a person other than the seller, either at the previous level of the supply chain or on behalf of the seller, unless he shows that he has clearly notified the buyer before the conclusion of the sale contract that the seller accepts no responsibility for the guarantee.⁶⁹⁶ In Norway, according to Sec. 18(a) of the Consumer Sales Act,⁶⁹⁷ if a person other than the seller gives a guarantee and it appears to the consumer that this undertaking is made by the seller, there is a lack of conformity unless the seller has declared, prior to the conclusion of the contract, that it is not bound by the guarantees made by others.⁶⁹⁸ In other words, a guarantee given by the producer is binding on the seller to the extent that it appears to be given by the seller, and a guarantee given by the producer is binding on the producer on

⁶⁹¹ Communications Research Limited, *Redress for Faulty Goods: Consumer Views* (February 1989) as quoted in Cranston 1995, p. 114.

⁶⁹² White 2000, p. 13.

⁶⁹³ *Ibidem*, p. 13.

⁶⁹⁴ *Ibidem*, p. 13.

⁶⁹⁵ Kuluttajansuojlaki 38/1978.

⁶⁹⁶ Norros 2009, p. 296.

⁶⁹⁷ Lilleholt 2009, p. 473.

⁶⁹⁸ Lilleholt 2009, p. 473.

the conditions set out in the guarantee document or found in related marketing materials.⁶⁹⁹ In Belgium, in case the final seller sets up an advertising campaign in which he refers to a guarantee offered by the producer, without specifying that he is not the offeror, he runs the risk of being regarded as guarantor.⁷⁰⁰ Also in the UK, in 1992 the Department of Trade and Industry made a proposal that a final seller should be jointly and severally liable with the manufacturer for the producer's guarantee to a consumer, but nothing has come of it.⁷⁰¹

2.4 Seller's guarantee

Undeniably, the most common type of guarantee is the guarantee offered by the producer. It is therefore quite paradoxical that some legal systems made the opposite assumption concerning the question of the typical guarantor. For example, the rules in the Polish Civil Code on guarantees were created with the assumption that the seller is the party that will provide the guarantee most often, and there was only one article dedicated to the producer in this position (Article 582). It probably had to do with the fact that obligatory guarantees existed in the Polish system at the time. The practice, however, reversed these proportions.⁷⁰² Also in Italy⁷⁰³ and Portugal,⁷⁰⁴ specific rules on commercial guarantees contained in the civil codes dealt only with the relation between the buyer and the seller.

Nevertheless, the seller's guarantee appears on the market less often than the guarantee given by the producer. It does not, in principle, create problems similar to the producer's guarantee, as there are only two parties involved, and they are the same as in the case of the sales contract. The biggest problem in the case of the seller's guarantee is the unclear relation between the seller's statutory liability regime and the guarantee, which is described in detail in Chapter IV. In addition, the differences between the seller's and the producer's guarantee are discussed there in greater detail.

Here it suffices to mention that some legal systems, recognising the difference between the guarantees offered by sellers and producers, introduced a separate regulation for the two types. In Greek law, for example, sellers' guarantees were mandatory for new consumer durables and had to observe certain requirements, whereas general contract law governed the producers' guarantees.⁷⁰⁵ Also in Italy, the rules of the civil code⁷⁰⁶ applied only to the relations between the seller and the buyer. All other types of guarantees were governed by the general contract rules. Before the introduction of the Consumer Sales Directive⁷⁰⁷ the distinction between the guarantees provided by the seller and by the producer was recognised also in the Netherlands. There was no express regulation of guarantees as such, but according to general contract law and, in so far as the guarantee was provided by the seller, the guarantee could not deprive the consumer of his statutory rights. That was not different from the producer's position, but he had only the statutory obligations under the product liability directive, which he could not contract out of by way of the guarantee.

⁶⁹⁹ Ibidem, p. 473.

⁷⁰⁰ Rutten, Staetmans & Wuyts 2009, p. 205 and the case law referred to therein.

⁷⁰¹ DTI 2002, p. 9.

⁷⁰² Marmaj 1990, p. 258.

⁷⁰³ Green Paper of 1993, p. 47.

⁷⁰⁴ Ibidem, pp. 48-49.

⁷⁰⁵ Green Paper of 1993, p. 46.

⁷⁰⁶ Ibidem, p. 48.

⁷⁰⁷ Ibidem, p. 48.

2.5 The party who receives the guarantee and the party who benefits from the guarantee

2.5.1 Who receives the guarantee?

Generally speaking, the buyer of the goods benefits from the guarantee that accompanies the goods. However, this is not an absolute rule. There may be two instances where a person other than the buyer comes to benefit from the guarantee. First, if the buyer acquires the goods for a third party, e.g. in the case of indirect representation (in the case of direct representation, the sales contract is between the represented party and the seller). Second, unlike in the case of the statutory liability for the sold goods, which as a rule operates between the seller and the buyer only,⁷⁰⁸ the guarantee may pass to the subsequent owners of the goods (for example as a result of sale, gift, inheritance, etc.).

2.5.2 Who benefits from the guarantee? The question of transferability

Whether or not the guarantee follows the goods decides in practice on whether the guarantee will benefit the owner of the goods throughout the entire duration of the guarantee, or whether its protection will be limited to the initial owner of the goods.⁷⁰⁹ Commenting on the market practice, the Green Paper of 1993 observed⁷¹⁰ that few guarantee documents refer to the question of transferability of the guarantee in the case of the transfer of property of the guaranteed goods. At the same time the Green Paper claims that the guarantee documents do not necessarily limit the validity of the guarantee to the first purchaser. The conditions imposed concern rather the submission by the complainant of the invoice made out to the first user, or the restriction that the guarantee begins to run from the date of purchase by the first purchaser.⁷¹¹

Basically, there are three options regarding the transferability of the guarantee. First - only the initial buyer can benefit from the guarantee; second - the guarantee always follows the goods; and third - the guarantee follows the goods, but the guarantor can limit the transferability in certain situations by imposing specific requirements.

The first option is the most radical and the least beneficial for the consumer. However, in some special circumstances such a limitation is quite rational, since the guarantee may be offered to a specific person with specific needs, who meets a certain client's profile.

Example: a guarantee is offered in a personalised form of a contract and the terms of the contract are adjusted in order to meet specific needs of the buyer for whom a custom-made product is sold.

The second extreme option is the one that favours the interest of consumers most. The guarantee is attached to the goods and follows them unconditionally. Research conducted by the British Director General of Fair Trading⁷¹² showed that most of the responders representing consumer interests were in favour of allowing a free transfer of a guarantee to a future owner. Representatives of trade, while not specifically against it, foresaw difficulties in putting it into practice. One of the greatest problems envisaged was keeping adequate records

⁷⁰⁸ Łętowska 1990, p. 187.

⁷⁰⁹ On that, see the duration of the guarantee in this Chapter.

⁷¹⁰ Green Paper of 1993, p. 73.

⁷¹¹ Ibidem, p. 73 -74.

⁷¹² OFT 1984, p. 22.

of transfers. Several of the respondents pointed to a situation where this facility might not be in the consumer's interest. It was suggested that an owner could obtain a better price for goods by referring to a guarantee, but that the goods may have been mistreated, or the terms of the guarantee breached, so that a claim by the subsequent owner might not be honoured. Where a guarantee was in fact an insurance contract, the insurer would want to reserve the right to refuse insurance to a new owner.

The third option tries to strike a balance between the interest of the guarantor and the consumer. According to this option the guarantor can restrict the generally allowed transferability. This option finds a lot of support, starting from the Green Paper of 1993, which proposed allowing anyone in possession of a guarantee to invoke it, provided that it would be possible to provide evidence of the first purchase.⁷¹³ According to the Office of Fair Trading, a guarantee should be freely transferable, if necessary on the condition that a change of ownership is properly notified.⁷¹⁴ At the same time, research has shown⁷¹⁵ that very few consumers attempt to transfer guarantees to subsequent owners, unless in the UK. Other markets, like the Netherlands or Poland seem to have an established practice of transferring the guarantee if the goods initially bought with a guarantee.

This is also the option accepted by the PELS the DCFR, which declare respectively: the PELS in Article 6:102(2) and the DCFR in Article IV. A- 6:102(2) that, unless otherwise provided in the guarantee document, the guarantee is binding without acceptance also in favour of every owner of the goods for the duration of the guarantee. The comments draw attention to two issues.⁷¹⁶ First, the legal basis on which the subsequent owner acquires the ownership of the goods is irrelevant. Second, this is a default rule, which means that the guarantor is able to limit the applicability of the guarantee to the first buyer only, or restrict its transferability, for example by imposing a notification requirement or a stricter requirement to obtain permission from the guarantor in order to transfer the guarantee to another person.

Both, the PELS⁷¹⁷ and the DCFR⁷¹⁸ stress that this form of control may be irrelevant for many guarantors, but at the same time it might be a highly sensitive area for the guarantors who offer guarantees based on the buyer's profile. One can claim that restrictions of the guarantee, in the situation where the guarantee is not based on the buyer's profile, should not be allowed, because there is no valid explanation why the guarantor would like to limit it.

The approach of the Member States to the question of transferability was presented in Chapter III, in part 1.6 - The beneficiary.

2.6 Who performs under the guarantee and who is liable under the guarantee?

The fact that the guarantor bears liability under the guarantee does not amount to the fact that the guarantor has to personally perform under the guarantee. The Green Paper of 1993⁷¹⁹ listed various arrangements that occur in the guarantee documents, concerning the person liable for the guarantee and the person to be contacted:

⁷¹³ Green Paper of 1993, p. 98.

⁷¹⁴ OFT 1984, p. 14.

⁷¹⁵ Ibidem, p. 22.

⁷¹⁶ PELS 2008, p. 364, DCFR, Book IV, p. 1402.

⁷¹⁷ PELS 2008, p. 364.

⁷¹⁸ DCFR, Book IV, p. 1402.

⁷¹⁹ Green Paper of 1993, p. 73.

- the guarantee granted by the importer or manufacturer's agent without further particulars;
- the guarantee is granted by the importer, who gives the client the right to invoke the guarantee against any official distributor;
- the guarantee is granted by the importer, who indicates to the client that he should contact the seller or send it to the importer at his expense;
- it is the manufacturer who grants the guarantee, but it is the seller who it is to be contacted;
- the consumer is only given a telephone number in order to find out who is liable for the guarantee.

The willingness of the guarantor to perform personally will depend on many factors. These include the technical capabilities of the guarantor – hence a guarantor who is also a producer will be more inclined to perform; as well as the economical calculations – depending on whether it is more efficient to perform personally, or to conclude a contract with a third party who will undertake to perform the guarantee services.

The answer to the question of who performs under the guarantee also depends on the particular remedy invoked in a given case. To give an example of basic requirements for the four most common remedies (as in the conformity scheme). Repair requires specific technical capabilities, in terms of the availability of the work force and the spare parts. Performing a replacement means that the replacement goods must be present. In the case of price reduction and the termination of the guarantee contract, there must be a legal basis for intervention in the content of the sales contract. For example, if the price for the guarantee is not expressed separately, there must be a possibility for the guarantor to intervene into the terms of the sales contract. For that reason, in Greece it is accepted that the right of termination may only be exercised in cases where the guarantor is the seller itself, and not where the person that provides the guarantee does not participate in the contract of sale.⁷²⁰

The situation where the guarantor does not perform personally under the guarantee gives rise to certain complications. The Green Paper of 1993 expressed the opinion⁷²¹ that in certain cases the consumer is informed that another party will perform work under the guarantee without being told anything about the legal bonds between the different parties. Hence the consumer is unable to determine the validity and scope of the third party obligations set out in the guarantee document and the legal possibility of invoking the guarantee against that party. The Green Paper stated that this state of affairs required greater transparency, to the benefit of consumer, as regards the links that exist between the various participants in the product's marketing network. Hence, when the product is sold through a selective distribution network or a franchise, the consumer should be informed, because his expectations towards the different participants in the network may be higher than in the case of the non-integrated networks.⁷²²

It seems, however, that here two situations should be distinguished. First, it is the possibility to claim the guarantee through an integrated distribution network (selective distribution, franchise). If a consumer buys goods from a member of such a chain, and is able to direct his demand based on the guarantee to any member of the chain, there may be confusion as to who

⁷²⁰ Karakostas & Voulgari 2009, p. 348, footnote 30 and the literature referred to therein.

⁷²¹ Green Paper of 1993, p. 74.

⁷²² Ibidem, p. 74.

is really liable on the basis of the guarantee. The position of a concrete member of the chain may depend on the way the relations between the members of the chain are regulated.

The second situation is that the guarantor concludes a contract with a third party, who is obliged to perform the guarantor's obligations arising under the guarantee. This scheme has raised a very vivid discussion in Poland. The reason was that, under the former Polish legislation (in force until 1996), the most common situation was that the guarantor did not perform personally under the guarantee, but transmitted the obligations to a third party, which gave rise to certain problems and controversies.⁷²³ In the case of social economy units (PI: *jednostki gospodarki uspołecznionej*) these problems were even directly addressed in a Resolution of the Government on the general conditions of transferring and mandating a guarantee service between the social economy units.⁷²⁴

Three aspects of such contracts were underlined in the jurisprudence.⁷²⁵ It claimed that it is in the best interest of the buyer to obtain the possibility to perform the repair near his place of residence, and not only at the place of business of the guarantor.⁷²⁶ Next, this arrangement also served the interest of the producer, who could concentrate first of all on the production.⁷²⁷ At the same time, a contract to mandate repairs under the guarantee to a specialised entity, over which the buyer had no influence could not have an impact on his interests and in particular could not limit the statutory entitlements against the producer, who is at the same time the guarantor.⁷²⁸

As described by Żuławska,⁷²⁹ according to Polish case law⁷³⁰ the guarantor may perform the guarantee services personally, or using a third person, on the basis of a contract based on Article 393 (*pacta in favorem tertii*).⁷³¹ The case law made clear that a stipulation in the guarantee document that the repair will be performed by a third party is binding against the buyer.⁷³² At the same time, it was underlined that the most important aspect of the tripartite relation created by such a contract is that the fact that the guarantor concluded a contract with a third party in order to provide the guarantee services does not release him from the liability against the buyer. If the third party does not perform the services or performs them incorrectly, the liability is still on the guarantor. The party liable for the guarantee is always the party, who offers the guarantee, even if that party does not perform personally the obligations arising under the guarantee.⁷³³ The terms of a contract transferring the guarantee services are invalid against the guarantee holder if, on their basis, it was possible to free the party liable under the guarantee in the case of non-performance or improper performance of the accepted obligations. In such cases the person entitled under the guarantee had a claim

⁷²³ Marmaj 1990, p. 266.

⁷²⁴ Resolution of the Government number 193 of 2 December 1985; Mon. Pol. 1986 number 1 item 1.

⁷²⁵ Marmaj 1990, p. 266.

⁷²⁶ Resolution of the Supreme Court III CZP 62/80 – OSNCP 1981, nr 8, item 163.

⁷²⁷ Glosa J. Kulfla, OSPiKA 1979 nr 11, po. 197.

⁷²⁸ Judgement of the Polish Supreme Court of 17 June 1985, Nowe Prawo no 4-5, p. 167.

⁷²⁹ Żuławska 1999, p. 83.

⁷³⁰ Resolution of Polish Supreme Court of 29.3.1979, OSNCP 1979, item 146; judgement of the Supreme Court of 17.06.1985, OSNCP 1986, item 38.

⁷³¹ If it is stipulated in the contract that the debtor makes a performance to a third party, that person in the absence of a different provision in the contract may claim directly from the debtor that he make the performance specified in the stipulation.

⁷³² Judgement of the Supreme Court of 29.03.1979, OSNCP 1979, item 146; judgement of the Supreme Court of 20.06.1983, OSNCP 1984, item 21.

⁷³³ Żuławska 1999, p. 82-83.

against the person obliged under the guarantee, which was the producer or the importer.⁷³⁴ Moreover, the case law established that if the third party refused to accept the claims of the person entitled under the guarantee, it constituted grounds for a claim.⁷³⁵ Also, it did not exclude the possibility to claim the performance of the services that were not “transmitted” to the third person directly from the guarantor.⁷³⁶ A contrary view was presented in the guidelines of 30 December 1988, according to which a contract transmitting the guarantee services, which would exclude or limit the services to which the guarantor was obliged was classified as invalid.⁷³⁷ The guarantor could perform the services personally, but in such a case, he would bear (according to Article 391 of the Polish Civil Code) liability for the consequences of a refusal by the third party to perform.⁷³⁸ The Supreme Court decided that, if the guarantee document did not contain information as to who performs under the guarantee, the person entitled under the guarantee could claim the performance directly from the guarantor.⁷³⁹

3. Coverage of the guarantee

3.1 Introduction

When discussing the coverage of the guarantee, it is first necessary to establish what is actually meant by this, as the expression can be understood in two different ways. In a narrow sense, the coverage means the description of the widely understood faults of the goods, against which the guarantor issues its guarantee. In a wider sense the coverage covers also other aspects of the guarantor’s undertaking: the remedies offered if the guarantee promise is not fulfilled, its time frame, the territorial scope, etc.

This part of the chapter discusses the guarantee coverage in the wider understanding. First it concentrates on the question of the possible methods of approaching the guarantee coverage, and the consequences of adopting specific approaches. The analysis deals with various types of the guarantee’s coverage (mandatory, default, minimum), and discusses the differences between them. At the end, the additional benefit guarantee is discussed as the most frequent example of a default guarantee by a reference.

3.2 Methods of indicating the scope of the guarantee coverage

Member States adopt various methods when dealing with the guarantee coverage, which leads to varied practical solutions as regards the content of the guarantee. Therefore, this part of the analysis begins by discussing the possible methods that may be employed in order to regulate the coverage of the guarantee.

The first division line that can be drawn is established by whether or not the legal system deals with the coverage of the guarantee at all. The most extreme situation, when a national legislation does not contain rules not only regarding the cover of the guarantee, but also the notion of consumer sales guarantee as such, does not happen in the legal systems of the Member States anymore, as a consequence of introducing the Consumer Sales Directive.

⁷³⁴ § 6 para. 2 general rules of service, as quoted in Łętowska 1990, p. 185.

⁷³⁵ Resolution of the Supreme Court of 20.06.1983, OSNCP 1984, item 21.

⁷³⁶ Judgement of the Supreme Court of 5.1.1978, OSPiKA 1979, item 27.

⁷³⁷ Żuławska 1999, p. 84.

⁷³⁸ Ibidem, p. 84.

⁷³⁹ Resolution of the Supreme Court of 6.1.1981, III CZP 62/81, not published.

Next, the fact that a given legal system has introduced rules on guarantees does not have to mean that the problem of the coverage is expressly regulated. This is the case in the scheme adopted by the Consumer Sales Directive, which only mentions the obligation to disclose the coverage of the guarantee in the guarantee document, but does not provide guidelines as to the way the coverage should be understood.⁷⁴⁰ The Consumer Sales Directive introduced a regulation that prevails on the EU market at the moment, which can be characterised as non-interventional. The EU legislator has suggested leaving the problem of the coverage in the absolute discretion of the guarantor and the vast majority of the Member States have followed this option. The lack of legislative intervention concerning the coverage of the guarantee in the rules of the Directive is balanced by the informational requirement that consists of two elements: information about the coverage of the guarantee and information that the guarantee cannot affect the consumer's statutory rights. (Article 6(1) and (2) of the Consumer Sales Directive).

The system created by the Consumer Sales Directive does not provide an automatic solution to fill in the lacuna that appears when the guarantor fails to properly establish the content of its undertaking. In such a scheme, the problem of coverage may arise in another context, for example, while establishing the guarantee in a specific legal form. The coverage may be qualified as a part of *essentialia negoti* that have to be agreed on in order to conclude the guarantee contract. Another possibility is that the legal system introduces additional requirements for establishing the guarantee. For example, Article 13 of the Polish Consumer Sales Act, which transposes the Consumer Sales Directive, declares that a guarantee is created by the guarantor's declaration, contained in the guarantee document or advertisement, which establishes the obligations of the guarantor and the entitlements of the guarantee holder. There also is a clarification in the rule that a declaration that does not create obligations of the guarantor does not create a guarantee.

Where a legal system does deal with the coverage, the intervention can take various forms. First, the law may directly establish the coverage of the guarantee. Such rules may have mandatory or default character. Second, the law may indicate the coverage indirectly by reference. The best example of such an approach is reference to the buyer's statutory entitlements in the additional benefit guarantees. Other possibilities include the specific aim that the guarantee is meant to fulfil (the guarantee of good functioning) or the custom established in this area.

3.3 Mandatory coverage

The mandatory coverage of a guarantee is a rare occurrence. It is normally associated with mandatory guarantees, although one cannot exclude the theoretical possibility that the mandatory coverage of the guarantee would accompany a guarantee freely offered by the potential guarantor.

The mandatory content of the guarantee is normally found in legal systems that recognise the mandatory guarantee as such, like in Hungary, where, according to Article 248(5) of the Civil Code, the remedies of compulsory guarantees are identical with those of legal guarantee,⁷⁴¹

⁷⁴⁰ On this problem see Chapter III, part 2.3 Contents of the guarantee.

⁷⁴¹ Fazekas & Sós 2009, p. 360.

Slovenia,⁷⁴² or under the former Polish regime, already described in the previous chapter, in the part on mandatory guarantees.

In a specific way, some legal systems introduce the concept of the mandatory coverage by extending the liability for the voluntary guarantee given by a producer or any other party on the seller. This is done, for example, in Ireland, Finland and Norway (see point: The seller's liability above). In this case, the seller is unable to influence the coverage of the guarantee and is bound by the decisions of the initial guarantor. In some systems the seller can merely exclude its liability for the third party's guarantee at a certain moment, and if it fails to do so, then it is unable to influence the scope of its own liability in any way.

The mandatory coverage of guarantee raises many controversies as a concept that stands in clear contradiction with the idea of a guarantee as a competition tool, where guarantors can compete on the generosity of their offers. The opposition against intervention in the content of the coverage goes so far that even the idea of default coverage is criticised sometimes as intolerably restricting the freedom of the potential guarantors.⁷⁴³

3.4 Default coverage

In the vast majority of cases when the law establishes the content of the guarantee it is done so by default rules. The unquestionable advantage of default coverage is that it gives the consumer clarity and reassurance where the guarantor is not specific about the coverage of the guarantee, or if the guarantor does not indicate anything about this at all. For example, a guarantee that declares a 90-day satisfaction guarantee on everything is quite difficult to decipher, because there might be many different ways to understand what satisfaction on everything is.

The default coverage does not limit the possibility of the guarantor to create the guarantee it deems most convenient, because it applies only if the guarantor does not deal with the problem of the coverage, or deals with it insufficiently. In principle, the default guarantee is different from the obligatory minimum coverage of the guarantee established by law, because the default guarantee applies only if the guarantor does not regulate the content of the guarantee. If the guarantor sets the content of the guarantee, the default rules do not apply, no matter whether or not the content is more beneficial for the consumer as compared with the default rule. However, taking into account the consumer character of the regulation, the default rules often tend to have a semi-dispositive character, meaning that it is not possible to deviate from them to the disadvantage of the consumer.

The idea of the default content of the guarantee has long been present in the EU discussion on consumer sales guarantees, though it has never actually been implemented into the legislation. The Green Paper of 1993 already proposed that whenever the guarantee document does not specify the scope of the guarantee, it should be considered as covering the good in its entirety against any defect that could arise after delivery, unless the defect was the user's fault. The guarantee would also be considered as entitling the beneficiary to have the item repaired or replaced free of charge.⁷⁴⁴ The Consumer Sales Directive did not address the question of what happens if the guarantee statement omits to inform the consumer on the content of the guarantee, and the Green Paper on the Review of the Consumer Acquis (the Green Paper of

⁷⁴² Art. 15b of Consumer Protection Act and Regulation of the Minister of Trade (OJ No. 73/2003).

⁷⁴³ Twigg-Flesner 2003, p. [...].

⁷⁴⁴ Green Paper of 1993, p. 97.

2007)⁷⁴⁵ pointed that out. The Green Paper of 2007 referred to the opinion that such a solution may be misleading for consumers who rely on vague statements without checking whether they are actually granted any additional rights.⁷⁴⁶ The Green Paper of 2007 presented two options. The first one was to keep the status quo, meaning that the horizontal instrument would contain no default rules. The second option was that a default content of the guarantee setting out the basic rights that the guarantee holder should have if these are not spelled out in the guarantee document could be introduced in the future horizontal directive.⁷⁴⁷ The Green Paper in fact combined the default content of the guarantee with the idea that the guarantee should offer the consumer an additional benefit. The Green Paper proposed that if not established otherwise, the guarantee could include a right to replacement or repair if goods are not in conformity with the contract. If the duration of the commercial guarantee was not indicated, it could apply to the estimated life-span of the goods. It would have to be EU-wide. Finally, the costs of invoking and performing the guarantee would be borne by the guarantor.⁷⁴⁸

According to the Analytical Report on the Green Paper on the Review of the Consumer Acquis, submitted by the Consumer Policy Evaluation Consortium,⁷⁴⁹ the result of the public consultation was that 47% of the respondents favored maintaining the status quo, whereas the default rules option was chosen by 46% of the contributors. Consumer groups and the business sector had contrasting views. The consumers groups preferred the introduction of default rules with 80%, the business opted for maintaining the status quo with 85%. Legal practitioners (36% in favour of maintaining the status quo and 50% in favour of introducing default rules) and the other groups (with an even division of 50% for the two options) did not have a clear preference for one of the two options. Regarding Member States, the majority (15 Member States and one EFTA/EEA country) supported option 2, whereas eight Member States supported the status quo. Two Member States opted for “other option”.

The contributors who were against introducing the default coverage highlighted that guarantees are benefits provided on a voluntary basis by producers or sellers, and as such go beyond the legal mandatory framework. They are a marketing tool in order to attract consumers. The contributors claimed that attaching liability risks to them would only lead to a situation where such guarantees would no longer be granted in a large proportion of cases.⁷⁵⁰ Many contributors of this group also noted that the Unfair Commercial Practices Directive already protects consumers as it deals with the issue of vague statements, and it will be unlawful to offer a guarantee that offers no additional benefits, however without an explanation how such a result could be reached.⁷⁵¹

The Analytical Report also underlined that certain public authorities would not support any extra administrative burden on businesses where they seek to offer market differentiation

⁷⁴⁵ Green Paper on the Review of the Consumer Acquis, Brussels, 08.02.2007, COM(2006) 744 final.

⁷⁴⁶ Green Paper of 2007, p. 30.

⁷⁴⁷ Ibidem.

⁷⁴⁸ Ibidem.

⁷⁴⁹ Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis, DG Health and Consumer Protection, Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium, p. 121.

⁷⁵⁰ Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis, DG Health and Consumer Protection, Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium, p. 121.

⁷⁵¹ Ibidem, p. 121.

through a commercial guarantee that is clear and does not seek to mislead consumers. Moreover, any ambiguities in the guarantee should not lead to a default presumption of the highest level of protection for the individual consumer.⁷⁵²

The European Parliament emphasised that all questions in relation to the commercial guarantee, such as the content, the question of transfer or limitation, should remain subject to the principle of contractual freedom and should not be determined by a legal framework. Therefore these issues should not be part of the horizontal instrument.⁷⁵³

A large number of the contributors who opted for introducing the default content insisted on the fact the additional rights granted by the seller or producer to attract consumers are often a source of confusion. The vast majority of consumers fail to differentiate between legal and commercial guarantees, as they are not properly informed. The first aim of the default rules should be to give clear information to the consumers. Some of the academics referred to the solution adopted in the PELS in this respect.

The PELS indeed introduces a default content of the guarantee (Article 6:104) but at the same time it sets high transparency requirements in Article 6:103. It requires the guarantor not only to inform the consumer that his statutory rights are not affected by the guarantee, but also to indicate what advantages the guarantee offers to the consumer as compared with the legal regime.

According to Article 6:104, if the guarantee document does not specify otherwise:

- a) the duration of the guarantee is five years or the estimated life-span of the goods, whichever is shorter, without specifying whether this is the economic or technical life-span;
- b) the guarantee includes the requirements set out in Article 2:202(b), (d), (e) and (f);
- c) the guarantee holder may choose between repair and replacement;
- d) all costs involved in invoking and performing the guarantee are to be borne by the guarantor.

The comments explain⁷⁵⁴ that the default content gives assurance to the consumer and at the same time stimulates activity on behalf of the guarantor, who remains free to define the terms of his own guarantee in any other way.

The DCFR introduces a very similar rule in Article IV. A. – 6:104. It says that if the guarantee document does not specify otherwise:

- (a) the period of the guarantee is 5 years or the estimated life-span of the goods, whichever is shorter;
- (b) the guarantor's obligations become effective if, for a reason other than misuse, mistreatment or accident, the goods at any time during the period of the guarantee become unfit for their ordinary purpose or cease to possess such qualities and performance capabilities as the guarantee holder may reasonably expect;
- (c) the guarantor is obliged, if the conditions of the guarantee are satisfied, to repair or replace the goods; and
- (d) all costs involved in invoking and performing the guarantee are to be borne by the guarantor.

⁷⁵² Ibidem, p. 121.

⁷⁵³ Ibidem, p. 121.

⁷⁵⁴ PELS 2008, p. 375.

3.5 The minimum content

The rules that establish the content of the guarantee may also have a semi-dispositive character in favour of the consumer. It means that the guarantor is bound by the minimum standard established by the rules, and can only increase the level of protection set by the law. This solution works like a default rule if there is a need to fill in the lacuna in the guarantee content – semi-dispositive rules apply exactly in the way that dispositive rules would be applied. The difference between the minimum content and the default content rests in the scope of freedom to establish the content of the guarantee enjoyed by the guarantor.

The fact that the law establishes the default or semi-mandatory content of the guarantee does not have to mean that the legal system introduces a requirement that the guarantee should offer an additional benefit as compared with the legal rights. This carries a risk that consumers will grow confused and understand “default rules” as “minimum” rules.⁷⁵⁵ The additional benefit exists in the case of minimal content if the level of protection in the rules setting the content of the guarantee is elevated above the content of the legal rights of the consumer. In the case of the default content the same is true, if the default content offers additional benefit, and the rules are actually applied (i.e. the guarantor fails to establish the coverage of the guarantee).

3.6 Establishing the content by reference

The content of the guarantee may be established indirectly, by referring to the statutory protection level to which the buyer is entitled and which the guarantee has to exceed (the additional benefit guarantees), as well as to the function of the guarantee based on the characteristics of the goods they accompany (guarantees of good functioning), the custom, the consumer’s expectations or any other standard established in the practice.

The scheme used when the content of the guarantee is established indirectly is basically the same no matter what yardstick is used. In such a case, there is no direct mention in law as to what precisely the guarantee should offer, though there is a certain established standard that the guarantee has to meet. In the case of the additional benefit it is the level of protection offered by law; in the case of a guarantee of good functioning – the standard of performance that can be expected from the goods; and in the case of custom – the custom established with regards to a given category of goods, etc.

The most typical example of indirectly established content is the additional benefit guarantee, which will be discussed here. The guarantee of good functioning refers more to coverage in the strict sense (what qualities or performance could be expected from the goods, and not what the remedies are if they do not) and therefore it is discussed in the next part, which deals with the coverage in the strict sense. It suffices to mention that it exists, for example, in the Italian or Portuguese legal system.⁷⁵⁶ The guarantee content based on the widely understood custom is rather a rare occurrence, and therefore it is not worth investigation beyond the mention. For example, in Austria if the guarantee does not specify the features of the item, it must have expected features that are customary (§ 9b(2)(2) *Konsumentenschutzgesetz*,

⁷⁵⁵ Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis, DG Health and Consumer Protection, Analytical Report on the Green Paper on the Review of the Consumer Acquis submitted by the Consumer Policy Evaluation Consortium, p. 121.

⁷⁵⁶ Green Paper of 1993, p. 48.

KSchG).⁷⁵⁷ In Greece, according to Article 5 of Law 2251/1994, the duration of the guarantee must be reasonable in relation to the life expectancy of the product, or the time for which it is expected that it will stay modern from a technological point of view. The context of the guarantee must also correspond to the usual rules of good faith and not be revoked by excessive exception terms.⁷⁵⁸

If the legal system introduces the additional benefit requirement but does not at the same time construct the default rules stating precisely what is meant by that, then the question appears how to reconstruct the coverage of the guarantee, if the guarantor set it inappropriately. In such a case, the courts have to reconstruct the coverage of the guarantee, but they are guided by the standard set by the additional benefit requirement. A parallel situation exists in other cases where the guarantee content is established by reference.

3.6.1 The additional benefit requirement

At first sight, the additional benefit (advantage) requirement is a relatively simple legal construction, clearly beneficial for the consumer. The coverage of such a guarantee depends on the protection level set by the statutory rules, as it must exceed the protection level granted to consumers by the statutory regime. However, a closer analysis reveals that the concept of additional advantage raises many controversies in the process of applying it in practice.

To begin with, the very question whether or not the consumer sales guarantee should offer a benefit to the consumer that exceeds the protection level granted by the law receives a very mixed reception. The opinions expressed in the European literature on the grounds of the Consumer Sales Directive, as well as the solutions accepted in national legislations as a result of its transposition and implementation (all presented in Chapter III), confirm that.

At the same time, the additional benefit requirement meets expectations of consumers, who assume that if a guarantee is additional to the statutory protection it must offer something extra. It is a common sense argument: why give something that is already afforded by law? If the guarantee offers less than the statutory protection it is misleading for consumers. Some simply assume that the guarantee should offer something more, as the Office of Fair Trading put it: “The term guarantee covers a variety of situations where a trader offers the consumer rights additional to those normally provided by the contract and by law.”⁷⁵⁹

A detailed analysis of the Consumer Sales Directive in this respect is contained in Chapter III. Here it is worth briefly summarising the approach adopted towards the additional benefit guarantees in the EU legislation and to see how it was followed up in the PELS and the DCFR.

The Green Paper of 1993 was clearly in favour of the additional benefit concept and argued that a commercial guarantee should confer additional benefits on the consumer over and above the rights already arising from the legal guarantee. It also claimed that the guarantee document should mention the existence of the legal guarantee and summarise its contents in order to grant sufficient transparency as regards the guarantee.⁷⁶⁰ The initial draft of the

⁷⁵⁷ Augenhöfer 2010, p. 181.

⁷⁵⁸ Karakostas & Voulgari 2009, p. 348.

⁷⁵⁹ OFT 1984, p. 4.

⁷⁶⁰ Green Paper of 1993, p. 96.

Consumer Sales Directive⁷⁶¹ followed the path indicated by the Green Paper of 1993. It defined the guarantee in Article 1(2)(d) as any additional undertaking given by the seller or producer, over and above the legal rules governing the sale of goods, to reimburse the price paid, to exchange, repair or handle a product in any way in the case of non-conformity of the product with the contract. In Article 5(1), the draft Directive required the guarantee to place the consumer in a more advantageous position than that resulting from the rules governing the sale of consumer goods set out in the applicable national provisions. The final text of the Consumer Sales Directive did not, however, contain any reference to the additional advantage requirement, which received a mixed reception in the legal writing.⁷⁶² Some of the Member States decided to maintain the additional advantage requirement in their legal systems, which was possible as a consequence of choosing the minimum harmonisation clause in the Consumer Sales Directive. These states include: Denmark,⁷⁶³ Norway,⁷⁶⁴ Estonia,⁷⁶⁵ Latvia⁷⁶⁶ and Sweden.⁷⁶⁷

The PELS and the DCFR adopted an intermediate solution. Although it was fiercely debated during the work, it did not introduce the requirement of the additional benefit, but simply required the guarantee document to indicate what the advantages of the guarantee are to the consumer as compared with the conformity rules (PELS Article 6:103(1)(b), DCFR Article IV. A. – 6:103(1)(b)). The comment on this article⁷⁶⁸ explains that the requirement to indicate the advantages of the guarantee, combined with the requirement expressed in Article 6:103(1)(a) is introduced in order to secure the guarantee's transparency. The comments, however, make a mistake when referring to Article 6:103(1)(a), as the article itself requires that the guarantee document should state that the buyer has legal rights, which are not affected by the guarantee whereas the comment speaks only about the remedies for conformity. This definitely is too restrictive, as the legal rights, conferred to the consumer are not limited to the remedies for lack of conformity. Other elements that should be taken into account, and which cannot be changed by the guarantee, include for example: the scope of the defectiveness covered by both regimes, time limits for claiming under the guarantee, or the reverse of the burden of proof.

The comments also add that such a requirement will prevent guarantors from providing guarantees with no additional or even less protection than provided under the conformity regime. The two elements (6:103(1)(a) and (b)) should enable consumers to make a correct assessment of the guarantee and its benefits.

The Green Paper on the Review of the Consumer Acquis⁷⁶⁹ did not address the issue of the additional benefit, and it restricted itself to proposing default coverage.⁷⁷⁰ However, the explanation attached to the question on default content is quite confusing in this respect. It

⁷⁶¹ COM (95) 520.

⁷⁶² On that see Chapter III, part 2.6.2 Guarantee offering an additional advantage.

⁷⁶³ § 12(1) MA of 2005.

⁷⁶⁴ Article 9c of the Marketing Act.

⁷⁶⁵ Article 10 Consumer Protection Act.

⁷⁶⁶ Consumer Law Compendium, p. 446.

⁷⁶⁷ Agell, SvJT 1991, 420.

⁷⁶⁸ PELS 2008, p. 368, DCFR.

⁷⁶⁹ Brussels, 08.02.2007, COM (2006) 744 final.

⁷⁷⁰ Green Paper on the Review of the Consumer Acquis, Brussels, 08.02.2007, COM(2006) 744 final, p. 30.

says⁷⁷¹ that, since the Consumer Sales Directive does not address the question of what happens if the guarantee statement omits to inform the consumer on the content of the guarantee, it may mislead consumers who rely on vague statements without checking whether they are actually granted any additional rights. It seems then that when asking about the possibility of introducing the default guarantee content in the Consumer Rights Directive, the Commission wanted in fact to achieve the solution whereby in practice guarantees will not lower the consumer protection level granted by the conformity regulation (i.e. the default guarantee content would be at least at the level of protection already granted by law). However, the Draft Consumer Rights Directive followed the approach established in the Consumer Sales Directive and did not address the problem of the content at all.

3.6.2 The main advantages of the additional benefit approach

From the consumer's point of view, the main advantage of the additional benefit approach is that it is a very effective way to enforce the level of protection that exceeds the level already granted by law. It meets the consumers' expectations that the guarantee should offer something extra as compared with the statutory consumer rights, and consumers believe that guarantees do that. For example, in the 1980s Nordic research (in particular the Nordic research by the Nordic Committee for Consumers Questions) ascertained an often negative effect on the overall consumer protection of issued guarantees on goods that did not correspond at all with the usual positive expectations of average consumers regarding higher quality of goods and/or special granted remedies.⁷⁷² If the guarantee provides consumers with the same or even a lesser degree of protection – what, from the consumer's perspective, is the point of getting one? At the same time, it has been claimed that the mere fact that the guarantee is offered to consumer is beneficial for the consumer, because when the guarantee is present it betters the position of consumer against the seller.⁷⁷³ A similar line of argumentation was used in Polish legal writing, where Żukowski claimed that in some cases, although the guarantee offers the consumer less than the legal regime, it is at the same time also less troublesome with respect of claiming it, i.e., it may not be limited by preclusion.⁷⁷⁴ In addition, the guarantee holder may not be obliged to inform the guarantor about the defect within a certain time after discovering it.⁷⁷⁵

It should, nevertheless, be strongly underlined that the difficulties with establishing the content of the guarantee towards the legal rights of consumer most often lead to a situation where the consumer is simply misled. Howells and Beale have phrased it very accurately by saying: “Even if [guarantees] do not restrict the rules on non-conformity or other rights, guarantees may pose subtle dangers to consumers if they do not offer more than general sales law. Consumers may believe that they are getting and are paying for additional rights, when in fact they are not being given any additional rights at all.”⁷⁷⁶ The main problem of the guarantee is that it has great potential to create a false impression (and a false sense of security) that something of a value exceeding the statutory protection is offered to the consumer. Such a situation may mean that the consumer would not only be willing to pay extra for the goods (or separately for the guarantee), but also that the consumer would be inclined to rely on the guarantee rather than on conformity, to his disadvantage. The problem

⁷⁷¹ Brussels, 08.02.2007, COM (2006) 744 final, p. 30.

⁷⁷² See Fogt 2009, footnote 59, p. 236.

⁷⁷³ Hondius 1996, p. 17.

⁷⁷⁴ Żukowski 2001, p. 39.

⁷⁷⁵ Żukowski 2001, p. 39.

⁷⁷⁶ Howells & Beale 1997, p. 38.

of the additional advantage is therefore very closely related to the problem of how to effectively assure transparency of the guarantee in order to allow the consumer to make a conscious and informed decision on whether or not the guarantee offers any benefit and whether it is worth buying it and claiming it. For this reason, the problem of the additional advantage reappears in the part dealing with the transparency requirements.

3.6.3 Difficulties in establishing the scope of consumer protection

A legal scheme whose shape is fully dependent on another legal scheme gives rise to many problems, largely resulting from the need to establish reciprocal relations. This applies also to a guarantee based on the additional benefit concept, where the scope of coverage depends on the scope of protection offered by the legal regime.

In order to indicate the coverage of the guarantee, it is necessary to begin by establishing the scope of protection offered to the consumer by law, which the guarantee must exceed. This is, generally speaking, a complicated process from the point of view of a professional, and even more so from the point of view of a consumer.

The basic question in this process is: which rules set the level of protection that the guarantee must exceed? Basically, there are two possibilities here. The first, narrow one, is that the rules against which the advantage is measured are established by the rules on liability in consumer sales. In the case of the Consumer Sales Directive, these would be all the rules that establish the meaning of non-conformity, the remedies that are offered to the consumer, the timeframe, the burden of proof, etc. and also, possibly, the national rules that exist within the area covered by the rules of the Consumer Sales Directive. The second possibility is that not only the rules governing the sales contract are taken into account, but also other rules meant to protect consumers in a given situation, such as, for example, at the EU level the Unfair Contract Terms Directive, the Product Liability Directive, the Distance Selling Directive, etc.

It seems that the majority view is that the additional advantage should be measured against the sales liability rules. At the same time, the wider approach is also adopted sometimes, as for example in Finland, where the court referred to distance selling legislation in such a case.⁷⁷⁷

Although the first option (contrasting the guarantee advantage with the conformity rules) is more restrictive than opposing it with all other rules that protect a consumer in a given case, it seems that it is at the same time more practical. First, normally the consumer rules are mandatory, so the guarantor is, in any case, unable to waive them effectively, although he is able to create a false impression for the consumer. Second, the other rules (unfair contract terms, distance contracts, off-premises contracts, product liability etc.) have a general scope of application and apply in a context other than the rules on conformity and the rules on guarantees, which are in principle attached to the sales contract. Next, there is a practical aspect - the comparison process, which in any case is very difficult, is less complicated if the rules against which the guarantee's benefit is measured are limited to the liability rules in the sales contract. It applies, of course, with an assumption that consumers are aware of their rights, and at the same time able and willing to make the comparison.

In order to help consumers out, legislation may be an option that would require the guarantee document to summarise the entitlements of the consumer, which arise on the basis of the

⁷⁷⁷ MT 1993:001, as quoted Nurminen 2002, p. 23.

conformity rules (or any other applicable set of rules).⁷⁷⁸ This idea was present during work on the PELS. However, on the one hand formulating such a statement proved to be extremely difficult, and on the other it gave rise to criticism that the aim of the law is not to educate consumers. The solution adopted in the PELS (Article 6:103(1)(b)) and the DCFR (Article IV. A. – 6:103(1)(b)) that requires the guarantor to indicate the advantages of the guarantee as opposed to the legal rights has proved to be an effective compromise here.

3.6.4 How to measure the additional advantage?

The next important question is how to measure the additional advantage? The question may at the first seem a bit superficial as, quoting Dreads,⁷⁷⁹ “the guarantee is more advantageous so long as it provides greater rights than the legal guarantee”. However, when analysed in-depth, it turns out that it might be difficult to say when the guarantee actually offers more.

Firstly, as already discussed, a problem may arise against which rules the advantage should be measured.

Secondly, considering the EU dimension of the regulation, a question may appear, raised by Dreads,⁷⁸⁰ as to whether the guarantee should provide rights greater than those available in the Member State with the highest level of consumer protection, or simply greater than those in the Member State where the consumer resides. He claims that the former might impose too great a burden on a small business, but the latter might be impractical for business,⁷⁸¹ without however presenting a clear argument to support it. This problem can become more visible if the guarantee is offered in a cross-border dimension, or the same guarantee is offered in a commercial chain that operates in several Member States.

The third question is whether any advantage over and above the legal entitlements of the consumer is sufficient. Is there a measurement concerning how much the additional advantage should exceed the statutory protection level? Does the difference between the coverage of the guarantee and of the statutory regime have to be substantial, i.e. will the extension of the period when the consumer may claim his rights by a day amount to an additional advantage, for example? Here the rules of the Unfair Contract Terms Directive might have a decisive meaning. This problem can also be dealt with directly. In Denmark, for example, according to § 12(1) MA of 2005 the guarantee has to fundamentally better the consumer’s legal position in comparison to the default rules (in particular DSA).⁷⁸² The Danish Consumer Ombudsman declared for example that a “24-month new car guarantee” from a car importer⁷⁸³ or a “five-year quality guarantee”⁷⁸⁴ would only improve the buyer’s legal position insignificantly and would therefore violate § 12(1).

Fourthly, there is a question as whether the scope of protection granted by the statutory regime has to remain intact, and the guarantee may only add to the level secured by statutory

⁷⁷⁸ On this problem see also transparency part of this chapter.

⁷⁷⁹ Dreads 1998, p. 107.

⁷⁸⁰ Ibidem, p. 108.

⁷⁸¹ Ibidem, p. 108.

⁷⁸² Fogt 2009, p. 237

⁷⁸³ Opinion of the Danish Consumer Ombudsman in the case no. 2002-52175-219, available at www.forbruger.dk, as referred to in Fogt 2009, p. 237, footnote 61.

⁷⁸⁴ Opinion of the Danish Consumer Ombudsman in the case no. 1994-116/5-180, available at www.forbruger.dk, as referred to in Fogt 2009, p. 237, footnote 61.

law; or whether it is alternately possible to add some rights and at the same time to limit some as compared with the level set by law in the additional advantage guarantee? This question is understood in different ways, for example Deards has argued⁷⁸⁵ that the requirement that the guarantee must add to and not restrict the rights under the legal guarantee is similar to the requirement under English law that guarantees offered by suppliers must not affect a consumer's statutory rights.

If a guarantee could only extend the statutory regime, establishing whether or not the guarantee offers an additional advantage would be relatively simple. It would mean that the rights granted to the consumer by law constitute the minimum scope of the guarantee that needs to be at least met in all aspects of the guarantee and exceeded in at least one of the guarantee's aspects.

There are a number of Member States that follow this approach. In Bulgaria, the problem of additional advantage is expressly addressed in Article 111(1) CPA. According to it, the guarantee does not offer additional benefit to the consumer if it, at the same time, improves some rights of the consumer and limits others.⁷⁸⁶ Similarly, a recommendation drawn up by the Danish ombudsman on the use of the term "guarantee" and its content stated that a guarantee cannot limit the buyer's rights in any circumstances and the trade-off between good and bad terms is prohibited.⁷⁸⁷ In addition, in Sweden the guarantee can only add to the entitlements of the consumer.⁷⁸⁸

However, if the second option is accepted (the guarantee content may at the same time exceed and limit the protection level), the picture gets much more complicated. The crucial question in such a case is whether the limitations imposed by the guarantee must be measured against the benefits that the guarantee provides the consumer with. If that would be the case, then the estimation whether a guarantee provides additional benefit would indeed be very challenging. Another problem is what kind of measurement should be used to evaluate the advantage: objective (if it is possible) or subjective (which would mean that the personal preferences of the consumer were to be decisive in establishing whether or not the advantage is present). To give an example of such a situation: the guarantee offers only the repair or replacement of a product, but it covers a period of five years. In such a case, it is possible to claim that the guarantee offers the additional benefit (the extended protection period), but that it is restrictive, because it offers only repair and replacement. The preparatory work on the Danish Marketing Practices Act,⁷⁸⁹ for example, made it clear that guarantees and similar declarations must offer the consumer a better deal, and that account must be taken of the guarantee or similar declaration as a whole, in assessment of whether the legal position of the consumer is better than under the existing law.

One can theoretically consider that, if only the advantage that the guarantee provides would be taken into account, and not the limitations it imposes, it would be much easier to assess the guarantee. At the same time, however, it would certainly lead to abuses, because the imposed limitations could easily outweigh the additional benefits.

⁷⁸⁵ Deards 1998, p. 107.

⁷⁸⁶ Takou 2009, p. 216.

⁷⁸⁷ Green Paper of 1993, p. 45.

⁷⁸⁸ Agell, SvJT 1991, 420.

⁷⁸⁹ Danish Consumer Commission report II No 681/1973, p. 22, as quoted in the Green Paper of 1993, p. 120.

3.6.5 Sellers and others

If a legal system introduces an additional advantage requirement, the question may be asked, whether it exerts the same influence on guarantees offered by sellers and other potential guarantors (producers, importers, intermediaries, etc.). Since the liability regime in consumer sales contracts that exists in the EU places the main burden on the final seller, and leaves the problem of the producer's liability as well as the liability of the previous sellers in the business chain against the consumer in the hands of the national legislators, the position of the seller and the producer (and other possible guarantors) can potentially be different in this case.

Generally speaking, any protection provided by a person other than the seller improves the legal position of the consumer, because it creates a parallel possibility to claim deficiencies in the goods. Therefore, in principle any guarantee provided by a person other than the seller can account for the additional advantage. In a legal system, where the consumer has no direct recourse against the producer, no matter how limited the coverage of the guarantee provided by the producer, it is always to the benefit of the consumer to have another party, against which the liability for the deficiencies of the goods can be claimed. To sum up: if the producer is not liable directly against the consumer, the producer meets the additional benefit requirement by simply offering the guarantee, whereas the seller must indeed offer something additional. The main problem here is that this kind of guarantee may give the consumer a false impression of his statutory rights. In the eyes of the consumer, the benefit presented by the guarantee may amount not to the additional person against whom he may claim the faults of the goods, but it may refer to the coverage of the offered guarantee. It should also be taken into account that the guarantee coverage in this case will normally be more limited than the conformity rules and the consumer, unaware of the content of his statutory entitlements will not be able to become aware of that. In Germany, before the transposition of the Consumer Sales Directive, the Supreme Court established a principle, according to which, when the guarantee was provided by the producer, it was not bound, as was the seller, by the *AGB-Gesetz*, the German legislation on unfair standard contract terms. The producer could, in principle, limit in his guarantee the remedies available to the consumer. However, the Supreme Court considered that, insofar as the producer's guarantee could mislead the consumer as to the remedies he may invoke against the seller and hence discourage him from relying on his rights, such a limitation constitutes an infringement of the general rule concerning unfair terms contained in the *AGB-Gesetz*.⁷⁹⁰

This will, of course, apply if the guarantee can have a scope that is, in comparison with the statutory rights of the consumer, more restrictive and more beneficial. If the system introduces a requirement that the guarantee may only add to the entitlements of the consumer, the position of all guarantors will in fact be the same, as they will all be bound by the conformity rules. This is, however a rather far reaching concept, since it would mean that non-sellers would be bound by the non-conformity rules, when establishing the content of their own guarantees.

3.6.6 Additional advantage guarantee v guarantee not affecting consumer's rights

It should be made clear that there is a distinction between the requirement that the guarantee does not affect the consumer's statutory rights and the requirement that the guarantee should offer an extra benefit to the consumer.

⁷⁹⁰ Green Book of 1993, p. 44.

In the situation where the guarantee cannot affect the consumer's statutory rights, the law in fact remains neutral as to the content of the guarantee. The guarantee cannot affect the rights and whether or not it offers anything extra (or anything of value for that matter) is immaterial, subject to the contractual unfairness control or market control rules. In such a case, no requirement concerning the minimum content is created, and the guarantor can offer a guarantee with a more restrictive scope than the one the consumer already enjoys under the law, as long as he clarifies that the legal rights of the consumer are not affected by the guarantee. This concept is based on the theoretical assumption that the statutory protection and the guarantee create parallel regimes. This is the case under the Consumer Sales Directive. For example, a three-month guarantee that only covers the exchange or replacement of faulty parts could easily meet the requirement of not affecting the consumer's legal rights if it only contained a statement in the guarantee document that it does not waive or restrict the consumer's legal rights. Such an arrangement certainly carries a danger of misleading consumers as to the scope of the statutory regime. The example given above might not be the best one from this perspective, because the very short three-month period could raise the consumer's suspicions as being too short. However, if a guarantee has a duration similar to the statutory protection, it can create an impression that the guarantee is all that is being offered to the consumer.

4. Analysis of the guarantee coverage in the strict sense

4.1 General introduction

On the basis of the Polish Civil Code rules, Żuławska described the guarantee of quality as consisting of two elements.⁷⁹¹ The first one was the assurance of the proper operation of the goods, which can be generalised as assurance that the goods will meet the specifications set in the guarantee, using the terminology of the Consumer Sales Directive. The second one was a description of the conditions under which the liability of the guarantor arises, which most often comes down to establishing the scope and type of the guarantor's obligations and the period for which the guarantee is offered, also potentially the terms of performance of the guarantee services and the person (the entity) who will perform them.⁷⁹² This part of the analysis deals with the second element, which here is referred to as the widely understood guarantee coverage. It begins with coverage in the strict sense, followed by the remedies, the duration of the guarantee, the problem of payment for the guarantee and ends with limitations of liability.

4.2 The coverage in the strict sense

The question of the strict sense coverage remains to a large extent unregulated in the EU as well as at the level of the Member States. One of the reasons for that is that the Consumer Sales Directive does not really effectively address the issue of coverage in the strict sense.⁷⁹³

The analysis here concentrates on the question how coverage in the strict sense can be established. From a legislative point of view there are three possibilities. Firstly, the coverage can be established by referring to existing legal constructions, mainly defect and conformity. Secondly, it can be established by referring to the guaranteed qualities of the goods, and

⁷⁹¹ Żuławska 1999, p. 82.

⁷⁹² Ibidem, p. 82.

⁷⁹³ On that see Chapter III, part 2.3.3 The contents of the guarantee.

primarily the good functioning of the goods. Thirdly, establishing the coverage can be left in the hands of the guarantor, with or without further details.

It must be underlined that the issue of coverage is important not only from the point of view of the legislator, who creates the legislative support for the guarantee in a legal system, but also from the point of view of the guarantor, who establishes his own guarantee. However, the three possibilities mentioned above are not always equally relevant for the legislator and the guarantor, and the analysis takes that into account.

4.2.1 Referring to legal constructions

As already mentioned, the first way in which the guarantee coverage in the strict sense can be established is by referring to existing legal tools. As this is simply a convenient technique, both legislators and guarantors use it. Its attractiveness rests in the fact that the guarantee (or the legislative scheme applicable to guarantee) refers to a legal institution that already has a meaning established in the legal system.

4.2.1.1 The notion of defect

The first impulse when discussing the coverage of a guarantee in the strict sense is to refer to the defects covered by it. A defect is normally understood in the objective meaning of the word. Most of the time, guarantees refer to defects in the goods, its manufacture or the materials used for its creation. This is probably the most common way of defining the coverage of the guarantee. It is pretty understandable, given that referring to a defect allows the coverage to be established in a very precise way.

Examples:

Roman Ltd. guarantees all products against faulty materials or manufacture.

The Volvo International Guarantee covers material defects and flaws in workmanship.

However, while tempting and useful, the notion of a defect has its limitations. If viewed from a legislative point of view it may create a bottleneck solution that does not cover all real-life situations. Nowadays, consumer guarantees more and more frequently cover the satisfaction of the buyer, which underlines the importance of the subjective attitude of the consumer. Therefore, the notion of the defectiveness of the goods may go beyond the objective defect. Another example is the good functioning of goods. This means that if there is, objectively speaking, a defect in the goods, but which does not influence the performance, it might not be covered by the guarantee. Therefore, in the case of a guarantee, the meaning of the defect may at the same time be wider and narrower than the objective notion of a defect.

Nevertheless, Twigg-Flesner,⁷⁹⁴ for example, opts for a wider and more subjective understanding of the defect. He claims that guarantees are given against “quality defects” and recognises two categories of quality defects: the first one refers to the basic functionality, which includes reliability (the product will perform as it should) and durability (the period during which a particular product can be used before it requires attention); the second one is the appearance and performance of the product. According to Twigg-Flesner, “Although durability and functionality are fundamental aspects of product quality, there are also other

⁷⁹⁴ Twigg-Flesner 2003, p. 4-5.

matters that are also relevant, particularly in a consumer context. A consumer will not only be interested in the functionality of the product but also its appearance and finish.”⁷⁹⁵

The notion of defect also arises in the legislation and legislative materials. The Green Paper of 1993 proposed a solution that, whenever the document of the guarantee does not specify the scope of the guarantee, it should be considered as covering the goods in their entirety against any defect that could arise after delivery.⁷⁹⁶ Reference to the notion of defect can also be found in national legislations, where the liability of the seller is traditionally based on the concept of defect.

In Poland, the coverage of the guarantee was (and still is in non-consumer contracts) based on the concept of the physical defect. Article 577(1) of the Civil Code states that if the buyer received from the seller a document of guarantee of the quality of the thing sold, it will be deemed, in the case of doubt, that the issuer of the document (the guarantor) is obliged to remove the physical defects of the thing or deliver a thing free from defects, if these defects are disclosed within the time limits specified in the guarantee. The physical defect is defined in Article 556(1) of the Civil Code as a situation when:

- the thing sold has defects that reduce its value or utility with respect to the purpose stipulated in the contract or resulting from the circumstances or the destination of the thing,
- the thing does not have the properties about which he assured the buyer or if the thing was released to the buyer in an incomplete condition.

However, Polish doctrine and jurisprudence limit the scope of the guarantee. The guarantee covers only the physical defects that affect the serviceableness of the thing in connection with the normal, common purpose of the thing. The fact that the thing does not meet special requirements set in the sales contract or by the seller’s assurances, does not constitute a defect within the meaning covered by the guarantee, although it might be a defect within the meaning of the legal regime.⁷⁹⁷

In Germany, the Civil Code introduces a separate regulation of the guarantee of quality and durability in §443. § 443 BGB distinguishes two types of guarantees: guarantees concerning the characteristics of the goods (*Beschaffenheitsgarantie*) and guarantees concerning the durability of the goods (*Haltbarkeitsgarantie*). It states in paragraph 1 that if the seller or a third party gives a guarantee for the quality of the thing, or that the thing will have a specified quality for a specified period (guarantee of durability), then, if there is a claim under the guarantee, the buyer, notwithstanding his statutory claims, has the rights given by the guarantee upon the terms set out in the declaration of guarantee and in the relevant advertising in relation to the person who granted the guarantee. Paragraph 2 follows that, to the extent that a guarantee of durability has been given, there is a presumption that a material defect, which appears during the guarantee period, triggers the rights under the guarantee. In the case of *Haltbarkeitsgarantie*, there is a presumption that a defect that appears during the time mentioned in the guarantee allows the buyer to enforce his rights expressed in the guarantee.⁷⁹⁸ Sometimes the concept of defect appears together with that of conformity. In Norway, Section 18(a) of the Consumer Sales Act (introduced in 2007)⁷⁹⁹ states that the seller may accept liability for defects, even if the defects do not amount to a lack of conformity

⁷⁹⁵ Ibidem p. 4-5.

⁷⁹⁶ Green Paper of 1993, p. 97.

⁷⁹⁷ Żuławska 1999, p. 86.

⁷⁹⁸ Bittner & Rott 2009, p. 331.

⁷⁹⁹ Lilleholt 2009, p. 473.

under the act. The seller may also accept liability for a lack of conformity that is more extensive than the liability following from the act.⁸⁰⁰

4.2.1.2 Existence of the defect at the moment of purchase

With regard to defects covered by the guarantee, there is one more question that appears frequently concerning the time when the defect should exist. The problem comes down to answering whether the defect should be present, as for example Twigg-Flesner claims,⁸⁰¹ at the moment when the consumer buys (takes delivery of) the goods, or whether it is immaterial that the defect existed at that time, as long as it manifested itself within the time limits of the guarantee.

There is no uniform way to approach the question of time when the defect has to exist among the Member States. In Spain, before the implementation of the Consumer Sales Directive, the General Law for the Defence of Consumers and Users of Law 26/1984 of 19 July stated that in the case of guarantee, the fault or defect had to be of origin, which meant that it had to have dated from a moment prior to the formation of the contract.⁸⁰² Similarly in Poland, in the case of non-consumer contracts, Article 578 of the Civil Code states that, if not stipulated otherwise in the guarantee document, the liability for the guarantee will only cover defects that arose from a cause inherent in the thing sold. The opposite solution is present in Finland, where, according to Chapter 5, sec. 15a(1) of the Consumer Protection Act, the goods sold will be deemed defective if they deteriorate during the guarantee period as referred to in the guarantee. In other words, the guarantee delays the moment in time at which the performance is evaluated.⁸⁰³

4.2.2 Referring to conformity

The content of the guarantee can also be established on the basis of the conformity regime. The concept of conformity gradually replaces the defect concept in the EU, and a natural consequence is that, since it prevails in the legal system, it also has an impact on the guarantee concept. This solution is very similar to the situation where the coverage of the guarantee is established by reference to the defect; the difference comes down to a different reference object. In addition, it raises very similar doubts as the notion of defect. As Beale and Howells phrased it: “The value of many guarantees is that they are not restricted to situations of non-conformity but, for instance, cover defects that did not exist at the time of delivery, but which materialise within the guarantee period or simply allow the consumer to return the goods if he or she is not satisfied for any reason.”⁸⁰⁴

The conformity concept is established in the Consumer Sales Directive. According to Article 2(2) of the Directive, goods are presumed to be in conformity with the contract if they:

- a) comply with the description given by the seller and possess the qualities of the goods that the seller has held out to the consumer as a sample or model;
- b) are fit for any particular purpose for which the consumer requires them, and which he made known to the seller at the time of concluding the contract, and which the seller has accepted (...).

⁸⁰⁰ Ibidem p. 473.

⁸⁰¹ Twigg-Flesner 2003, p. 8.

⁸⁰² Navas Navarro 2009, p. 520.

⁸⁰³ Norros 2009, p. 296.

⁸⁰⁴ Beale & Howells 1997, p. 38.

The Consumer Sales Directive does not use the conformity concept or its elements when referring the coverage of the guarantee in the strict sense.⁸⁰⁵ However, the PELS make a clear reference to conformity when establishing the default content of the guarantee. The PELS Article 6:104(b) states that if the guarantee document does not specify otherwise, the guarantee includes the requirements set out in Article 2:202 (b), (d), (e) and (f). It means that the goods must:

- (b) be fit for purposes for which goods of the same description would ordinarily be used;
- (d) be contained or packaged in the manner usual for such goods, or, where there is no such manner, in a manner adequate to preserve and protect the goods;
- (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive;
- (f) possess such qualities and performance capabilities as the buyer may reasonably expect.

The PELS addresses a very important problem, which appears if the legislator refers to the conformity notion, i.e. distinguishing between the qualities fixed by law and established by the agreement of the parties. The PELS opted for limiting the default coverage to these elements of conformity that are not based on the agreement of the parties. The comments explain⁸⁰⁶ that adding a reminder of the implied conformity requirements (fitness for a particular purpose and conformity with a sample or a model) would excessively burden the guarantor, as in fact they assume a direct contact between the guarantor and the buyer. It is a correct choice from a legislative point of view, as default rules must be sufficiently clear. Introducing a rule that necessitates the agreement of the parties as a default rule fails to meet this requirement. The situation might be slightly different where a guarantor refers to the conformity regime. He may choose to refer to the elements that require contact between the parties, though this solution, considering the mass character of guarantees, seems to be quite unlikely.

The DCFR takes a slightly different approach. It states in Article IV. A. – 6:104 (b) that if the guarantee document does not specify otherwise the guarantor's obligations become effective if, for a reason other than misuse, mistreatment or accident, the goods at any time during the period of the guarantee become unfit for their ordinary purpose or cease to possess such qualities and performance capabilities as the guarantee holder may reasonably expect.

It should be noted, that depending on the definition of a defect, a similar problem may appear when the guarantee coverage in the strict sense is based on a defect.

4.2.3 Referring to the features of the goods

The second method of establishing the guarantee coverage is by referring to certain characteristic features that the guaranteed goods possess. Here there are many different possibilities. The most typical guarantee that can be distinguished using this criterion is the guarantee that refers to the general good functioning of the goods. Such guarantees normally cover certain failures of the goods that have an impact on their proper functioning, for example, constructional deficiencies, faulty materials used for construction, etc. Other types of guarantees here are guarantees that refer to certain clearly distinguished qualities of the goods. Such guarantees can refer to objectively assessed coverage (for example: originality or authenticity guarantees, the lowest price guarantees, etc.) and as well as to the subjective evaluation of the consumer (satisfaction guarantees).

⁸⁰⁵ On that, see Chapter III, part 2.3.3 The contents of the guarantee.

⁸⁰⁶ PELS 2008, p. 376.

4.2.3.1 The guarantee of good functioning

The guarantee of good functioning concentrates on a specific aspect of the goods – namely its normal, proper functioning, hence the guarantees of good functioning normally cover the faults of the goods that disturb its normal functioning or use. This formulation has the potential to radically limit the scope of the objective defect, as the goods' faults that do not influence its objectively perceived good functioning would be excluded.

Referring to the good functioning of the goods, first of all this requires establishing which deficiencies disturb the normal functioning, and which are not relevant in this respect. The question here is to what degree the subjective preferences of the guarantee holder should be taken into account. The best example is a deficiency in the aesthetical values of the goods, which may be irrelevant to one person and absolutely unacceptable to another. In this case there must be a clear guidance whether the test of defectiveness is conducted objectively or subjectively. It would most certainly be difficult to apply the same test to all types of goods. For example, an imperfection on the surface of an expensive Italian couch should be treated differently than an imperfection on the back seat of a cheap car.

The good functioning formula is used primarily by legislators, though sometimes guarantors also refer to this technique.

Example: Every item we sell is guaranteed for its normal life under standard, non-commercial use.

As for the legislators, both the Italian and Portuguese civil codes recognise the guarantee of good functioning.⁸⁰⁷ In Polish civil code rules rules, the situation is slightly different, but in practice it carries a strong reminiscence of the guarantee of good functioning. In non-consumer sales, if there is any doubt, the guarantee is deemed to cover the physical defects of the thing. The meaning of the physical defect is reduced by the legal writing to the physical defect that affects the serviceableness of the thing in connection with the normal, common purpose of the thing.⁸⁰⁸ In addition, according to the Polish Supreme Court, the liability of the guarantor covers only the normal functioning of the thing.⁸⁰⁹ In Spain, before the implementation of the Consumer Sales Directive, the General Law for the Defence of Consumers and Users of Law 26/1984 of 19 July stated that the guarantee was to cover the existence of a fault or defect that caused the goods to fail to be in the optimal condition for its destined use (Article 11(3)(b)).⁸¹⁰ In Norway,⁸¹¹ if the seller has accepted liability, during a specified period, for the fitness of the goods for their intended use, or for some other quality of the goods, there is a presumption of the lack of conformity if this undertaking is not fulfilled, unless the seller's liability is clearly defined otherwise (there is an exception for accidents, misuse or other circumstances on the consumer's side).

⁸⁰⁷ Green Paper of 1993, p. 48.

⁸⁰⁸ Żuławska, 1999, p. 86.

⁸⁰⁹ Judgement of the Warsaw Court of Appeal of 22 January 1997, I Aca 105/96.

⁸¹⁰ Navas Navarro 2009, p. 520.

⁸¹¹ Lilleholt 2009, p. 473.

4.2.3.2 Quality guarantees

There is a group of guarantees that do not cover the mechanical, functional or constructional deficiencies in the goods, but refer to the non-physical qualities of the goods. There are several types of the guarantees based on quality. They differ with respect to the tools used in assessing whether the guarantee mechanism can be activated. The subjective approach is presented by ‘satisfaction’ guarantees, which cover the consumer’s satisfaction arising from the goods. In such guarantees, the assessment of whether the quality of the goods is satisfactory is left entirely to the guarantee holder.

Example: 100% satisfaction or your money back!

In the case of a satisfaction guarantee, the liability of the guarantor is set in a very vague manner, and at the same it is very extensive, as in principle the consumer can invoke the guarantee for any reason if he is dissatisfied with the goods. The goods do not have to necessarily be defective in any way, and any breach of the subjective expectations of the consumer is sufficient.

Quality guarantees based on an objective assessment are, for example, guarantees of authenticity, or a guarantee of the lowest price.

Examples:

Originality:

We provide an unlimited originality guarantee that all articles purchased from us are genuine, and the usual right of return and right of exchange within 14 days is applicable and for reasons of goodwill and fairness, certain articles within six months. Following this period, we can no longer be expected to accept returned goods. (Siegmond Stephan)

The lowest price:

If you book with firstchoice.co.uk and then find your holiday available for a lower price elsewhere, we guarantee to refund you 110% of the difference.

In this case, the guarantee coverage in the strict sense is based on the objectively measurable qualities of the goods. The special character of the guaranteed feature in the case of originality (authenticity) guarantees makes it difficult to set the time limits of the guarantor’s obligation. If the goods (for example a painting) are specifically and voluntarily guaranteed as authentic it is difficult to find a reason, why this should be limited in time. In the case of the lowest price guarantee, the solution would be opposite – normally there should be a clearly established period, during which the price should remain the lowest.

4.2.4 No legislative intervention

From a legislative point of view, there is one more division line that could be introduced, namely when the legislator does not deal with the coverage of the guarantee in the strict sense. This problem has already been discussed in the context of the wide sense coverage, so there is no point in repeating the discussion. Here it suffices to summarise the findings.

There are, in principle, two possible situations. First, the legislator may remain completely silent regarding coverage in the strict sense, and leave it in the hands of the guarantor. In this case, if there is a problem with establishing the coverage of the guarantee it will be at the discretion of the court. The best example of this solution is the Consumer Sales Directive.

Next the legislator may, in principle, leave the coverage of the guarantee in the strict sense in the hands of the guarantor, while at the same time introducing default coverage, applicable if the guarantor does not establish the content of its own guarantee. Here, the examples include solutions adopted by the PELS and the DCFR. Another possibility is that the guarantor gives certain guidelines to the potential guarantors, such as the minimum content of the guarantee or the requirement that the guarantee should offer an advantage over the statutory rights to the guarantor. In Austria, for example, if the guarantee does not specify the features of the item, it must have the expected features that are customary (§ 9b (2)(2) KSchG).⁸¹² A promise by the seller is to be regarded as a commercial guarantee under § 9b KSchG only if the promise contains more than the buyer would be entitled to under §§922 et seq. ABGB.⁸¹³ Promises by the seller with regards to the feature of the goods are therefore not regarded as commercial guarantees, but are only relevant to whether or not goods lack conformity (§ 922 ABGB).⁸¹⁴ Promises by producers are regarded as a commercial guarantee even if the promise only gives the consumer the same or less rights as compared to what the consumer already has by law. As the consumer has no direct claim against the producer, the consumer is in any case better off as he gets another debtor.⁸¹⁵

5. Remedies of the guarantee

5.1 Introduction

This part of the analysis deals with the issue of remedies available to the buyer under the guarantee. This is one of the subjects that was analysed in great detail in Chapter III, and therefore the remarks here have only a complementary character. This especially applies to the problem of the suitability of particular remedies for the guarantee scheme.

Setting the remedial system for a guarantee in practice depends in most cases entirely on the guarantor, unless there are compulsory guarantees in a legal system with firmly established remedies. Nevertheless, there are legal systems that impose default rules concerning the remedies, as they constitute the most important part of the guarantor's obligations arising under the guarantee. The analysis here begins with an overview of the possible remedies, later it proceeds to the question of various approaches towards the remedies in a legal system. At the end it deals with the practical issues relating to invoking the remedial regime.

5.2 The typical remedies

According to Tenreiro, the repair and replacement of goods are the traditional remedies of the commercial guarantee.⁸¹⁶ This statement reflects the practice, as repair and replacement very often appear as the primary remedies under the guarantee. As declared by the Office of Fair Trading, most guarantees promise to repair or replace faulty products or components.⁸¹⁷ The Green Paper of 1993 provides⁸¹⁸ a number of examples for formulating consumer rights arising under a guarantee, and repair and replacement are both visibly present on the list, which includes:

⁸¹² Augenhofer 2010, p. 181.

⁸¹³ Augenhofer 2009 and the literature referred to there, p. 180.

⁸¹⁴ RV 422 B1gNR 21.GP 25 as referred to in Augenhofer 2009, p 180.

⁸¹⁵ RV 422 B1gNR 21.GP 25 as referred to in Augenhofer 2009, p 180.

⁸¹⁶ Tenreiro 1995, p. 84.

⁸¹⁷ OFT 1984, p. 5.

⁸¹⁸ Green Paper of 1993, p. 74.

- no information provided as to the consequences of a defect;
- repair only;
- replacement of a defective part;
- repair or replacement at the professional's discretion;
- repair or replacement at the consumer's discretion;
- in addition to repair or replacement, a reduction in price or compensation;
- repair or replacement without indicating who is to decide;
- repair, and if repair is ineffective or impossible, replacement of the item; or the repudiation of the contract or a reduction in price.

The Green Paper of 1993 also proposed that repair and replacement should constitute default remedies whenever the guarantee document does not specify it. If the national legislator deals with the problem of the guarantee's remedies, repair and replacement come forward very often as well. Under Italian law,⁸¹⁹ the purchaser could choose between the replacement of the goods and repair. In Greece, Article 5(5) of Law 2251/1994 provides that if the product displays a defect during the guarantee period and the supplier refuses to repair it or delays unreasonably, the consumer is entitled to ask for a replacement or rescission.⁸²⁰ According to Article 577(1) of the Polish Civil Code (which applies only to non-consumer cases), if the buyer received from the seller a document of guarantee of the quality of the thing sold, it will be deemed, if there are any doubts, that the issuer of the document (guarantor) is obliged to remove the physical defects in the thing or to deliver a thing free from defects, if these defects are disclosed within the time limit specified in the guarantee.

At the same time, very often there is no limitation in the legislation as to what remedies are possible or allowed under the guarantee. This is the option chosen by the Consumer Sales Directive, and as a result adopted in most of the legal systems of the EU.⁸²¹ For example, the transposed rules in Austria apply to guarantees in which a entrepreneur promises a consumer that it will repair or replace goods, to reduce the price, to rescind the contract or to provide other remedies in the event of any non-conformity (§ 9b(1) KSchG).

The PEELS and the DCFR in principle opt for a wide catalogue of remedies. Article 6:101(2)(c) of PESL and Article xxx of DCFR define a guarantee as an undertaking given to a consumer, under which, subject to any conditions stated in the guarantee, the goods will be repaired or replaced, the price will be reimbursed or some other remedy will be provided. However, both the PESL and the DCFR reduce the possible remedy options when it comes to default remedies, opting for repair and replacement here (PEELS Article 6:104 (c), DCFR Article IV. A. – 6:104(c)). The comment explains that this choice, in principle, reflects the wording of Article 6:101(2)(c), but it omits the catch-all clause “some other remedy” and the reimbursement of the price, which are considered too open-ended and too burdensome for the guarantor.⁸²² An interesting solution is accepted in Finland, where if goods deteriorate during the guarantee period, then the buyer can invoke against the guarantor any of the remedies that are regulated in Chapter 5 of the Consumer Protection Act.⁸²³

⁸¹⁹ Green Paper of 1993, p. 47.

⁸²⁰ Karakostas & Voulgari 2009, p. 348.

⁸²¹ For a detailed analysis see Chapter III, part 2.3.4 Remedies.

⁸²² PEELS 2008, p. 376-377, DCFR.

⁸²³ Norros 2009, p. 296.

5.3 Practicalities of invoking the remedial system

5.3.1 Who chooses the remedy?

Generally speaking, taking into account the nature of the guarantee and its regulation, it will normally be the guarantor who chooses the remedy, unless he decides to leave the choice to the consumer. This is confirmed by findings of the Office of Fair Trading in the area of short-term guarantees offered by manufacturers, according to which the consumer is seldom offered the opportunity of choosing between a repair or replacement, and that decision rests entirely with the manufacturer.⁸²⁴ Under the Polish Civil Code regime, it is in principle the guarantor who makes the decision about the replacement.⁸²⁵ In certain situations, also the person entitled under the guarantee may ask for it: if the guarantee document does not indicate repair as an option, if there are a certain number of repair attempts allowed, and the allowed number of attempts was reached; or in the case of replacement under the guarantee the entitled person received defective goods and in the case when taking into from the number of the attempts and the time, during which the goods were repaired it follows that (taking into account all the circumstances of the case) the guarantee holder was deprived of using the goods accompanied with the guarantee.⁸²⁶

Giving the choice to the consumer is normally a legislative option. For example, Article 6:104 (c) PELS introduces a rule hereby, unless the guarantee document declares otherwise, the guarantee holder may choose between repair and replacement (according to Article IV. A. – 6:104(c)) if the conditions of the guarantee are satisfied, the guarantor is obliged to repair or replace the goods).

5.3.2 Hierarchy

Also when it comes to the structure of the remedial system under the guarantee, in principle it will be the choice of the guarantor, who can structure the remedies against each other in any way he finds proper. However, if the legislator or courts deal with the issue, a certain pattern for a solution can be established in this respect, resembling a hierarchy. In such a case, the usual solution is repair first, and should this turn out to be ineffective, then replacement and/or termination.⁸²⁷ Such a scheme exists under Greek law (Article 5(5) of Law 2251/1994), where, if the supplier refuses to repair or delays unreasonably, the consumer is entitled to ask for a replacement or rescission.⁸²⁸ A similar solution was present before the implementation of the Consumer Sales Directive in Spain. The rules of the General Law for the Defence of Consumers and Users of Law 26/1984 of 19 July (LGDCU) specified that once the defect was detected, the consumer was entitled to the repair of the goods. If the repair was unsuccessful, the consumer could seek the replacement of the goods (Article 11(3) LGDCU). A new guarantee was granted with the replacement. The consumer was also given the option, instead of seeking the replacement, to choose the termination of the contract.⁸²⁹

⁸²⁴ OFT 1984, p. 5.

⁸²⁵ Żuławska 1999, p. 85.

⁸²⁶ Judgement of the Supreme Court of 3.5.1980, NP 1981, nr 5 p. 152.

⁸²⁷ As to the problems relating to the termination – see Chapter III.

⁸²⁸ Karakostas & Voulgari 2009, p. 348.

⁸²⁹ Navas Navarro 2009, p. 520.

5.3.3 When a remedy is effective?

The conditions for asserting whether a remedy was performed effectively are normally set by law or by case law. If the remedy is performed effectively then the interest of the consumer is fulfilled and the problem relating to the goods' deficiency, against which the guarantee was given, ceases to exist or the guarantee itself ceases to exist. The real problem regarding the effectiveness of remedies rests in establishing what the consequences are of the lack of effective performance of the remedy. In principle, there are two options: first, the consumer can be entitled to invoke the same remedy one more time, and second, the consumer can be allowed to proceed to another, further reaching remedy (for example if the initial remedy was repair - to replacement, if the initial remedy was replacement - to termination⁸³⁰), as happens under Greek law.⁸³¹

If the question of the remedy's effectiveness is touched upon by the guarantor, it will normally be done as a part of the remedial scheme, which indicates when the consumer may proceed to another remedy.

The effectiveness of a remedy can be measured from two perspectives. First, it is the end result reached by performing the remedy. If the goods are repaired, it requires establishing what the condition of the goods should be after the repair, whether the goods should only be fully functional, or whether the esthetical value of the goods cannot be diminished, what kind of spare parts can be used (original or any), etc. If it comes to replacement, the question may be whether the goods must be replaced with the same type of goods, or the replacement goods should only be similar, and if so, what degree of similarity is required. Second, when evaluating the effectiveness, the main stress can be put on the process of remedying, i.e. whether it is not too long, whether it is not too burdensome for the consumer, etc. If this kind of effectiveness requirement is not met, it can also trigger the mechanism of moving to another remedy. An example of such a solution can be found in Greek law, where Article 5(5) of Law 2251/1994 provides that if the product displays a defect during the guarantee period and the supplier refuses to repair it or delays unreasonably, the consumer is entitled to ask for a replacement or rescission.⁸³²

The question of effectiveness was drawn up very carefully in Polish case law, especially under the former political regime, as the guarantee was used very often in practice, sometimes on an obligatory basis. In practice it gave rise to many problems, as repair was normally not very effective and replacement difficult due to supply shortages. It was established⁸³³ that repair that does not grant the goods full performance capabilities, in accordance with the technical conditions for this kind of goods, does not amount to the performance of the obligations arising from the guarantee. The guarantor is liable for the result.⁸³⁴ A resolution of seven judges of the Supreme Court⁸³⁵ underlined that, in the course of a guarantee, the person entitled under the guarantee is entitled to receive goods of the same kind, new and free from defects. At the same time, the defective goods should be returned to the guarantor.

⁸³⁰ Termination can be problematic in the case when the guarantee is given by a person other than the seller, see Chapter III, part 2.3.4.14 Rescission of the contract.

⁸³¹ Article 5(5) of Law 2251/1994.

⁸³² Karakostas & Voulgari 2009, p. 348.

⁸³³ Judgement of the Supreme Court of 6.12.1977, OSNCP 1978, item 163.

⁸³⁴ Judgement of 14.08.1985, OSNCP 1986, item 123.

⁸³⁵ Resolution of 7 judges of the Supreme Court of 26.10.1972, OSPiKA 1973, item 180.

At the EU level, the PELS deal with the problem of effective performance, though not in the rules. In the comments, the PELS⁸³⁶ state that if the guarantee holder chooses the repair or replacement of the goods, then the guarantor has to bring the goods into conformity with the requirements of Article 2:202(b), (d), (e) and (f), unless this is impossible. It means that the remedy is effective if the goods:

- (b) are fit for purposes for which goods of the same description would ordinarily be used;
 - (d) are contained or packaged in the manner usual for such goods, or, where there is no such manner, in a manner adequate to preserve and protect the goods;
 - (e) are supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive;
 - (f) possess such qualities and performance capabilities as the buyer may reasonably expect.
- No answer is given what happens if the remedies are not successfully performed.

5.3.4 Replacement goods

There are situations where guarantees are understood as granting the consumer an undisturbed period of use of the goods. It implicates that if the goods fail, the guarantor must provide the consumer with replacement goods for the time (in principle) when the consumer is deprived of the use of the goods, or when such a deprivation is seen as burdensome for the consumer (for example lasts longer than established maximum period). Such a rule is to be found in Greek law, where if the repair takes more than 15 working days, the consumer also has the right to ask for a temporary replacement during the time of the repair.⁸³⁷ The British National Consumer's Council created a very elaborate system relating to replacement goods in its Consumer Guarantees Bill.⁸³⁸ According to the bill, under a consumer guarantee the guarantor would have to provide the consumer with the use of a comparable replacement product free of charge, or otherwise to reimburse any reasonable expenses that the consumer incurred as a result of losing the use of the product, if the guarantor did not repair the product within four "relevant days", and in the case of a motor vehicle, two "relevant days". Relevant days was defined in terms of the days after a consumer has notified a defect until he got the product back repaired, but not counting days which were lost for the purposes of repair as a result of the consumer's unreasonable behaviour, weekends or public holidays. If, in any 12-month period, the number of relevant days exceeded 21 (whether in respect of one or more defects) then under a consumer guarantee the guarantor would have to refund the consumer or provide the consumer with a replacement product. The refund that the guarantor had to pay was the retail price.

6. Free guarantee and guarantee against payment

6.1 Introduction

This part of the analysis deals with the question of payment for the guarantee. This problem has already been discussed extensively in Chapter III, in the part Free guarantees, where all the major related issues were raised and analysed. Therefore the remarks in this part have only a supplementary character and are meant to give the discussion a wider context.

The analysis begins by asking the question, what does the discussion that the guarantees should be free or against payment really mean. Next, there is a brief overview of the types of

⁸³⁶ PELS 2008, pp. 376-377.

⁸³⁷ Karakostas & Voulgari 2009, p. 348, footnote 30 and the literature referred to therein.

⁸³⁸ Cranston 1995, p. 115.

payments that can be charged on the basis of a guarantee. Then a short reference is made to the problem of extended guarantees.

6.2 Should guarantees be for free or against payment?

If a guarantee is offered against payment, it sends a message to the consumer that he acquires something extra, something worth paying for. For consumers, paying for a guarantee means buying a peace of mind.

In principle, one can point to three main differences between free guarantees (where the price is included in the price of the goods) and guarantees for which the price is paid separately. First, from the formal point of view, once the price is expressed separately, it is more probable that the guarantee will be in the form of a contract. Second, from the consumer's point of view, if the price is distinguished, the consumer will probably be more interested in establishing what is he obtaining and his expectations towards the coverage of the guarantee will be greater (he should be better off once he is paying for greater protection). Third, for the same reason, the consumer will probably be more willing to formulate claims on the basis of the guarantee against a separate payment.

Nevertheless, the main problem is the same in the case of the both types of guarantees, and it comes down to answering the question how to ensure that when a consumer is buying goods accompanied with a guarantee or a guarantee as such, he is not paying for the rights he already has under statutory law?

The question whether or not guarantees should be against payment is not, in fact, formulated very precisely. Firstly, as already indicated in Chapter III, the guarantee is never for free, though the price may be expressed directly, or it may be hidden in the general price for the goods. This situation may be very confusing for consumers. As underlined by the Office of Fair Trading, with some types of goods, such as domestic electrical appliances, manufacturer's guarantees are included in virtually all cases. The terms and conditions of such guarantees may vary, but there is rarely an opportunity to choose between two similar products, one with a guarantee and one without. The consumer, therefore, cannot tell what proportion of the product is the cost of the guarantee, and whether it represents good value for money.⁸³⁹ Willet made a very interesting remark on this problem.⁸⁴⁰ He said that the price only increases significantly if the increase in demand is outweighed by the costs of improving product quality and claimed that this should not be the case with already responsible and efficient producers. He continued that those who are irresponsible or inefficient will either: (a) not offer the guarantee, not improve quality and consequently charge a lower price; or (b) attempt to compete by offering the guarantee. According to Willet, the former approach provides a cheaper option for consumers, whereas the latter diminishes the producer's reputation relative to those who have not significantly increase prices and force the return to (a). Alternatively, he claims, it will force producers out of business. If he or she is inefficient, this will result in an improved allocation of resources.

Secondly, the problem comes down to whether a legal system should regulate only guarantees provided "for free", or whether the regulation should extend to the situations when the consumer pays a separate price for it. The issue here is about creating the model guarantee in a given legal system, which according to the legislator, prevails or should prevail on the

⁸³⁹OFT 1986(1), p. 18.

⁸⁴⁰Willet 1991, p. 557.

market. Theoretically, one can also imagine a situation where a legal system prohibits guarantees to be provided against payment, but that would be quite difficult to implement in practice. First, there would have to be a very precise definition of a guarantee, which would probably not cover all the real life situations anyway. Second, considering how many different legal constructions could be qualified as a guarantee, this restriction would amount to a rather severe limitation of the freedom of contract.

Coming back to the question what kind of guarantee should be regulated by law, I would like to begin with the Green Paper of 1993. It opted for the guarantee to be without a separate price. The Green Paper introduced a clear division line between commercial guarantees that are provided for free and after-sales services provided against payment.⁸⁴¹ At the same time, the Green Paper stated⁸⁴² that guarantees offered by distributors or manufacturers cannot be seen as a gift, as they constitute part of a commercial strategy designed to boost sales, and hence are included in the final price.

The draft Consumer Sales Directive initially included guarantees against payment, but finally its scope was limited to the free guarantees.⁸⁴³ The initial draft of the Consumer Rights Directive did not introduce the limitation that the guarantee must be free of charge, at the end however, nothing came out of this proposal as regards the guarantees. Both the PELS and the DCFR decided for a wide scope of regulation and they cover both the guarantees provided without a separate price and the guarantees where the price is established separately. They both introduce a default rule (PELS Article 6:104 (d) and DCFR Article IV. A. – 6:104(d)) that states that if the guarantee document does not specify otherwise, all costs involved in invoking and performing the guarantee are to be borne by the guarantor.

In legal writing there are mostly opinions that favour the option of the “integral part of the bundle of satisfaction” where consumers are not required to pay an additional price over the price of the guaranteed goods⁸⁴⁴ and welcomed the exclusion of the guarantees against payment from the scope of the Consumer Sales Guarantee.⁸⁴⁵ Within this line of reasoning, Tenreiro claims that guarantees that have to be paid for and extended warranties for which a charge is made are not, strictly speaking, true guarantees, but disguised insurance policies that pose other problems.⁸⁴⁶ Nevertheless, as already stated and drawn up in a greater detail in Chapter III, there are a number of Member States that deal in the legislation with guarantees against payment: Austria,⁸⁴⁷ the Netherlands,⁸⁴⁸ the Czech Republic,⁸⁴⁹ Estonia⁸⁵⁰ and Ireland.⁸⁵¹

⁸⁴¹ Green Paper of 1993, p. 6.

⁸⁴² Ibidem, p. 59.

⁸⁴³ On that see Chapter III, part 2.1.7 Free guarantee.

⁸⁴⁴ Udell and Anderson 1968, p. 1.

⁸⁴⁵ Deards 1998, p. 108.

⁸⁴⁶ Tenreiro 1995, p. 81.

⁸⁴⁷ Article 9b Austrian Consumer Protection Act.

⁸⁴⁸ Article 7:6a Dutch BW.

⁸⁴⁹ Art. 598 and 620(5) CC.

⁸⁵⁰ Kull 2009, p. 282.

⁸⁵¹ Sale of Goods Act of 1980, section 16.

6.3 Where can the guarantor impose a charge (the 3 types)?

As already mentioned in Chapter III, the guarantor may impose payment for a guarantee at various stages of the life of the guarantee. First, naturally, the guarantee may be offered against payment. This situation, although it may be evaluated in various ways from the point of view of a legislative policy, is relatively clear from the point of view of the consumer. In order to buy the guarantee, the consumer must simply pay for it and, as Beale and Howells observe, most consumers are aware of price.⁸⁵² Sometimes, the initial charge can also take a form of extension charge. The consumer is offered a free guarantee for, for example two years, and an extension against payment for a further three years.

At the later stages of the guarantee life circle, other charges may appear. There can be a charge for the consumer invoking the guarantee or the guarantor performing under the guarantee. The report of the Office of Fair Trading mentions, for example, that sometimes consumers are asked to pay a small fee (between 2 and 5 GBP) when the product is returned for repair. In other cases consumers are charged the actual cost of repairs.⁸⁵³ Some types of guarantees (dump-proof guarantees) required payment of a 20 to 30 GBP inspection fee before a visit would be made to ascertain the cause of the problem.⁸⁵⁴ Even more extreme examples can be found in practice, where a charge is imposed for issuing a guarantee certificate. These charges carry the serious potential to surprise the consumer, who might not be aware of their existence when receiving a guarantee, which, in his eyes, is a free guarantee. In most cases the consumer finds out about the costs involved only when there is something wrong with the goods.

The first situation, where the payment for the guarantee is made upfront, is the one normally addressed if legislation deals with guarantees against payment. If the formulation is imprecise, it may lead to a situation like under the Consumer Sales Directive, where it is unclear what charges are meant by the legislator.⁸⁵⁵ The outcome is that the rules on guarantees in such a system do not apply for guarantees provided against payment. It does not, however, mean that guarantees against payment are prohibited as such - they just remain outside the scope of application of the rules on guarantees, unless the system expressly prohibits charging for guarantees and any guarantee-like undertakings. If it comes to payments charged at a later stage, the situation is positively clear if the legislation expressly declares that all types of charges are excluded. If a guarantee imposes a charge in such a case, it might either be that such a guarantee is not classified as a guarantee in the given legal system, in which case other, general, rules apply, or it may be decided that the charges should be disregarded, because imposing them is, for example, contrary to the nature of the guarantee, or constitutes an unfair contract term.

The PEELS and the DCFR follow this logic, as they contain a default rule whereby all costs involved in invoking and performing the guarantee are to be borne by the guarantor, unless the guarantee document does specify otherwise. Hence, both the PEELS and the DCFR recognise the difference between an upfront payment for a guarantee, and charges that may be imposed at a later stage, and address the problem of the latter. If a guarantee is provided against payment, it is quite evident that the buyer will not receive it, unless he pays for it. All other costs and payments should be expressly brought to the attention to the buyer and indicated in the guarantee document.

⁸⁵² Beale & Howells 1997, p. 25.

⁸⁵³ OFT 1984, p. 9.

⁸⁵⁴ OFT 1986(1), p. 22.

⁸⁵⁵ On that, see Chapter III, in the part 2.1.7 Free guarantee.

Especially in Great Britain, the problem of different types of payments arises in the discussion regarding the guarantee. In 1984, the British Office of Fair Trading put forward⁸⁵⁶ a proposal that, as a minimum, guarantees should not involve the purchaser in labour, postage costs, etc. and it clearly distinguished between guarantees against payment and other forms of costs that may be incurred by the consumer. After research conducted in 1986, the Office of Fair Trading made a recommendation that charges should not be imposed that are likely to deter claims.⁸⁵⁷ Under the Consumer Guarantees Bill prepared by the National Consumer Council,⁸⁵⁸ all remedies under the consumer guarantee had to be provided free of charge, and for a period of 12 months. The guarantor could impose a charge where the consumer guarantee had been given for more than the minimum 12-month period. The charge had to be directly attributable to the use of the product after that 12-month period, and had to be reasonable given the nature of the product and other relevant circumstances. As an exception, charges could be made after six months or 6000 miles for motor vehicles. The Secretary of State was to have the power under the bill to determine how the charge was to be calculated. A guarantor could also charge for any significant physical damage to the product, other than the damage resulting from the normal use. According to the Law Society of Scotland,⁸⁵⁹ certain categories of additional expenses should not fall on the consumer where a claim for repair or replacement is validly made under a consumer guarantee. However, at the same time it is not always desirable to require the guarantor to bear all such expenses, for this could greatly increase the cost to the consumer of the goods concerned (or of the guarantee if it is an optional extra).⁸⁶⁰ A similar opinion was expressed in the report of the Director General of Fair Trading, where⁸⁶¹ some respondents maintained that it was reasonable to expect a consumer to return the goods to the retailer if they were rapidly portable. A number of responders felt that, if the guarantor was to accept all expenses, it would increase the costs of the goods, or the insurance premium. The Office accepted that some nominal costs to the consumer (such as postal charges) might be justified, provided that this is made quite clear before purchasing the product or entering into the guarantee contract.

Certain reference could also be found in the former Spanish legislation, where the GAPCU stated that, during the guarantee period, the beneficiary is entitled at least to the repair of the product completely free of charge.⁸⁶² Another possibility is that the legislation simply requires transparency, regarding the imposed costs, like in the Irish Sale of Goods Act of 1980, section 16, according to which the guarantee must state clearly what the manufacturer/supplier undertakes to do and what charges apply, if any. Failure to comply is an offence (section 2(6)), but does not affect the existence of the guarantee.

6.4 Extended guarantees as a form of a guarantee against payment

Extended guarantees are a phenomenon that currently exists probably in all Member States, though they have given rise to particularly intensive discussion in Great Britain, where a number of market researches have been conducted, bringing very interesting findings.

⁸⁵⁶ OFT 1984, p. 2.

⁸⁵⁷ Howells, Bryant 1993, p. 7.

⁸⁵⁸ Cranston 1995, p. 115.

⁸⁵⁹ Law Society of Scotland 1984, p. 3.

⁸⁶⁰ Law Society of Scotland, 1984, p. 3.

⁸⁶¹ OFT 1986(1), p. 22.

⁸⁶² Green Paper of 1993, p. 46.

According to the Office of Fair Trading, extended warranty denotes a similar undertaking to that of a “normal” guarantee. However, it is given for an extended period, normally on payment of a fee by the consumer, and has a legal force under English law,⁸⁶³ which as a result of transposing the Consumer Sales Directive is not exceptional anymore. There is no universal definition of this expression. However, in its original concept, it was a contract whereby the trader undertook to the consumer (usually in return for a payment) to extend for a specified period (normally up to five years) the promises given in a short-term guarantee.⁸⁶⁴ In another document, the Office of Fair Trading described extended warranties as schemes where the consumer is offered protection against product failure for a fixed period after the expiry of the manufacturer’s guarantee. It also includes schemes offered in respect of second-hand goods (particularly cars), where the manufacturer’s guarantee may have expired. Extended warranty schemes are often insurance policies, usually offered as an optional addition to the product itself, but are sometimes included in the sale price.⁸⁶⁵ In the legal literature, extended warranties are described as an option for the consumer to purchase additional protection once the guarantee has expired,⁸⁶⁶ and within this meaning qualified as standard breakdown insurance policies.

Interest in extended warranties was expressed in Great Britain already back in the 1980s. In 1984, the Office of Fair Trading conducted a survey on extended warranties. Most of the examined warranties⁸⁶⁷ were called “mechanical breakdown insurance” schemes. About 50% of the examined manufacturers and concessionaires offered an optional extended warranty on new vehicles that could be taken up at the time of purchase or within a stipulated time. Over half of the used car dealers who responded to the survey offered extended warranties. In general, the schemes covered parts that fail in operation, although a part replaced during repairs before failing would not normally be covered. For new vehicles, the schemes tended to run for 12 or 24 months after the expiry of the manufacturer’s guarantee. For used vehicles, the period was normally 6, 12 or 24 months, which included any guarantee given by the dealer.

Extended warranty schemes were also found to be available independently of the seller of the vehicle, and it seemed possible to obtain cover for any new car or motorcycle, and for most used cars and motorcycles less than five years old with less than 50 000 miles on the clock. The extent of the cover varied widely, and not only in terms of the items covered, but also the number and value of claims allowed. Several schemes offered a range of cover, from “economy” with heavy restrictions, to “premium” with a much higher level of coverage. The transfer of the extended warranty was normally possible.

The Office of Fair Trading characterised these schemes as follows.⁸⁶⁸

- The consumer is required to decide whether to join within a specified time of purchasing the product or service. Applications after this period are generally refused.
- In the majority of cases, the procedure for joining requires a form or card to be filled out and posted, together with the appropriate fee to the manufacturer, supplier, scheme administrator or insurer.

⁸⁶³ OFT 1984, p. 4.

⁸⁶⁴ OFT 1984, p. 6

⁸⁶⁵ OFT 1986(1), p. 4.

⁸⁶⁶ Twigg-Flesner 1999(2), p. 279, note 2.

⁸⁶⁷ OFT 1986(1), p. 7.

⁸⁶⁸ OFT 1984, p. 6.

- The fee varies, depending on the goods or services purchased. For small electrical goods it can be as little as 10 GBP; for larger electricals GBP to 40 GBP is typical; and for cars a fee of 50 GBP to 200 GBP (according to the size and type of car) is to be expected.
- The warranty document contains a description of the cover provided and a number of clauses defining the trader's or insurer's liability and a claim procedure. In some cases, the consumer is obliged to have a repair under warranty carried out at his own expense, and to reclaim the costs from the trader or insurer (sometimes via the scheme administrator).⁸⁶⁹ In others, a trader will carry out the repair without any charge to the consumer.

The report by the Director General of Fair Trading also identified the most common problems with regards to extended warranties,⁸⁷⁰ which generally speaking are the same as the problems that other types of guarantees create. It stated that:

- 1) It may not be clear with whom the consumer has a contract and to whom any claim should be made;
- 2) It may not be clear (particularly before the consumer pays the fee) whether the extended warranty is an insurance policy;
- 3) The consumer may form an incorrect impression of the protection provided;
- 4) A difficult or inconvenient procedure may have to be followed in making a claim;
- 5) It may not be possible to transfer the extended warranty if the product is sold, or it may entail a fee.

Another problem relating to the insolvency of the guarantor was identified in the report by the Director General of Fair Trading.⁸⁷¹ It presented the following case. In December 1984, Coldshield Holdings Ltd became insolvent and went into liquidation. One of the companies in the group, Wallguard Ltd, had been issuing 30-year guarantees on the work it had done (chemical damp proofing of houses), and its failure left many of its customers with worthless guarantees. Another member of the group, Coldshield Windows, Ltd, left behind a string of unenforceable five-year guarantees on double-glazing it had installed. Early in 1985, Bloomsides Ltd, a company that had been marketing extended warranties on domestic electrical appliances, ceased trading. The firm was compulsorily wound up and about 55 000 consumers who had purchased warranties for three or five-year periods were left without cover.

In 1986, the Director General of Fair Trading stated that extended warranties, a recent market development, had become very common in the UK. At that time, extended warranties were still not clearly distinguishable from other forms of guarantees, as the report stated that the cost of such guarantees may be included in the price of the product itself, or available as an optional extra.⁸⁷²

The popularity of extended warranties in the UK was proven by a survey concerning extended warranties, conducted on request of the Office of Fair Trading in 2002,⁸⁷³ when it turned out that the awareness of extended warranties is almost universal (claimed by 95 %) and most

⁸⁶⁹ OFT 1984, p. 6

⁸⁷⁰ OFT 1986(1), p.16.

⁸⁷¹ OFT 1986(1), p. 5.

⁸⁷² OFT 1986(1), p.4.

⁸⁷³ OFT 2002(3), p. 6.

consumers have a good understanding of what they are.⁸⁷⁴ Extended warranties were seen by consumers as necessary in order to avoid expensive replacement and repair costs.⁸⁷⁵

Those aware of the extended warranties were asked to convey their understanding of it. Just over half (54 %) correctly explained that it involves an additional payment for extended cover on an appliance. In addition, 26 % mentioned that it extends the cover beyond the period guaranteed by the manufacturer; 14 % made a general comment about it being insurance; 8 % said that it is another form of insurance for a longer period; 7 % said that it covers parts, and another 7 % stated that it covers labour.⁸⁷⁶

However, another face of the extended guarantees must be mentioned. The DTI, in the impact assessment of the Consumer Sales Directive, expresses an opinion that if consumers better understand their legal rights, their willingness to buy extended warranties could diminish. In 1996, the total expenditure on the consumer goods concerned was around £72.4 billion at 1996 prices⁸⁷⁷ (source:), which represented 15.3% of total consumers' expenditure. From the argumentation of the DTI it follows that consumers often buy the extended guarantees because they are unaware of their statutory rights.

7. Duration of the guarantee

7.1 Introduction

7.1.1 Preliminary remarks

The duration of the guarantee is one of its essential elements. In short it fulfils two functions. The first function is a direct one: it informs the buyer how long he will have the protection offered by the guarantor. The second, indirect function is the message that the duration of the guarantee sends to the consumer. It can be formulated in the following way: the longer the guarantee, the better the quality of the goods. The significance of the duration is based on the fact that it carries an indirect message to the consumer, how far does the guarantor stand behind the goods. This is the reason why advertisement campaigns that employ guarantees concentrate mostly on the duration of the guarantee, as the element of duration easily catches the attention of the consumer. The consumer gets the message: if somebody offers (5, 15, 100) years guarantee, the goods must indeed be of an excellent quality!

The discussion on the duration of a guarantee is closely related to the question of the durability of goods, which has been described as “a bug-bear of consumer law.”⁸⁷⁸ The main question in this field – for how long should the law assure the good functioning of the sold goods is answered by setting the conformity period at the EU level, which burdens the seller at the level of two years. However, there is a rather substantial gap between the level of protection offered to consumers by law, the consumers' expectations and the life span of the goods. In a survey conducted in 2002⁸⁷⁹ a group of consumers were asked, among other things, how long they would expect certain household electrical appliances to last, on average, before needing repairs or replacement. A fridge or freezer was expected to last eight years,

⁸⁷⁴ Ibidem p. 3.

⁸⁷⁵ Ibidem p. 10.

⁸⁷⁶ Ibidem, p. 5.

⁸⁷⁷ Monthly Digest of Statistics November 1997, table 1.6

⁸⁷⁸ Cranston 1995, p. 111.

⁸⁷⁹ OFT 2002(3), p. 14.

colour televisions had an expected trouble-free life span of seven years, washing machines and dishwashers six years, and personal computers and games consoles five years.⁸⁸⁰

Consumer sales guarantees might, in a way, fill the gap between the level of protection granted by the law, consumer expectations and the actual durability of the goods. However, it still is the case that guarantees are given for a period that is shorter than the average life expectancy of the relevant goods.⁸⁸¹

7.1.2 Scope of the analysis

The discussion on the duration of the guarantee is not limited to the considerations on the typical length of the guarantee period. It includes also other related issues, namely: the possible ways of measuring the duration of the guarantee, establishing the initial moment when the guarantee starts to run, the impact of the goods' failure on the calculation of the guarantee period, establishing the duration of the guarantee, and a short mention to the specific problems relating to long-term guarantees.

7.2 Measuring the duration

7.2.1 Introduction

The duration of every guarantee is somehow limited in time, as even eternal guarantees end at some point. The duration of a guarantee runs in time, but it does not have to be expressed in time. In principle, there are two ways of measuring the duration: the duration measured in time and the duration measured in use.

7.2.2 Duration expressed in time

The most popular method of expressing the duration of a guarantee is time. Time units used for this purpose vary, and include days, weeks, months and years. The general tendency is: the shorter the duration, the shorter the time unit that expresses it and, at the same time: the shorter the guarantee the more comprehensive the cover.

Examples: "90-day satisfaction guarantee on everything", "guarantee of the lowest price if proven within a week from the purchase" as opposed to a three-year guarantee for expressly indicated parts of the product.

7.2.3 Guarantee expressed in use

With regards to some categories of consumer goods, the duration of the guarantee is expressed by use. Goods of a measurable use are appliances that are able to record its own functioning, the best example being cars. Guarantors measure the durability of these goods not in time, but in their technical capability. A guarantee expressed by use is a safety device for the guarantor that mitigates its liability with regards to goods used with great intensity. As observed by Emons,⁸⁸² consumers do not use goods in a uniform manner and guarantors are not able to distinguish between consumers that use the goods at different intensities, as a car may be driven from home to the shops and back, but it also may participate in the Gumball

⁸⁸⁰ OFT 2002(3), p. 14.

⁸⁸¹ Emons 1989, p. 287.

⁸⁸² Emons 1989, p. 287.

3000. The guarantor may either, as suggested by Emons,⁸⁸³ limit the duration of the guarantee, investigate the specific needs of the consumer and establish whether he belongs to the high-intensity users or the low-intensity users, or measure the duration of the guarantee by use.

It should be noted that the technique of mitigating the liability of the guarantor by expressing duration through use is much more efficient and less costly than examining the specific needs of every buyer in order to adjust the guarantee. In addition, it does not lead to an automatic limitation of all guarantees (as may be the case in guarantees expressed in time). In terms of transferability, it could be claimed that it creates a clearer solution and fewer restrictions for the transfer, though in reality the problems may be very similar to those that appear in the case of guarantees with the duration expressed in time.

Guarantors use one more similar technique to mitigate their liability: they combine duration expressed in time and duration expressed by use. For goods that are used intensively, the duration of the guarantee will be limited by use, and for products used less often the duration will be limited in time. This approach, however, carries a danger of misleading consumers who cannot evaluate how intensively the product will be used – i.e. for how long the guarantee will last in practice.

Example: A car guarantee is given for 15 000 km or two years.

7.2.4 “Never-ending” guarantees

The extreme forms of guarantees are lifetime guarantees or eternal guarantees.

Concerning lifetime guarantees, the first question that appears refers to the need to establish whether “lifetime” refers to the normal expected lifespan of the goods, or to the life of the person who bought it.

In my opinion, the concept of lifetime guarantees should be interpreted as based on the average expected lifetime of the goods that are furnished with a guarantee. If the lifetime guarantee would relate to the life of the owner, assuming that the transfer of the guarantee to a subsequent owner (through inheritance) would be possible, the guarantee would be in fact eternal. Moreover, if there was no factor, such as the average lifespan of the goods, against which the lifetime could be measured, it would be impossible to estimate how long the guarantee should last. In other words, the lifetime would be meaningless, because it would not matter how long the goods would last, if during that time the guarantee would be binding.

Very often the difficulties in establishing the average lifetime of a product is raised as an argument against using this method of establishing the duration of the guarantee, or in a wider context as a method of establishing the duration of the seller’s liability. On the other hand, for example, Hall suggested that producers should be obliged to indicate the minimum life for their products.⁸⁸⁴ In addition, there are examples of systems that adopt such a solution. In a wider context, Dutch legislation accepted that the liability of the seller for the non-conformity of the goods sold should cover the average lifespan of the goods. Both the PELS (Article 6:104(a)) and the DCFR (IV. A. – 6:104(a)) decided that the default duration of a guarantee should cover the estimated lifespan of the goods or five years, whichever is shorter. The

⁸⁸³ Emons 1989, p. 287.

⁸⁸⁴ Hall 1994, p. 151.

comments indicate⁸⁸⁵ that the estimated lifespan of the goods should be established via means of interpretation. The elements to be taken into account when making this assessment include the reasonable and justified expectations of the consumer, based on objective factors like the price of the goods, the reputability of the particular branch, etc.

When it comes to the coverage of lifetime guarantees, two situations can be distinguished. Firstly, such a guarantee may have the usual coverage (meaning without severe limitations), and the lack of limitation of liability in time is a sign of the guarantor's conviction that the goods are of particularly high quality.

Examples: (Kinder): Every Kinder gas fire carries a free lifetime guarantee providing you with reassurance and peace of mind. We offer this, unlike other manufacturers, as a sign of our commitment to the highest standards of build quality, ensuring that life will revolve around your Kinder fire for many years to come.

Secondly, lifetime guarantees very often concern not the specific proprieties of the goods that relate to its operation, but its quality, the quality of the materials that have been used for its production, its authenticity or origin. In the case of such coverage, the time-limit is not really necessary⁸⁸⁶ as the flow of time does not have any effect on the guaranteed qualities.

Example: (store.past.present.info) “lifetime authenticity guarantee on antique pieces”.

7.3 Computation of the guarantee duration

7.3.1 Establishing the duration - general

There are three elements that have an impact on establishing the exact duration of a guarantee. These are: (1) defining the moment when the duration starts to run, (2) the consequences of invoking the guarantee for calculating its duration, (3) establishing the moment when the guarantee ends.

7.3.1.1 The relevant point in time when the guarantee starts to run

There are several possibilities for establishing the starting moment for the guarantee period. First, this is the moment of sale, as for example in Article 16 (4) of the Irish Sale of Goods and Supply of Services Act of 1980, whereby a guarantee will clearly state the duration of the guarantee from the moment of purchase.

The moment of sale is one of the standard moments for establishing the starting point in time for calculating the guarantee duration. For the consumer it carries a danger of “an empty period” – the period between the moment of sale and the moment of delivery. During this period the guarantee runs, but the consumer does not benefit from it, since he is not yet in possession of the goods.

Another moment that may be taken into account is the moment of the delivering the goods to the buyer. This solution has been accepted in the guidelines drawn up by the Danish

⁸⁸⁵ PELS 2008, p. 375.

⁸⁸⁶ Herre 1999, p. 248.

Consumer Ombudsman in 1987,⁸⁸⁷ according to which the written guarantee should clearly state that the guarantee runs from the moment of delivery.

This scheme remedies the shortcomings of the previous one. The guarantee starts to run when the buyer receives the goods, so the buyer is able to fully benefit from the guarantee from the very beginning. The weak point of this option is establishing the precise moment of delivery, especially if it is a third party who delivers. There may be a substantial difference between the moment when the goods were dispatched from the seller and the moment they were delivered to the buyer.

Third, it may be the moment of registering the guarantee with the guarantor. This option, although very beneficial from some perspectives, has at the same time a potential of creating uncertainty in relations between the guarantor and the guarantee holder. There are different techniques for registering guarantees. If the guarantee is registered at the place and at the moment of sale, the situation is rather uncomplicated. However, if the registration of the guarantee involves contacting the guarantor, who is a different entity to the seller, or registering on the guarantor's webpage, the possibility of disturbances increases. The traditional manner of registering the guarantee is sending the registration card to the guarantor.

Example: The guarantee card should be registered. The card must be completed in a legible manner and signed by the buyer and the monteur. The lower part of the guarantee card should be sent by registered mail within 30 days from the moment of finishing of the installation to the following address (...). (Royal Europa S.A).

The postage element brings to mind several questions: when does the guarantee start to run – from the moment of posting, or from the moment of the actual registration with the guarantor. If the guarantee starts to run from the moment of registration with the guarantor, another “empty period” is created, which lasts until the guarantee is actually registered with the guarantor.

A method of registration that is steadily gaining popularity is the registration of the guarantee on the Internet website of the guarantor. Problems similar to those connected with the registration by postage may occur here, although to a lesser extent. Data processing via the Internet normally takes less time than using traditional ways of communication, and very often guarantors clearly present their policy concerning this issue.

Guarantors sometimes combine different options for starting to compute the duration of the guarantee, or designate other moments, for example the moment of the installation.⁸⁸⁸

Example: Opel (Poland) calculates a 24-month guarantee period from the moment of delivery or the first registration of the car, whichever occurs earlier.

The most sensitive areas from the consumer point of view in deciding on the starting moment of a guarantee include: (1) providing the consumer with certainty concerning the beginning of the guarantee, and (2) preventing the occurrence of “empty periods” when, after conclusion of the contract of sale, the product is not covered by the guarantee.

⁸⁸⁷ Green Paper of 1993, p. 120.

⁸⁸⁸ Green Paper of 1993, p. 75.

7.3.2 The impact of the goods' failure on the duration of the guarantee

An element that may have an influence on the duration of a guarantee is the failure of goods still covered by the guarantee. As a result of a failure, the guarantee holder is deprived of the use of the goods and, very often, also of the possession of the goods (when the goods are, for example, taken for a repair).

The failure of the goods might affect the duration of a guarantee in various ways. First, it may not have any impact at all on the period of the guarantee. Second, it may cause the suspension of the guarantee term or the prolongation of the duration of the guarantee. The third, and the most extreme possibility, is that it may cause that the guarantee period to be restarted.

7.3.2.1 No impact

Very often consumer guarantees do not contain any references to the impact of the goods' failure on the duration of the guarantee. If the national legislation does not regulate this issue (which is normally the case), the consumer is at a disadvantage, especially if the failure of the goods reoccurs, or if remedying the failure takes a long time. In such a case, in practice the periods during which the consumer cannot use the goods due to its failure and the process of remedying it will constitute a part of the guarantee period.

7.3.2.2 Suspension and prolongation of the guarantee period

The failure of the goods may mean that the duration of the guarantee will be suspended. There are many ways to calculate the suspension. For example, the suspension may cover the period during which the consumer was deprived of the use of the goods, the period when the consumer was deprived of the possession of the goods, or the period of repair.

Another option is that the duration of the guarantee is prolonged in the event of the goods' failure. This is a mirror image of the suspension idea. There are different techniques for calculating the period for which the period of the guarantee is prolonged. As in the case of suspension, prolongation may cover the period when the guarantee holder was deprived of use of the goods, possession of, or the time of the repair.

The Green Paper of 1993⁸⁸⁹ suggested a solution whereby, unless the guarantee document states clearly to the contrary, the guarantee should be automatically extended for the duration of repairs. Such a solution is present in some legislation. According to Article 581(2) of the Polish Civil Code (which at the moment does not apply to consumer sales within the scope of the Consumer Sales Directive), in cases where there was no replacement or essential repairs carried out by the guarantor, the time limit of the guarantee is prolonged by the period during which the buyer could not use the item because of the defect. The Guidelines drawn up by the Danish Consumers Ombudsman⁸⁹⁰ state that if repairs are carried out under the guarantee, the guarantee period is extended by a period corresponding to the period running from the time when the claim is introduced, until the time when the requirement has been met. The Code of Conduct of the British Retail Consortium Concerning Commercial Guarantees⁸⁹¹ requires the guarantor, upon the presentation of reasonable documentary evidence, to extend the guarantee

⁸⁸⁹ Green Paper of 1993, p. 97.

⁸⁹⁰ Ibidem, p. 120.

⁸⁹¹ Ibidem, p. 126.

by the amount of time the buyer has been without the use of the goods as a result of repair under the guarantee. In Greece in case of replacement of the product or a part thereof, the guarantee is automatically renewed for all of its duration as far as the new product or the spare part is concerned.⁸⁹² In Malta, on the other hand, according to Article 88 of the Consumer Affairs Act, the duration of the guarantee is automatically extended to a period that is equal to the time during which the guarantor may have had the goods in his possession in order to perform or execute the guarantee or as a result of a recall of the goods or part of the goods by the manufacturer.⁸⁹³

Another problem is whether the suspension or prolongation of the guarantee should be allowed for any disturbance in the use of the goods, or whether it should be introduced only if the inability to use the goods or the deprivation of possession lasts for some time. For example, the French Act of 18 January 1992 stipulates that for consumers, the duration of the guarantee is extended for any period during which the goods cannot be used for a period of at least seven days. The British Office of Fair Trading issued a recommendation after research conducted in 1986⁸⁹⁴ where it suggested that an extension to the guarantee period should normally be allowed where the consumer has lost the use of the product for a significant period. In Greek law according to Article 5(5) of Law 2251/1994 if the repair takes more than 15 working days, the consumer has the right to ask for a temporary replacement during the time of the repair.⁸⁹⁵

7.3.2.3 A new guarantee

A new guarantee would normally be restricted to extreme cases where entire goods have been exchanged, the repair was so extensive that in fact a new product is offered, or defective parts were replaced with new ones that come with a separate guarantee. In such a situation, either a new guarantee for the entire goods can be offered, or the new guarantee can be limited to the parts of the goods that have been exchanged.

The Green Paper of 1993⁸⁹⁶ proposed that, unless the guarantee document states clearly to the contrary, the guarantee would be automatically extended for the duration of repairs, while spare parts would automatically come with a new guarantee with the same duration as the initial guarantee. According to Article 581(1) of the Polish Civil Code (which at the moment does not apply to consumer sales within the scope of the Consumer Sales Directive) if, in discharging its obligations resulting from the guarantee, the seller delivered to the buyer, instead of a defective item, an item free from defects, or carried out essential repairs of the item sold, the time of the guarantee will restart from when the item is delivered free from defects, or the repaired item is returned. If the seller has exchanged part of an item, the above provisions apply accordingly to the exchanged part. According to the Guidelines drawn up by the Danish Consumers Ombudsman,⁸⁹⁷ a guarantee will be provided for parts that have been changed or repaired under the guarantee under the same conditions as for the product as a whole, and for a corresponding period.

⁸⁹² Karakostas & Voulgari 2009, p. 349.

⁸⁹³ Karakostas & Voulgari 2009, p. 349.

⁸⁹⁴ OFT 1986(2), p. 16.

⁸⁹⁵ Karakostas & Voulgari 2009, p. 348.

⁸⁹⁶ Green Paper of 1993, p. 97.

⁸⁹⁷ Ibidem, p. 121.

At the same time, there are arguments against prolongation with regards some types of guarantees. A report by the Director General of Fair Trading⁸⁹⁸ refers to the opinion of trade representatives, whereby keeping a track of the due duration of a guarantee would be administratively difficult, and therefore expensive, particularly under a long-term guarantee or extended guarantee, when an item might need attention more than once. On the other hand, however, the Office's research showed that a delay in carrying out repairs is indeed a source of consumer dissatisfaction, as a survey showed that 30 per cent of those who were dissatisfied with a guarantee or extended warranty claimed delays as a cause.⁸⁹⁹

7.3.3 *Establishing duration*

The duration of the guarantee is, as has already been stated, a very important feature of the guarantee. It belongs to the wider issue of the goods durability, which is quite problematic in the EU dimension.⁹⁰⁰ The question of duration can be discussed from two perspectives. Firstly, this is a practical aspect that would require empirical studies of the EU market as well as consumer expectations: how long the guarantees are, and how long the guarantees should be (taking into account, for example, the price paid for the goods and the environmental requirements), or are expected to be by the consumers.⁹⁰¹ There is no clear tendency in this respect, and the diversity in the duration of the guarantee is explained by the presumed life span of the goods and the commercial strategies with respect to different makes.⁹⁰² Here it is sufficient to confirm the opinion of Twigg-Flesner, who claims that it is still the case that the guarantees are given for a period that is shorter than the average life expectancy of the product.⁹⁰³ I would go even further: the duration of most consumer guarantees does not meet buyers' expectations, concerning not the life span but the undisturbed use of the product. It circulates around, and probably, in most cases, does not exceed the period of conformity, unless the guarantee is against payment.

The second aspect of the duration problem is how the legal systems approach it. There are several ways a legal system may deal with it. First, the most extreme is that the law does not deal with the guarantee duration at all, and it is left entirely in the hands of the guarantor. This situation existed in some Member States, for example Belgium before the introduction of the Consumer Sales Directive. Second, the law might not require that a specific duration be established, but it requires the guarantor to inform the guarantee holder about the duration of the guarantee. This is the solution accepted by the Consumer Sales Directive (Article 6(2)), which at the moment functions as a common denominator in all Member States. A similar scheme can be found in the Code of Conduct by the Danish Ombudsman Concerning the Commercial Guarantee and in the Irish Sales of Goods Act of 1980. Here the question arises as to the duration of the guarantee if the guarantor does not inform the guarantee holder. The Consumer Sales Directive does not provide an answer in this respect.⁹⁰⁴ Basically, there are few alternative solutions possible in this respect. First, a guarantee that does not indicate its duration might be considered void, as under Italian law⁹⁰⁵ where the guarantee period must be stipulated in the contract, otherwise the guarantee is void. Second, the court might be able to

⁸⁹⁸ OFT 1986(2), p. 23

⁸⁹⁹ Ibidem, p. 23.

⁹⁰⁰ Cranston 1995, p. 111.

⁹⁰¹ See introductory remarks to this part.

⁹⁰² Green Paper of 1993, p. 75.

⁹⁰³ Twigg-Flesner 2003, p. 30.

⁹⁰⁴ On this see more Chapter III, part 2.6.4 Problems not considered for a regulation.

⁹⁰⁵ Green Paper of 1993, p. 47

establish the guarantee period, and this seems to be the majority solution in the EU at the moment. Third, the legal system might provide certain guidelines in this respect, either by introducing a minimum duration for a guarantee, or by introducing a default duration. Fourth, the law may firmly fix the duration of the guarantee.

An example of default duration might be found in the Polish legislation, where Article 578 of the Civil Code (which does not in principle apply to consumer sales at the moment) states that, if not stipulated otherwise in the guarantee, the time limit is be one year from the day when the thing was released to the buyer. In Portuguese law,⁹⁰⁶ except where otherwise stated, the guarantee expires six months after delivery, unless custom has established a longer period. There are also additional limitations as to the duration of the guarantee: the buyer must notify the seller of the defect, in principle, within 30 days of discovering it (except where otherwise stipulated), and the buyer must bring the action on the guarantee within six months of reporting the defect. According to Danish law, even if commercial guarantee does not specify a guarantee period, it is generally interpreted as a guarantee of durability and good working order over the normal life of product.⁹⁰⁷

Both, the PELS and the DCFR opted for establishing the default duration of the guarantee. They both introduce a rule (PELS Article 6:104, DCFR Article IV.A-6:104) that is specifically devoted to establishing the default coverage of the guarantee. It states that the period of guarantee, if the guarantee document does not specify otherwise, is five years or the estimated life-span of the goods, whichever is shorter.

As far as the minimum duration is concerned, first of all it might be deduced from the general requirement that the guarantee must offer a better protection than the statutory regime. Extending the duration of the guarantee seems to be easiest way to better the position of the consumer. Such reasoning can be misleading if better protection is understood in a way that allows some of the guarantee aspects to be raised and others to be lowered (for example the duration). However, for example in Sweden, the understanding is that the guarantee may only add and it cannot restrict the entitlements of the consumer, so the minimum duration of a guarantee will be set at the conformity level.

The guarantee duration may of course be set in a more direct way, for example the Code of Conduct by the Danish Ombudsman Concerning the Commercial Guarantee⁹⁰⁸ states that, as a general rule, guarantees provided on new goods cover a period considerably longer than the one-year claim under the Sale of Goods Act. In the case of guarantees on second-hand goods, a guarantee covering a period that corresponds to – or is shorter than – the one-year period in the sale of goods act, can be regarded as a real improvement in the legal position of the buyer, provided that the guarantee makes it clear that defects covered by the Sale of Goods Act can also be taken into account within the one-year period mentioned in that act.

Next, the law may establish a guarantee period by referring to semi-mandatory rules, which allow the extension of the period in favour of the consumer. In Spain, for example, Article 12(2) LOCM provides that the minimum time limit of a guarantee is six months from the date of delivery of the item, unless its nature does not allow it and without affecting specific rights and regulations for some goods and services.⁹⁰⁹ The British National Consumer Council has

⁹⁰⁶ Ibidem, p. 49.

⁹⁰⁷ Ibidem, p. 45.

⁹⁰⁸ Green Paper of 1993, p. 120.

⁹⁰⁹ Lete 2001, p. [xxx], Moreno Blanco 2002, p. 51.

recommended in its report 'Buying Problems: unsatisfactory goods and the law'⁹¹⁰ a fixed period of six to twelve months for a guarantee.

Last, the legal system may fix the duration of a guarantee in a mandatory way, though this is a very rare occurrence, normally restricted to mandatory guarantees.⁹¹¹

7.3.4 One product – many durations

In practice it happens that different durations of a guarantee are offered for different parts of the goods.

Example: A guarantee offered by Ford in Poland for a new Ford Focus:

- the basic guarantee – 2 years
- guarantee for the paintwork – 2 years
- guarantee for corrosive perforation of the body – 12 years.

Such a solution is also expressly recognised by Irish legislation, where, according to Article 16(3) of the Sale of Goods and Supply of Services Act of 1980, a guarantee may state different periods for different components of any goods. This choice by the guarantor is normally dictated by different durability of the various parts. The extreme situation is that the guarantor wants to exclude certain parts, for example bulbs, from the guarantee. The problem that arises in the consumer context with regards to a guarantee containing various durations, is that there is a greater need to secure proper consumer information (the consumer may be confused what is in fact the scope and the content of the guarantee offered to him).

7.3.5 Transferability of the guarantee as a duration factor

The problem of the transferability of the guarantee is thoroughly covered in the previous part of this chapter.⁹¹² Here it is important to underline that the question whether or not the guarantee may be transferable constitutes an important factor in establishing the duration of the guarantee. If the possibility to transfer the guarantee to subsequent owners of the goods is excluded or limited, the real duration of the guarantee will in fact be limited to the length of the period during which the goods are owned by the original buyer. The period of the guarantee, as established by the guarantor, matters as long as the first owner owns the goods.

7.3.6 The point in time when the guarantee ends

At first sight, the question concerning the end date of the guarantee seems to be superfluous, as the guarantee should end when the time period for which it was issued elapses, or when the guaranteed use of the goods is exhausted. The apparent clarity of this statement may, however, be slightly disturbed when various aspects, mentioned above, are considered in greater detail.

First, if the guarantee is based on the goods' life expectancy, it is rather difficult to establish a precise point in time when the guarantee ends. Such a period amounts to an estimation, and requires the parties (the guarantor and the beneficiary) to agree on the outcome, or the case is settled by the court. Second, if the guarantee period is suspended or prolonged, establishing

⁹¹⁰ Hall 1994, p. 151.

⁹¹¹ See: Chapter IV, part 3.6 Obligatory guarantees.

⁹¹² Chapter V, part 2. Parties engaged in the guarantee relation.

the moment when the guarantee ends requires a certain calculation. A similar situation exists when the guarantee runs anew. Third, there is one question that, although quite technical, carries great practical significance: what consequences are attached to the fact that the guarantee period ends at a certain moment? Does it mean that the consumer is not able to claim on the basis of the guarantee, or does it mean that deficiencies appearing after this moment cannot constitute the basis of a claim? The Polish Supreme Court, for example, accepted the possibility of bringing a claim under the guarantee after the period of the guarantee has elapsed, on the condition that it is possible to prove that the defect appeared during the period covered by the guarantee.⁹¹³ According to the Guidelines drew up by the Danish Consumers Ombudsman⁹¹⁴ if a requirement under the guarantee is that the purchaser shall make a claim through, for example, the retailer within the guarantee period, a claim made to the guarantor within that period is regarded as having been made in good time as far as the retailer is concerned.

7.3.7 Long-term guarantees – a mention

When discussing the duration of guarantees, it is worth mentioning (without entering into too much detail) that there are some specific problems associated with long-term guarantees. The Green Paper of 1993 warned that the consumer should offset the advantage of a longer guarantee against other potentially applicable guarantee conditions, which sometimes considerably restrict the scope of the guarantee.⁹¹⁵

The long-term factor is important in the guarantee discussion carried on in the UK, where long-term guarantees are specifically distinguished. In a discussion paper published in 1984, the Office of Fair Trading⁹¹⁶ classified guarantees given for a period in excess of five years as long-term guarantees. Such guarantees, according to the OFT, are generally associated with the performance of a service or the supply of materials. Long-term guarantees are often found in the home improvement sector, where the work done or materials supplied are guaranteed for long periods, for example 10, 30 or 50 years. Some car manufacturers guarantee body work against rust penetration for six years or more, and at least one car manufacturer guarantees replaced parts for the life of the vehicle.⁹¹⁷

As the OFT claims, it is quite evident that the longer the guarantee period, the greater the danger that factors other than shortcomings in the manufacturing process will be the cause of the defect.⁹¹⁸ Therefore, the OFT recommended that guarantees issued by traders purporting to give cover for more than one year should be constructed as a direct contract of insurance between the consumer and an insurer authorised to conduct that business.⁹¹⁹ In the case of long-term guarantees, it is very difficult to establish what caused the defect (whether the cause of defect was covered by the guarantee or was it caused by the lack of sufficient care on the side of the consumer) and therefore the guarantor may “overperform” its obligations under the guarantee.⁹²⁰ They would normally be classified as services provided against payment. Other problems observed by the Office of Fair Trading refer to the flow of time, the burden of

⁹¹³ Judgement of 8 January 1970, II CRN 539/69, OSPiKA 1971, No 6 item 119.

⁹¹⁴ Green Paper of 1993, p. 121.

⁹¹⁵ Green Paper of 1993, p. 75.

⁹¹⁶ OFT 1984, p. 7.

⁹¹⁷ OFT 1986(2), p. 4.

⁹¹⁸ Eddy 1977, p. 844.

⁹¹⁹ OFT 1984, p. 14.

⁹²⁰ Twigg - Flesner 2003, p. 30.

proof, the higher chance of a product becoming defective, higher maintenance requirements, exclusion clauses, a greater probability that guarantor will cease to operate or become bankrupt, the question of transferability (products tend to be transferred over a longer time perspective).

8. Limitations on the guarantor's liability under the guarantee

This part of the analysis is not meant to present a comprehensive analysis of a particular area that has not been so far touched upon. On the contrary, it deals almost exclusively with issues that already have been or will be dealt with. This is because the overview contained here aims at emphasising the potential traps awaiting consumers in the area of consumer sales guarantee – be it limitations as regards the coverage of the guarantee, or resulting from imposing formal requirements on the guarantee holder. This part constitutes a very illustrative transition between the discussion on the content of the guarantee and the transparency requirements, as it clearly indicates the areas where there is a need to impose the latter. The question remains as to what extent such an approach (imposing the informational requirements) is effective.

In principle, the potential limitations on the guarantor's liability can be assigned in two different aspects of the guarantee: firstly the coverage of the guarantee, and secondly the formal requirements imposed by the guarantor. Both types of limitation seem to be equally present in the market practice. Taking the personal point of view as a start, the limitations may relate to the scope of the guarantor's obligations, or they can result from the guarantee holder not fulfilling his duties under the guarantee.

8.1 Limitations regarding content

If it comes to limitations relating to content, they may naturally take various forms. It is important, however, to distinguish between two situations: limited coverage of the guarantee as such (as allowed by law), and limitations regarding the coverage that the consumer does not expect. The Office of Fair Trading very accurately described the drawbacks and potential economic detriment arising as a result of the unexpected limitations in the guarantee coverage for consumers.⁹²¹ The OFT recognised two instances where limitations may appear: the first one is when the guarantor denies liability because of an exclusion (such as fair wear and tear), which had not been made clear to the consumer. Second, it is possible that interpretation of the guarantee conditions differs from what the consumer has anticipated. As pointed out by the OFT, had the consumer been aware of the shortcomings of the guarantee's coverage, he might have been able to arrange a more effective means of protection against defects, for example by a maintenance contract or an insurance policy. The OFT also underlines that if the fault is a major one and the guarantor denies liability, the consumer will have to arrange for the product to be repaired or replaced, and this might be considerably more expensive than the maintenance contract or insurance premium would have been.⁹²²

8.1.1 What is normally excluded from the cover of a guarantee?

There are certain typical exclusions concerning the coverage of a guarantee. Firstly these are consumable components of the goods, which tend to be used up more quickly than the rest of the goods, or are more exposed to damage, such as bulbs, tyres, etc. It must be noted that excluding certain parts of the goods from the guarantee, or even providing a different scope

⁹²¹ OFT 1986, p. 18.

⁹²² OFT 1986(1), p. 18.

for different parts, may be very confusing for the consumer, who may assume that the same guarantee covers the entire goods. Secondly it is the normal wear and tear of goods, as mentioned for example in the Green Paper of 1993,⁹²³ or in the recommendation by the Director General of Fair Trading, which stressed⁹²⁴ that guarantees cover defects not normal wear of goods.⁹²⁵ The Green Paper of 1993⁹²⁶ also provides other examples of typical exclusions regarding the coverage of the guarantee: defects due to external causes, damage due to transport, minor defects, any damage occurring after purchase, exclusion of damage caused by the product or the illegibility of the appliance's serial number. To give an example of a real-life guarantee:

The Volvo International Guarantee does not cover damage to the car that results from a car accident, or from modifications or constructional changes – unless the defect is not connected with the above-mentioned. The guarantee does not cover the normal wear of cars.

There are two more areas that are sensitive when it comes to safeguarding the consumer's position: the duration and the territorial scope of the guarantee. Limitations regarding duration may result from adopting a specific policy concerning periods when the goods could not be used due to the fact that they were either not fit to be used or simply not in the possession of the consumer, due to the fact that they have been worked on by the guarantor. If the guarantor does not compensate the consumer by extending the duration of the guarantee appropriately, the duration of the guarantee is effectively shortened. The Law Society of Scotland, for example, agreed⁹²⁷ with the idea of extending the guarantee period proportionally if the consumer was without the goods. Secondly, whether or not the guarantor allows transferring the guarantee to subsequent owners of the goods may amount to an effective limitation of the guarantor's liability, justified under certain circumstances.⁹²⁸ If the transfer is not allowed, the guarantee period is effectively reduced to the period when the initial purchaser owns the goods. From the point of view of a consumer who wants to sell the goods, he is also losing because the goods accompanied with a guarantee would have received a better price.

The next limitation may relate to the territorial scope of the consumer sales guarantee, which is especially severe for consumers if the goods are bought, used or transferred to a subsequent owner in a trans-border context. Such a limitation may restrict the validity of the guarantee to only one country, to the country of purchase, etc. and effectively limit the usefulness of the guarantee to the guarantee holder. A similar limitation, when it comes to the effect for the consumer, is a limitation resulting from the distribution policy of the producer (should competition law allow it). As formulated by the Court of Justice: "A contractual obligation to restrict the guarantee to dealers within the network, and to refuse to grant it in respect of goods sold by third parties leads to the same result and has the same effect as contractual terms that reserve the right to sell to members of the network. Like such terms, the restriction of guarantee is a means whereby the manufacturer can prevent persons outside the network from marketing products covered by the system."⁹²⁹ From the consumer's point of view it

⁹²³ Green Paper of 1993, p. 72

⁹²⁴ OFT 1986(1), p. 3.

⁹²⁵ OFT 1986(2), p. 15.

⁹²⁶ Green Paper of 1993, p. 72

⁹²⁷ The Law Society of Scotland 1984, p. 3.

⁹²⁸ See part 2.5.2 Who benefits from the guarantee? The question of transferability of this chapter.

⁹²⁹ Judgement of 13 January 1994, Metro SB-Großmärkte GmbH & Co.KG SA (1994). (Metro/Cartier) C-376/92.

means that the guarantee he has received together with the goods does not have any value for him (apart from signalling the good quality of the goods) as the consumer cannot rely on it.

8.2 Limitations based on formal requirements

The second area where the guarantor can limit his liability is the widely understood area of formal requirements. These can relate to all phases of the guarantee's life: concluding the guarantee contract, validating/activating the guarantee, fulfilling the maintenance requirements, notifying about the goods deficiency, transferring the guarantee, etc.

The non-fulfilment of the formal requirements may result in either the guarantee not being binding (because the guarantee contract was not concluded or the guarantee was not validated or activated), or simply that a certain failure of the goods will not be addressed under the guarantee (because, for example, the goods were maintained not in the manner requested by the guarantee).

When it comes to the formal requirements that appear in the initial phase of the guarantee, they can amount to, for example, an obligation to register the guarantee with the seller or the guarantor, to receive a stamp from the shop, etc. The next phase that can result in the limitation of the guarantor's liability is the incorrect installation or use of the appliance and repair by unauthorised third parties, as indicated by the Green Paper of 1993.⁹³⁰ The guarantor may require that the goods be installed or maintained only by indicated entities. This may result not only in the fact that the guarantee is not binding on the consumer or does not cover certain failures of the goods, but also it can generate certain extra costs on the side of the consumer, relating to the installation and the maintenance services.⁹³¹

Next, there might be formal conditions relating to the process of claiming under the guarantee. The Discussion Paper published by the Office of Fair Trading⁹³² mentions that short-term guarantees offered by manufacturers often impose a requirement that the faulty product is to be returned within a specified period of discovering the defect. An even more burdensome requirement is that the product be returned in the original package. The Office of Fair Trading even made a recommendation⁹³³ that the original packaging should not be required to make a claim. The Law Society of Scotland⁹³⁴ agreed with the fact that the requirement to return the goods in the original packaging could impose an unnecessary burden on the consumer, at the same time, however, it indicated that if it is necessary for safety reasons to impose such a requirement, this should be indicated very prominently on the original packaging and the guarantee form.

It is important to mention that the formal requirements that effectively limit the liability of the guarantor may originate not only from the content of the guarantee, as decided by the guarantor, but they may also be a result of the content of law. To give an example: in Portuguese law⁹³⁵ unless otherwise stipulated, the buyer must notify the seller of the defect, in principle, within 30 days of discovering it. In addition, the buyer must act under the guarantee within six months of reporting the defect.

⁹³⁰ Green Paper of 1993, p. 72

⁹³¹ On this problem see part Free guarantee and guarantee against payment of this chapter.

⁹³² OFT 1984, p. 9.

⁹³³ OFT 1984, p. 2

⁹³⁴ The Law Society of Scotland 1984, p. 3.

⁹³⁵ Green Paper of 1993, p. 49.

8.3 Burden of proof

The last element I would like to mention here is the burden of proof. For the consumer, proving that the failure of the goods was indeed covered by the guarantee may turn out to be difficult and effectively limit the liability of the guarantor.

The Green Paper of 1993 claimed that this problem is not very urgent in practice, as according to a survey prepared, if the defect appears during the period of the guarantee, the consumer does not have to generally prove that it existed at the time of sale.⁹³⁶ However, the buyer (the guarantee holder) will have to at least indicate (if not prove) that there is something wrong with the goods. A good example of a national solution in this respect is Danish law, where the buyer will not have to prove the existence of non-conformity at the time the risk passed (which normally happens at the time of delivery, see §§ 44 and §§ 17, 37 DSA), but only that the lack of conformity falls within the scope of the guarantee. The guarantor will have to prove that he is exempted due to *vis major* or negligence on the part of the buyer.⁹³⁷ However, in Italian law⁹³⁸ the buyer must prove the faulty functioning of the product, as well as the existence of a guarantee of good functioning. On the other hand, the seller is not bound by the guarantee if he proves that the faulty functioning of the goods depends on a cause that appeared after the contract was concluded, or is the result of abnormal use by the purchaser. Similarly, in Portuguese law⁹³⁹ the buyer must prove the faulty functioning of the goods during the guarantee period, and the seller cannot repudiate liability except by proving that the defect occurred after delivery, or it was caused by the buyer or a third party.

8.4 Conclusions

The problem of limiting the guarantor's liability is inherently connected with the presence of the guarantee on the market. Protecting consumers against the negative effects of such limitations may, generally speaking, amount to imposing intensive informational duties, or imposing certain requirements as to the content of the guarantee.

The example of the first solution is the way the problem of providing information on limitations of liability was tackled in Poland under the old political regime (it must be kept in mind that regulation of the content existed as well). All limitations and exclusions of liability (if they were allowed by law) had to be communicated to the client, or at least they were supposed to be made available in a manner that would allow the client to become acquainted with them. This requirement meant that general information printed out and available in the shop (normally hung on a wall), contract terms printed on the back of a receipt or receipts delivered to the client after the conclusion of the contract or during its performance were insufficient.⁹⁴⁰ Very often, legislation formulated *expressis verbis* the requirements relating to the manner of becoming acquainted with the clause by the client.⁹⁴¹

⁹³⁶ Green Paper of 1993, p. 14.

⁹³⁷ Fogt 2009, p. 238 and the literature referred to therein.

⁹³⁸ Green Paper of 1993, p. 47

⁹³⁹ Ibidem, p. 49

⁹⁴⁰ Łętowska 1990, p. 186.

⁹⁴¹ Supreme Court Judgement of 18.10.1983, OSN CP 1984 No 9 item 159.

If it comes to content requirements, in 1984 the British Office of Fair Trading put forward⁹⁴² a proposal that guarantees should at least:

- 1) state that statutory rights are not affected;
- 2) allow free transfer to a future owner;
- 3) not involve the purchaser in labour, postage costs, etc;
- 4) allow the extension of the guarantee when repairs take some time;
- 5) not normally require goods to be returned in the original packaging.

9. Transparency requirements

9.1 Introduction

Consumer information has been an element of consumer protection for as long as it has existed.⁹⁴³ The European legislator has always aimed at allowing the consumer to be “conscious of his rights and responsibilities,”⁹⁴⁴ as only an informed buyer will be able to “make a rational choice between competing products and services.”⁹⁴⁵ It is therefore impossible to disagree with the statement by Oughton and Willet that it is evidently important that guarantees should be as transparent as possible.⁹⁴⁶ The crux of the problem, however, lies in the question, what does it mean that the guarantee is as transparent as possible, and how best to ensure that guarantees indeed reach this level of transparency? This part of the analysis tries to provide an answer.

The importance of ensuring proper information can be assessed on several different levels. First, as Twigg-Flesner, Weatherill and Willet underlined, the supply of information about quality is of central importance to the proper functioning of markets for goods and services.⁹⁴⁷ Without proper information, the participants of the market are unable to make proper purchasing decisions. In this respect the guarantee, as Twigg-Flesner, Weatherill and Willet continue, is insufficient. “The device of guarantee is [...] limited in its ability to enable consumers to protect themselves from inefficient and damaging purchase decisions. It may be very difficult for the average consumer to assess exactly which defects are covered by a guarantee, what remedies are available and how one guarantee compares to another. The result is that the consumer does not select a guarantee that ensures appropriate redress when the product is defective. Moreover, a guarantee on its own is rarely capable of providing an adequate protective device, for consumers will usually require additional information pertaining to, for example, the reputation of the producer or the costs of repair.”⁹⁴⁸

Taking another perspective, as formulated by Willet,⁹⁴⁹ informed and rational purchasing decisions are less likely to lead to costly disputes than those that are ill-informed. In cases where they do, the purchaser is required to invest less money and time in obtaining information as to the available remedies. According to Willet, there will still be negotiation when a product is defective, but negotiation is less costly for a consumer armed with a greater

⁹⁴² OFT 1984, p. 2.

⁹⁴³ Calais-Auloy 1985, p. 54.

⁹⁴⁴ Council Resolution of 14 April 1975 on a preliminary programme of the European Community for a consumer protection and information Policy, O.J.25.4.1975, No C 92/1.

⁹⁴⁵ Council Resolution of 14 April 1975 on a preliminary programme of the European Community for a consumer protection and information Policy, O.J.25.4.1975, No C 92/1.

⁹⁴⁶ Oughton & Willet 2002, p. 322-323.

⁹⁴⁷ Twigg-Flesner, Weatherill & Willet 2002, p. 291.

⁹⁴⁸ Ibidem, p. 293.

⁹⁴⁹ Willett 1991, p. 557.

degree of knowledge as to the legal environment. Such knowledge gives a sharper, more rational focus to the dispute, and prevents manufacturers from “muddying the waters”.⁹⁵⁰ Research conducted by the Office of Fair Trading indicated that those consumers who expressed dissatisfaction with guarantee claims were less likely to have understood the limitations of the guarantee at the time of purchase.⁹⁵¹

9.2 Why ensuring transparency is important in the case of guarantees.

As rightly stated by Spence, guarantees may be seen to play an important role in signalling to consumers message about the quality of goods.⁹⁵² Consumers may treat a guarantee as an indicator of the quality of the goods, and thus in part base their purchasing decision on the guarantee offered, even if they are not concerned with legal rights *per se*.⁹⁵³ If the decision to buy goods is based on a guarantee, the consumer should, in principle, know what convinced him to make this decision and whether it has any real value at all. Assuming rational behaviour, consumers should be interested in knowing not only the content of the guarantee, but also what to do (in terms of the entitlements and the procedure) if the goods turn out to be defective.

According to Riesenhuber, when a consumer considers buying goods he will normally investigate two aspects of the future transaction⁹⁵⁴ (1) the characteristics of the goods and the cost, and (2) whether and in how far the supplier guarantees the characteristics of the goods. At the same time, if acquiring information is – even minimally – costly for the consumer, but having the information would not change either the terms of the transaction or future use, the consumer may rationally forgo the acquisition of information and prefer to remain ignorant on a relevant variable (the law and economics concept of a rational ignorance).⁹⁵⁵ The most notable example of this problem in consumer contracts arises in the context of standard form contracts: reading and understanding the standard terms is costly for the consumer – in time and effort - and given that the terms are not subject to negotiation, the consumer will usually opt to not even start reading the forms.⁹⁵⁶ The lack of incentive to acquire information is one characteristic of consumer relations; to quote Reinfer it is “the basic problem of ignorance in consumer law [which] is much more deeply rooted – there is little demand for this information.”⁹⁵⁷

The transparency requirements in the area of the consumer sales guarantee (but also in consumer relations in general) should then be discussed, bearing in mind two the angles from which they might be looked at. The first one refers to the need to establish transparency requirements for the guarantee in the legal system, i.e. making a decision on what information, when and how should be provided to the consumer. The second level of the problem refers to incentives to make consumers acquire and make use of the available information, which actually exceeds the scope of this legal analysis.

⁹⁵⁰ Willett 1991, p. 557.

⁹⁵¹ OFT 1984, p. 25.

⁹⁵² Spence 1974, p. [xxx].

⁹⁵³ Beale & Howells 1997, p. 25.

⁹⁵⁴ Riesenhuber 2001, p. 350-351.

⁹⁵⁵ Gomez: 2004, p. 203.

⁹⁵⁶ Gomez 2004, p. 203.

⁹⁵⁷ Reinfer 2000, p. 68.

9.3 Transparency requirements – general overview

Transparency requirements relate to a great variety of problems: the scope of information that is to be provided, the form in which the information is to be provided, the time when the information is to be given or made available, the person who is burdened with such obligations, etc. The method of regulating the transparency requirements, as well as how detailed the regulation is, depend primarily on political choices made by a given legislator. Various factors influence the policy choices, for example the consumer model accepted by the legal system, the aims that are to be achieved by granting a certain level of transparency, etc. Depending on the strategy adopted by a legal system, various aspects of ensuring transparency may be brought forward in the legislation, while others will only have a supplementary character. In any case, two general issues must be addressed:

- 1) Information relevant for consumers, which requires that first it is established what information is important for consumers (material transparency); and
- 2) The way the information is presented to consumers, which ensures that the consumer not only has access to the information, but also that the information is provided in a way that allows the consumer a relatively easy understanding of the guarantee (formal transparency).

9.4 Different perspectives of assuring the guarantee's transparency

Transparency requirements may be approached from two perspectives: the position of the consumer and the functioning of the market, depending on how the function of the guarantee on the market is defined (promotion of competition, consumer protection tool), and which aspects of the guarantee are seen as bringing about the most substantial danger for consumers or for the competition.⁹⁵⁸ At the same time, the Court of Justice stresses the close relationship between protecting consumers and providing the consumer with information⁹⁵⁹ and the provision of information to the consumer is considered one of the principal requirements.⁹⁶⁰ The court also underlines the link between transparency and market competition: the more transparent the market, the stronger the competition.⁹⁶¹

Taking consumer protection as the departure point, two different perspectives for approaching the problem of guarantee transparency can be distinguished: (1) creating a possibility of the consumer making informed purchasing decisions, and (2) establishing and enhancing the consumer's position against the guarantor.

Ensuring the possibility of making an informed purchasing decision involves addressing two particular issues. First, it is allowing the consumer to become acquainted with the content (coverage) of the guarantee *per se*, and at the same time to be able to compare it with other offers on the market. Next, it should be possible for the consumer to see the coverage of guarantees in the context of the statutory protection granted to him (in the case of the EU system – the system based on conformity and the remedial system of the Consumer Sales Directive). On the basis of these two elements, the consumer may estimate the value and the coverage of the guarantee, which is especially important if the guarantee is provided against

⁹⁵⁸ See Chapter II on that.

⁹⁵⁹ Council resolution of 14 April 1975 on a preliminary programme of the European Community for a consumer protection and information Policy, O.J.25.4.1975, No C 92/1, and Council resolution of 19 May 1981 on a second programme of the European Community for a consumer protection and information Policy, O.J. 3.6.1981, No C133/1.

⁹⁶⁰ Case 362/88. GB-Inno-BM v. Confédération du commerce luxembourgeois, (1990) ECR, p. 683.

⁹⁶¹ T 35/92, John Deere Ltd v. Commission of the European Communities (1994) ECR, p. 957, d'Usseaux 1998, p. 324.

payment. Here, the most important is the information on the contents of the guarantee and its relation with the statutory rights of the consumer. Taking a more general view, these requirements make it possible for the consumer to define his contractual rights and duties and to compare different offers from different member states⁹⁶² so that he is enabled to make his choice in full knowledge of the facts.⁹⁶³

In the context of establishing and enhancing the consumer's position against the guarantor, the guarantee should give information to the consumer on how to proceed in the case when the goods do not live up to the guarantee statements, which is especially important in the case of long-term guarantees and goods transferred to subsequent owners. Additionally, a guarantee that meets certain transparency requirements could improve the situation of the consumer in the event of an argument with the guarantor. In this area, the main importance should be given to information on the procedure of claiming the goods' deficiency under the guarantee, and the availability of the guarantee document (which is also necessary to allow the consumer to compare the offers).

The analysis in this part follows this pattern. First it takes up the issue of ensuring the consumer is able to make an informed purchasing decision. In this part the analysis deals with the information about the coverage and the possibility of understanding the coverage of the guarantee in the context of the statutory protection. In the second part, attention is paid to the problems relating to the formal transparency requirements, including data about the guarantor and the persons performing under the guarantee, the formal requirements, the claiming procedure, the accessibility of the guarantee document, as well as the way and language in which the guarantee is formulated. Finally it deals with the problems stemming from including the guarantee content in the advertisement.

9.5 Information allowing an informed choice by the consumer

This part analyses the informational aspects regarding the guarantee, which allow the consumer to make an informed purchasing decision. This decision may have a twofold subject. It may be that the consumer is influenced as regards buying the goods, which are accompanied by the guarantee or may concern the guarantee itself, when it is offered for sale as such (when the price for the guarantee is expressed separately).

The analysis begins with information about the existence of the guarantee, later it proceeds to the information about particular parts of the guarantee's coverage and lastly it takes up the subject of the transparency of the relation between the conformity regime and the guarantee.

9.5.1 Information concerning the existence of the guarantee

The most basic information concerning the guarantee is whether a guarantee is actually offered to the consumer. Generally speaking, if there is a guarantee, both the seller and the guarantor should be interested in providing this information to the buyer. From the point of view of the seller, disclosing the information about the existence of the guarantee should always be beneficial. If the seller is not at the same time the guarantor, the guarantee has the potential to limit his liability against the buyer. If the seller is also the guarantor, the guarantee is a very handy device to structure his own liability under the sales contract. From the point of

⁹⁶² Nassal 1995, p. 689.

⁹⁶³ Meyer 1993, p. 290

view of the non-seller guarantor, if he makes the commercial decision to offer a guarantee, it is evidently in his best interest that the guarantee actually reaches the consumer.

The situation is different when the price for the guarantee is calculated as a part of the price for the goods and where the guarantee is purchased separately. In the latter case the problem will not really be relevant, as there is a clear incentive for selling the guarantee and the potential buyer must be aware of this option. If the guarantee is only part of the “bundle of satisfaction”, surprisingly, it does happen that the consumer is not informed about the guarantee.

The importance of the obligation to report the existence of the guarantee has been recognised in the latest legislative projects in the EU. Firstly, the initial draft of the Consumer Rights Directive imposed in Article 5(1)(f) a general obligation that, prior to the conclusion of any sales or service contract, the trader will provide the consumer with information, if not already apparent from the context, about the existence and the conditions of after-sales services and commercial guarantees, where applicable. In addition, “A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback”⁹⁶⁴ contains a similar duty with regards to distance or off-premises contract with a consumer. Article 14 (1)(f) states that a business concluding a distance contract or off-premises contract with a consumer has a duty to provide, where applicable, information about the existence and the conditions of after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy to the consumer, before the contract is made or the consumer is bound by any offer.

It must be stressed that, since the guarantee signals above normal quality goods,⁹⁶⁵ if the guarantee is not offered it may be an equally important signal to the buyer. The British National Consumer Council assumed this perspective in its proposal concerning consumer guarantees.⁹⁶⁶ It imposed a requirement on producers of specified products to explicitly state on the product, and its labelling or packaging and in non-media advertisements, whether or not the product was covered by a consumer guarantee. According to Willet,⁹⁶⁷ “Such a statement sends a signal to consumers as to the manufacturer’s lack of confidence in his product. The consumer is therefore not simply being given information on terms. Information is also being implicitly provided as to quality, or at least as to the manufacturer’s confidence in his product’s quality. The effect of the consumer guarantee would therefore be the socialisation of information as to product quality and post-purchase rights.”

9.5.2 How the information can be provided to the consumer

Depending on the strategy, information about the existence of the guarantee (or the lack thereof) may be communicated to the buyer in the course of advertising or promoting the goods or the entire brand (before the purchase), the information may be attached to the goods itself (information printed on the box, a written guarantee attached to the goods, etc.), or the seller may provide oral information about the existence of the guarantee at the time of conclusion of the contract. All these options have their pros and cons. If information about the guarantee is a part of the promotional campaign, and it is the only time that the consumer

⁹⁶⁴ http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf.

⁹⁶⁵ Riesenhuber 2001, p. 354.

⁹⁶⁶ Cm 137 (London: NCC, 1989).

⁹⁶⁷ Willett 1991, p. 557.

hears about the guarantee, the consumer may be handicapped when trying to invoke the guarantee (no document, no precise information). At the same time, however, he knows more about the goods before making the purchasing decision, which gives him an opportunity for thorough market research. If the guarantee is attached to the goods and the consumer learns about its existence only at the time of concluding the contract or later, he is deprived of the possibility to compare the market offers, although he has the guarantee document, which facilitates the claiming process. If the consumer is informed orally by the seller, although he will know that he has the guarantee, he will not be able to compare different offers beforehand and, if the guarantee document is not attached, he may face difficulties with the claiming process.

9.5.3 Information concerning the contents of the guarantee sensu stricto

This part of the analysis deals with the relatively uncontroversial question of the information concerning the guarantee content. The list of information that can be identified is rather extensive and includes:

1. Who offers the guarantee and who performs under the guarantee, if it is not the guarantor himself;
2. What is the coverage of the guarantee (defects, satisfaction, etc.);
3. The scheme of remedies (what are the available remedies, who can choose them, is it possible to switch from one remedy to another and under what circumstances, how long may the remedy take, are there replacement goods provided, etc.);
4. What is the period of the guarantee;
5. Is the guarantee free, or are there any costs that burden the consumer involved;
6. Is the consumer burdened with any obligations under the guarantee, possibly including formal requirements for activating the guarantee, like for example registration.

The list of information concerning the content is rather similar in various legislations. The list contained in the Guidelines drawn up by the Danish Consumers Ombudsman⁹⁶⁸ requires that the written guarantee clearly state:

- a) what the guarantee covers,
- b) who provides the guarantee,
- c) the period of validity of the guarantee,
- d) what the purchaser has to do if he needs to make a claim under the guarantee,
- e) that the guarantee runs from the time of delivery.

Sometimes the requirements are bit more precise, for example according to Irish Sale of Goods and Supply of Services Act of 1980 a guarantee must clearly state the name and address of the person supplying the guarantee (Article 16(2)), the duration of the guarantee from the date of purchase, though different periods may be stated for different components of any goods (Article 16(3)), what the manufacturer or the other supplier undertakes to do in relation to the goods, and what charges, if any, including the costs of carriage, the buyer must meet in relation to such undertakings (Article 16(5)).

At the EU level, the transparency requirements set out in the Consumer Sales Directive as well as their transposition into the national legal systems have already been discussed in Chapter III. Here it suffices to say that although the Directive is more general in its formulation, probably most of the elements (if not all) mentioned above could be found in the requirements set by Article 6.⁹⁶⁹

⁹⁶⁸ Green Paper of 1993, p. 120.

⁹⁶⁹ On that see Chapter III, part 2.4. Transparency requirements.

It is interesting to compare the solution of the Consumer Sales Directive with other important documents that touched upon the transparency requirements in the consumer sales guarantee. Firstly the Green Paper of 1993, which did not limit its focus to the issue of ensuring the guarantee's transparency and concentrated more on discussing the substantial regulation of the guarantee. It is quite a paradox, taking into account its fruit, i.e. the Consumer Sales Directive, which deals almost exclusively with transparency requirements. The proposal contained in the Green Paper of 1993⁹⁷⁰ divided the transparency requirements into three categories: requirements relating to the form, conditions for implementing the guarantee and transparency. In the part dealing with the requirements relating to the form,⁹⁷¹ the Green Paper proposed that all guarantee documents should indicate at least the name and address of the person offering the guarantee, as well as other particulars mentioned elsewhere. It is difficult to decipher what was meant by the particulars, but it seems that they referred to the indication of the legal nature of the guarantee, establishing relations with the legal guarantee, subject-matter of the guarantee (defects covered) and duration, the persons liable for the guarantee and the beneficiaries of the guarantee. Under the same heading, quite inconsistently, the Green Paper also listed the requirement that all guarantee documents should be worded clearly and understandably, and all obscure terms should be interpreted in the most favourable light from the beneficiary's angle.

The initial draft of the Consumer Rights Directive followed the path of the Consumer Sales Directive, and in Article 29(2)(b) it declared that the guarantee statement will set the contents of the commercial guarantee and the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor. At the end, however, the Consumer Rights Directive does not deal with guarantees.

The PECL and the DCFR both approach the question of transparency in a very similar way, which is distinct from the approach accepted in the Consumer Sales Directive. Article 6:103(1)(c) of PECL states that the guarantee document must list all the essential particulars necessary for making claims under the guarantee, notably the name and the address of the guarantor, the name and the address of the person to whom any notification is to be made and the procedure by which the notification is to be made, as well as any territorial limitations on the guarantee, so it concentrates on the elements of the guarantee that are necessary in the claim-making procedure. Apart from the name of the guarantor and the territorial limitations, Article 6:103 does not address the content of the guarantee as such. This is because Article 6:103 must be read together with Article 6:104, which introduces the default content of the guarantee, setting the content of the guarantee if the guarantee document does not specify otherwise. According to this article: (a) the duration of the guarantee is five years or the estimated life-span of the goods, whichever is shorter; (b) the guarantee includes the requirements set out in Article 2:202 (b), (d), (e) and (f); (c) the guarantee holder may choose between the repair and replacement; and (d) all costs involved in invoking and performing the guarantee are to be borne by the guarantor.

PELS as well as the DCFR go beyond these requirements and require detailed information about all the important aspects of the guarantee, which could lead to a limitation of the guarantor's liability and as such be misleading for the consumer. PELS Article 6:105 (DCFR Article IV. A. – 6:105) requires that a guarantee relating only to a specific part or specific parts of the goods must clearly indicate this limitation in the guarantee document, otherwise

⁹⁷⁰ Green Paper of 1993, p. 98.

⁹⁷¹ Ibidem, p. 98.

the limitation is not binding on the consumer. Accordingly, on the basis of PELS Article 6:106 (DCFR Article IV. A. – 6:106), a guarantee may exclude or limit the guarantor's liability under the guarantee for any failure or damage to the goods caused by a failure to maintain the goods in accordance with instructions supplied with the goods or adequately explained in the guarantee document, provided that the exclusion or limitation is clearly set out in the guarantee document.

In fact then, the rules of PECL and DCFR contain the most comprehensive regulation of the guarantee transparency requirements, using two different legislative techniques: a simple list of transparency requirements and a default content that forces the guarantor to deal expressly with the content of the guarantee in the guarantee document.

9.5.4 *Guarantee lacking information*

From the consumer's point of view it is extremely important that the guarantee contains all the elements of the guarantee content. The first reason, already mentioned, is that the consumer is able to assess the value of the guarantee only if he receives proper information regarding its content. Second, if this information is not available to the consumer when a need to invoke the guarantee arises, the consumer might be confused as to what exactly his entitlements are.

9.6 Putting the guarantee in the proper context

The information about the content of the guarantee, although absolutely necessary, can hardly be seen as sufficient in order to grant consumers a basis for taking an informed purchasing decision. For that it is necessary to put the guarantee in a wider context of the entitlements the consumer has according to the law. Only when the content of the guarantee is compared with the content of the statutory protection can the consumer get a clear picture as to what the guarantee offers him.

The problem of the unclear relation between the obligatory statutory regime and the guarantee is one of the most complicated spheres in the area of guarantee. The objective difficulties related to distinguishing between the two, combined with the general lack of knowledge concerning the content of the law,⁹⁷² create a challenging mixture. As the Green Paper of 1993 put it: it is difficult for the consumer to know what rights he has under the legal guarantee, or to assess the relationship between a legal guarantee and a commercial guarantee.⁹⁷³ The problem is not new; back in 1986, research conducted by the Office of Fair Trading showed that one of the largest problems in the area of guarantees was related to the fact that guarantees tended to confuse and mislead by not giving accurate statements about the consumer's legal rights against the supplier.⁹⁷⁴ Beale and Howells very elegantly referred to at least two layers of this problem: "Even if guarantees do not restrict the rules on conformity or other rights, they may pose a subtle danger to consumers if they do not offer more than the general sales law. Consumers may believe that they are getting – and are paying for – additional rights when in fact they are not being given any additional right at all."⁹⁷⁵

⁹⁷² Wilhelmsson 2004, p. 325.

⁹⁷³ Green Paper of 1993, p. 75.

⁹⁷⁴ OFT 1986, p. 17.

⁹⁷⁵ Beale & Howells 1997, p. 38.

In practice, two situations can be distinguished. The first is that the guarantee offers more rights than the consumer enjoys under the statutory regime, and the second is that the guarantee, although it does not limit the entitlements of the consumer, offers less (the solution accepted by the Consumer Sales Directive). The first option is relatively safe from the consumer's point of view, because his rights are extended. In this case, even if the consumer bases his claims on the guarantee, he will probably be better off, unless the guarantee extends some of the entitlements as compared with the statutory regime and limits others.⁹⁷⁶ At the same time, the consumer might still not know what he is getting precisely, in terms of the content and the value. In the second case, when the cover is more restrictive, the consumer will be in a losing position if he is not aware that the guarantee is more restrictive than the legal rights he enjoys. According to the Green Paper of 1993,⁹⁷⁷ when a commercial guarantee is offered to the buyer, the consumer will not normally invoke his legal rights arising from the legal guarantee and will begin by trying to invoke the commercial guarantee. The problem in ensuring the proper transparency of the consumer sales guarantee in the context of its proximity with the statutory regime rests in fact in giving the consumer a fair chance of making an assessment of the guarantee value in order to make decision whether or not: first, to buy the guarantee (or the goods), and second whether or not to invoke it before activating the statutory regime.

The major problem in this area is that consumers do not know their rights, and as Standenmayer⁹⁷⁸ put it, a normal consumer without any legal knowledge is unable to make the difference between his legal rights and commercial guarantee. The question is then how to effectively inform the consumer about the statutory rights, which constitutes the first step in the process of making the value assessment.

First, one should ask precisely what information should be provided to the consumer, and second in what manner and when. Here the first issue is dealt with, as the second question applies to all elements of the guarantee content and is discussed separately below.

A certain gradation can be established with regards to the ideas on how to formulate information concerning the statutory rights of consumers. The first, most modest option is that the consumer receives information that his statutory rights cannot be waived or restricted in any way. This is the option chosen by the Consumer Sales Directive. Such a requirement was present before the implementation of the Consumer Sales Directive, for example under French law,⁹⁷⁹ where the Decree of 24 March 1978, required a seller offering a contractual guarantee to clearly mention that the legal guarantee is also valid,⁹⁸⁰ as well as according to the Guidelines drew up by the Danish Consumers Ombudsman.⁹⁸¹ The French Reform Commission presented a report in 1984,⁹⁸² stating that a consumer using a guarantee may not be aware of the legal guarantee he already has in his possession. Therefore, a consumer who receives a guarantee should be informed about his rights under the legal guarantee. It should be regarded as misleading advertising if the producer or trader indicates as an advantage in a guarantee what is already granted under the law. In Great Britain, the Consumer Transaction

⁹⁷⁶ On that see part 3.6 Establishing the content by reference of this chapter.

⁹⁷⁷ Green Paper of 1993, p. 92.

⁹⁷⁸ Standenmayer 2000, p. 559.

⁹⁷⁹ Green Paper of 1993, p. 108.

⁹⁸⁰ Ibidem, p. 46.

⁹⁸¹ Ibidem, p. 120.

⁹⁸² Calais-Auloy 1985, p. 58.

(Restrictions on Statement) Order 1976⁹⁸³ made it an offence to give a guarantee without drawing the consumer's attention to his statutory rights. It forbade sales of goods accompanied by written statements as to the buyer's rights, unless "in close proximity" there was a "clear and conspicuous" statement that consumer rights are not affected by thereby. The Office of Fair Trading suggested⁹⁸⁴ that the most helpful way of complying with this requirement would be to put in a red box the following words: "Under the law, the goods must comply with their description, must be of a merchantable quality and fit for their purpose, and must correspond with any sample. This guarantee does not affect the seller's legal obligations." In addition, the Code of Conduct of the British Retail Consortium Concerning Commercial Guarantees⁹⁸⁵ stated that a guarantee should contain a statement making it clear that it does not affect the purchaser's statutory rights. In Germany, before the transposition of the Consumer Sales Directive, the Supreme Court established a principle whereby, when a guarantee was provided by the seller, he must clearly inform the consumer that the commercial guarantee supplements the legal guarantee to which the buyer is entitled.⁹⁸⁶ Moreover, when the producer provided a guarantee, he was not bound, as was the seller, by the AGB, and could in principle limit the remedies open to the consumer. However, the Supreme Court considered that, insofar as the producer's guarantee could mislead the consumer as to the remedies he may invoke against the seller and hence discourage him from relying on his rights, such a limitation constitutes an infringement of the general rule contained in the AGB (general definition of unfair term).⁹⁸⁷

Since this aspect of the Consumer Sales Directive is thoroughly discussed in Chapter III, also in the context of the solutions adopted in the Member States, here it suffices to say that the Consumer Sales Directive provides a false assurance of transparency, as the consumer is informed about the existence of rights without any information as to their content (which is normally unknown to him). Another option, similar but at the same time bringing about a completely different result, is the one put forward by Grundmann, who said that the transparency principle may at least require that the seller tells the buyer if and that his commercial guarantee only repeats what is the law anyway.⁹⁸⁸ This option, without referring to the content of the statutory regime, provides substantial information to the buyer whether or not he is better off with a guarantee. A possibility combining the two already presented is the solution of the PELS and the DCFR. Article 6:103(1)(a) of the PELS states that a person who gives a consumer goods guarantee must provide the buyer with a guarantee document that states that the buyer has legal rights, and that these rights are not affected by the guarantee. Article IV. A. – 6:103(1)(a) of the DCFR clarifies additionally that this obligation exists, unless such a document has already been provided to the buyer. This formal requirement is, however, complemented by the requirement formulated in Article 6:103(1)(b) of the PELS and Article IV. A. – 6:103(1)(b) of the DCFR that the guarantee document must point out the advantages of the guarantee for the buyer as compared with the conformity rules. It substantiates the meaning of the guarantee for the consumer and makes it much more comprehensible.

An option that assumes that the consumer should be informed about the content of his rights, is also present in the European discussion. This option goes into the direction of educating

⁹⁸³ S.I. 1976 No 1813.

⁹⁸⁴ OFT 1984, p. 14.

⁹⁸⁵ Green Paper of 1993, p. 126.

⁹⁸⁶ *Ibidem*, p. 44.

⁹⁸⁷ *Ibidem*, p. 44.

⁹⁸⁸ Grundmann 2003, p. 246.

consumers, who nevertheless must themselves perform the comparison between the guarantee and the statutory regime. Beale and Howells argue that the presence of a guarantee document may cause some consumers to conclude that it is a description of all their legal rights, and therefore they would favour using the guarantee document as a source of information about the legal rights available to consumers.⁹⁸⁹ They continue that this obligation to inform about the existence of statutory rights should go further, and that the guarantee should contain a summary of the consumer's legal rights, which would be comprehensible to consumers without being too superficial or misleading. That was the idea presented in the Green Paper of 1993, which not only suggested that the commercial guarantee should confer additional benefits to the consumer over and above the rights already arising from the legal guarantee, but also that the guarantee documents should mention the existence of the legal guarantee and summarise its content.⁹⁹⁰ Article 29(2)(a) of the draft Consumer Rights Directive seemed to follow this suggestion. According to its wording, the guarantee document must include the legal rights of the consumer, as provided for in Article 26 (remedies for lack of conformity), as well as a clear statement that those rights are not affected by the commercial guarantee; in the end, however, nothing came out of this proposal.

The transparency of the relationship between a guarantee and the statutory regime can also be assured by a substantial intervention, for example by establishing that the guarantee must offer an additional advantage to the consumer. Here I only mention this possibility as it is thoroughly discussed earlier on in this chapter.⁹⁹¹

9.7 Information that allows the enforcement of the guarantee

The second type of information that is relevant for granting sufficient transparency relates to the information necessary to bring a claim under the guarantee. This information is essential for the consumer in the context of claiming under the guarantee, as without it the consumer would not be able to make an effective use of his entitlements. As in the case of information relating to the content of the guarantee, the list of information is rather standardised, and at the same time some of the elements can overlap with those relating to the content of the guarantee:

1. who is the guarantor (the name, address);
2. to whom direct the claim (the name, address);
3. what are the time and territorial limitations for notifying the problem with the goods;
4. how does claim making procedure look.

The approach of the Consumer Sales Directive and its transposition has already been discussed in Chapter III. It is therefore sufficient to only remind here that Article 6(2) of the Consumer Sales Directive requires that the guarantee set out, in plain intelligible language, the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor. The draft Consumer Rights Directive followed a similar pattern as the Consumer Sales Directive and required, in Article 29(2)(b), that the guarantee statement include the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor. The PELS and the DCFR are more precise in respect of this type of information than the Consumer Rights Directive. Article 6:103(1)(c) PELS and Article IV. A. – 6:103(1)(c) DCFR require that the guarantee document list all the essential

⁹⁸⁹ Beale & Howells 1997, p. 38.

⁹⁹⁰ Green Paper of 1993, p. 95.

⁹⁹¹ See part 3.6 Establishing the content by reference of this chapter.

particulars necessary for making claims under the guarantee, notably:

- the name and address of the guarantor;
- the name and address of the person to whom any notification is to be made; and the procedure by which the notification is to be made;
- any territorial limitations to the guarantee.

There are, however, legislations with a less standard approach. For example the Irish Sale of Goods and Supply of Services Act of 1980 requires that a guarantee state clearly the name and the address of the person supplying the guarantee (Article 16 (2)) and the procedure for presenting a claim under the guarantee. At the same time it clarifies, in Article 16 (4), that the procedure must not be more difficult than ordinary or normal commercial procedure. The problem of formal conditions, which must be observed if the consumer wants to invoke the guarantee, was raised in the Green Paper of 1993.⁹⁹² It gave numerous examples of the conditions: copy of the invoice; valid proof of purchase; original invoice or receipt; presentation of the warranty form and invoice issued to the first user; guarantee certificate with date of purchase; indication on the certificate of the purchaser's name or additional details; return of guarantee certificate within eight days of purchase; purchase certificate filled in by the concessionary/vendor; obligation on the client to pay for return post; purchase from an approved member of the network; performance of initial servicing under guarantee by an approved workshop; replacement of parts by original spare parts or parts approved by the manufacturer; installation to be conducted by an approved installation firm; merchandise to be returned in its original packaging.

9.8 The requirement to “activate” the guarantee

There is one more important element concerning transparency that is quite difficult to classify, as it can hardly be qualified as either part of the guarantee content or part of the requirements that refer to the claim-making procedure. It is the requirement, imposed by the guarantor, which requires a certain action on the side of consumer to validate or “activate” the guarantee. Such activity may include, for example, a duty to register the guarantee, be it with the seller or the guarantor, sending the guarantee card to the guarantor, registering the guarantee on the guarantor's website, etc.

From the consumer's point of view, the requirement to activate the guarantee may have far-reaching consequences, depending on what consequences the guarantor attaches to the failure to register the guarantee. If the guarantee is otherwise invalid, and the validation must take place in an expressly defined period of time (at the conclusion of the contract, one month from buying the goods), it is essential for the consumer to know about the requirement in order to be able to meet it. The problem is therefore quite sensitive here, as the moment when the consumer should receive the information is as important as the fact that the consumer was informed. Additionally, the information must be provided to the buyer effectively, which means that for example if the information that it is necessary to register the guarantee 10 days from the date of purchase is included in the guarantee document, even if attached to the goods, there is a high risk that the consumer will miss it (for example: a winter jacket bought on a spring sale). Most probably, the only effective way to pass this information to consumer is oral information from the seller at the time of the conclusion of the contract. This, however, can be problematic, as shown in the part ‘Parties’ of this chapter.

⁹⁹² Green Paper of 1993, p. 75.

The PEELS (Article 6:102(3)) and the DCFR (Article IV. A. – 6:102(3)) tried to solve this problem by imposing the rule that any requirement whereby it is conditional on the guarantee holder performing some formal requirement, such as registration or notification of purchase, is not binding on the consumer. The comments explain that this provision was not intended to restrict the guarantor from using devices like registration, notification, etc., as it only prohibits making the guarantee conditional on fulfilment of such requirements.⁹⁹³ A similar, yet more far reaching solution is to be found in the Code of Conduct by the Danish Ombudsman Concerning the Commercial Guarantee,⁹⁹⁴ which regards as unreasonable a provision stating that the guarantee does not apply unless, a written guarantee, or a similar form, has been completed and sent to the retailer or manufacturer.

9.9 Availability of the guarantee document - general

It would be extremely difficult to say what (if any) guarantee has been given if there was no guarantee statement that would record its content. That said, one cannot exclude a valid oral guarantee. Nevertheless, taking into account the mass character of consumer guarantees and the specificities of consumer relations in general, it is much more practical and consumer friendly, if the content of the undertaking is somehow recorded.

9.9.1 Presenting consumer with the guarantee document

The problem discussed in this part refers to the question whether the consumer should be entitled to receive a copy of the guarantee document. If so, should it be done automatically (guarantee attached to the goods) or only on request. The next question is whether the guarantee document should be handed over to the consumer at the conclusion of the sales contract or whether it should be (only) available for consultation before the conclusion of the contract.

Concerning the very basic question of whether or not there should be a guarantee document, it seems that there is unanimous support in favour. In truth, mostly it is probably assumed that a guarantee document as such exists. An example of a legal system that actually addresses this problem is Ireland, where the Sale of Goods Act of 1980 defines the guarantee as “any document, notice or other written statement.”⁹⁹⁵ Normally, based on the assumed existence of the guarantee document, the discussion begins with the question whether or not, and if so – when and in what form, the guarantee document should be presented to the guarantor.

The most extreme option, which is not present in the EU after the implementation of the Consumer Sales Directive, is that the legal system does not contain any express references as to whether the guarantee document should be presented to the consumer. However, even before the enactment of the Consumer Sales Directive, if there was no reference to the availability of the guarantee document in the rules expressly dealing with guarantees, the Member States could have dealt with this problem via the rules relating to conclusion of the contract, or the incorporation of non-negotiated terms into a contract. Such rules could impose an obligation to present terms of a contract to the other party, (in good time) before the conclusion of the contract. After the implementation of the Consumer Sales Directive, the most common solution in the Member States is that the guarantee document should be

⁹⁹³ PEELS 2008, p. 365.

⁹⁹⁴ Green Paper of 1993, p. 122.

⁹⁹⁵ Section 15 of the 1980 Act.

presented on request.⁹⁹⁶ This solution was also chosen by the draft Consumer Rights Directive (Article 29(3)).

On the grounds of the draft Consumer Sales Directive, Beale and Howells observed⁹⁹⁷ that it is in fact difficult to estimate how many consumers would actually be so active as to look for a guarantee document. It must be underlined that such a solution sets the requirement for consumers at rather a high level. First, the consumer must know about the guarantee, second the consumer must know that he may request the guarantee document, and third, the consumer must be the active party and request the document.⁹⁹⁸ At the same time, Howells and Wilhelmsson commented that “even if the provision is symptomatic of a trend in EC consumer law to adopt an image of the active information-seeking consumer and to develop policies based on this utopian ideal rather than on the far less calculating consumer behaviour of most EC citizens, and even if only some consumers search for information on terms, they may perform a disciplining role on behalf of the whole consumer body.”⁹⁹⁹

The Green Paper of 1993 presented an interesting solution, whereby the guarantee documents should be available in the shops just like the products displayed.¹⁰⁰⁰ What follows from this requirement is that the Green Paper did not attribute much importance to whether or not the guarantee document should be attached to the goods.

The next option is that the guarantor is obliged to present the buyer with the guarantee document. This may be done in two ways: the guarantee document is either attached to the goods (enclosed in the packaging for example), or the buyer hands it over to the consumer, which may create certain difficulties in practice.¹⁰⁰¹ The requirement that the guarantee document is attached to the goods is beneficial for the consumer, as it gives him easy access to information concerning his rights, obligations and the claim-making procedure, assuming that the guarantee contains this information.

An obligatory attachment of the guarantee document is the choice of the PELS and the DCFR. Article 6:103(1) PELS and Article IV. A. – 6:103(1) DCFR declare that a person who gives the consumer sales guarantee must provide the buyer with a guarantee document. The comments¹⁰⁰² explain that it was a practical choice to depart from the solution of the Consumer Sales Directive. First, the consumer would have to know about his right to request the guarantee in order to exercise it; second, in the case of long-lasting goods accompanied by a long-term guarantee it is essential for the consumer to have a guarantee document, and third: attaching the guarantee to the goods is already a Common Market Practice. This option was also present in Spain, where Article 11(2) LCU required the producer or the supplier of durable goods to deliver a written guarantee containing the object of the guarantee, the guarantor, the holder of the guarantee, the rights of the holder of the guarantee and the period of the guarantee.¹⁰⁰³

⁹⁹⁶ See Chapter III part 2.4. Transparency requirements for a detailed analysis.

⁹⁹⁷ Beale & Howells 1997, p. 39.

⁹⁹⁸ For details see Chapter III part 2.4. Transparency requirements.

⁹⁹⁹ Howells & Wilhelmsson 1997(1), Chapter 9 section 3.

¹⁰⁰⁰ Green Paper of 1993, p. 98.

¹⁰⁰¹ For details see part 2. Parties engaged in the guarantee relation of this chapter.

¹⁰⁰² PELS 2008, p. 369.

¹⁰⁰³ Lete 2001, p. [xxx].

9.9.2 *When should the guarantee document be presented?*

The question when the guarantee document is presented to the buyer might be seen as equally important as the issue whether and how the document is to be presented. In the pre-contractual stage, when the consumer makes his decision as to whether buy the goods or the guarantee, the availability of the guarantee document for consultation allows the consumer to make a conscious purchasing decision and confront the signal of good quality, which the guarantee sends, with the reality. The availability of the guarantee document in the post-contractual phase (which comes down to the question whether or not a consumer should receive a guarantee document at the conclusion of the sales contract, and was discussed above) is important for granting the consumer access to information on the content of the guarantee, as well as for facilitating the claim-making procedure.

The idea that the guarantee should be available for consultation before the conclusion of the contract received some attention in the EU as well as in the national discussion on the guarantees' transparency. It was mentioned in the Green Paper of 1993, which opted for a solution whereby consumers should be free to consult the guarantee conditions prior to purchasing the merchandise.¹⁰⁰⁴ The OFT observed that it is only rarely that the consumer gets to see a guarantee document before purchasing goods in order to analyse its conditions and to assess the genuine scope of the benefits it offers.¹⁰⁰⁵ Mostly all the consumer knows at the time of purchase is the existence and duration of the guarantee. This information may come from advertising, may be mentioned on the product's packaging, or may be provided by the vendor. Likewise this information is not enough to allow the consumer to compare guarantees offered by various manufacturers with a view to stimulating competition as regards the quality of these guarantees. Already in 1984 the Office of Fair Trading noticed¹⁰⁰⁶ that the marketing and administration of consumer guarantees is as important as the drafting of the documents and any conditions attached to them. The Office insisted that traders should ensure that neither their promotional material nor their sales staff over-sell "peace of mind" that is alleged to go with the scheme. Staff should always encourage the consumer to inspect a copy of the guarantee before a sale is agreed. This applies whether the guarantee goes automatically with the product or whether it is an optional extra, to be paid by the consumer.¹⁰⁰⁷ After research conducted in 1986,¹⁰⁰⁸ the Office of Fair Trading made a recommendation that consumers should not only be shown and but also asked to study guarantees before making a purchase. Where the consumer pays for the guarantee and he has not been able to fully study its term, he should be allowed to cancel in a specified period of three days. The Code of Conduct of the British Retail Consortium Concerning Commercial Guarantees¹⁰⁰⁹ also brought up this point, however it proposed a less far-reaching option and it suggested that purchasers should be given an opportunity to study the terms of the guarantee, if they wish, before being committed to purchase.

Howells and Bryant expressed a critical opinion on the OFT's recommendation,¹⁰¹⁰ saying that the information provisions rest on a purely formal assessment of consumer information requirements. They claimed that "showing a consumer a piece of paper listing the exclusions from the guarantee is not going to have a great impact, however clearly they are spelt out, as

¹⁰⁰⁴ Green Paper of 1993, p. 98.

¹⁰⁰⁵ OFT 1984, p. [...].

¹⁰⁰⁶ OFT 1984, p. [...].

¹⁰⁰⁷ OFT 1984, p. 15.

¹⁰⁰⁸ OFT 1986(1), p. 26.

¹⁰⁰⁹ Green Paper of 1993, p. 126.

¹⁰¹⁰ Howells, Bryant 1993, p. 7.

the consumer is more concerned with the benefits the product will bring him – be he for instance a youngster intent on rushing home to play with the computer game he is purchasing, or an adult pleased with the bargain he struck for a used car.”

9.9.3 Form in which the information is provided

Requirements regarding the form in which the guarantee is to be presented to the consumer, derive from practical considerations. Depending on the time when the guarantee is to be presented to the consumer, they are meant to secure: (1) before the conclusion of the sales contract: the possibility to become acquainted with the terms of the guarantee and to compare it with other offers on the market; (2) after the contract is concluded and the goods fail: to facilitate the claims-making procedure (the consumer knows what are his entitlements and how to apply them in practice).

If the first aim is pursued then the guarantee document should be handed over or made available to the consumer in good time before the conclusion of the contract, so the consumer is able to study it. The form is not very relevant here, as long as the consumer has the possibility to become acquainted with the content of the guarantee document. In practice there should be a guarantee document available in the shop or on the webpage of the shop. Of course, from the consumer’s point of view it would be more convenient if he were able to take the guarantee document home or study it from there (which assumes that the consumer invests time in seeking information, which, as indicated, is not always the case).

If the guarantee is to give the consumer proper practical support after concluding the contract, it is essential that the consumer is in possession of the guarantee document. The form (on paper or as an electronic file) is immaterial, as long as access is easy and undisturbed throughout the guarantee period.

To give an overview of the present solutions, one should start from the proposal of the Green Paper of 1993, which argued that consumers should be free to consult the guarantee conditions prior to purchasing the merchandise, and guarantees should be available in the shops just like the products displayed.¹⁰¹¹ The Consumer Sales Directive deviated from this approach in Article 6(3), as discussed in detail in Chapter III, and required that, up on request by the consumer, the guarantee must be made available in writing or some other durable medium. It is difficult to say when the possibility to request the guarantee document arises on the basis of the Directive: before or after the conclusion of the contract. An analogous solution was proposed in the initial draft of the Consumer Rights Directive, where Article 29(3) required the trader to make the guarantee statement available in a durable medium upon the consumer’s request.

The PELS adopt another solution, as it requires in Article 6:103(2) that the guarantee document be written on paper or in another durable medium and be available and accessible to the buyer. The comments explain¹⁰¹² that, apart from the traditional paper guarantee, this includes a guarantee in electronic form, i.e. sending the guarantee by e-mail or publishing the guarantee on the Internet. In any case, the guarantee document must be available and accessible to the consumer.

¹⁰¹¹ Green Paper of 1993, p. 98.

¹⁰¹² PELS 2008, p. 369.

The DCFR in Article IV. A. – 6:103(2) states that the guarantee document must be in textual form on a durable medium and be available and accessible to the buyer.

9.10 Language and formulation

Here I would like to briefly refer to the issue of the guarantee legibility in a wide sense. First, it deals with the question of the language in which the guarantee is formulated, and second with the way the guarantee is drafted. Both issues are extensively dealt with in the course of Chapter III, so the remarks here have only an ordering character.

If it comes to the language in which the guarantee is to be presented, it is a complex problem in the context of cross-border trade. Generally speaking, the main aim of the regulation is to ensure that a guarantee is offered to the consumer in a language that the consumer actually understands, which of course might be a challenge if the guarantee crosses national borders. For a legislator, the language, in which the guarantee should be offered does not create problems if the legislation limits itself (which is normally the case) to the national market. The standard requirement in such case is to require the official language/languages of the state. Examples of such solution are numerous.¹⁰¹³ In addition, if the guarantee is destined for a specific national market (or markets), chosen by the guarantor, then it is not difficult for the guarantor to ensure that the guarantee is offered in the official languages of the states where it is distributed.

From a legislative point of view, the problem appears when the legislator tries to tackle the guarantee in a cross-border dimension. An example of such an attempt is contained in the Consumer Sales Directive, which adopted a solution that the guarantee should be offered in one or more official languages of the Community. It was supposed to give the Member States an option to reach beyond the limits of the national limitations regarding the language. As it turned out, it was rather a failure, as most of the member states decided not to use the multi-language option. The choice of the national legislators seems to be quite rational, as a rigid choice of several languages in which the guarantee should be offered does not much sense, considering that these languages do not have to correspond to the marketing policy of a given guarantor. In such a situation, a possibly more rational option could be that the guarantee is drafted in the language, in which the goods were offered to the consumer.

If it comes to the way the guarantee is to be drafted, the requirements set out in Article 6 of the Consumer Sales Directive as well as the Unfair Contract Terms Directive establish a standard here, which has already been discussed thoroughly in Chapter III, so there is no point to repeat it here.

9.11 What if the transparency requirements are not met?

In principle there are three options that can be used if the transparency requirements established with regards to the guarantee are not met.

First, a legal system might simply not contain any indication as to what happens in such a case. This solution is, however, quite difficult after the introduction of the Consumer Sales Directive and the Unfair Contract Terms Directive. In any case, general rules on statements of intent and contracts would apply.

¹⁰¹³ For that see Chapter III in the part transparency requirements.

Second, there is the solution adopted by the Consumer Sales Directive (Article 6(5)),¹⁰¹⁴ according to which the fact that the guarantee does not meet the transparency requirements does not affect the validity of the guarantee and the consumer may still rely on it and require the guarantee to be honoured. This solution grants the right to specific performance, i.e. in this case the possibility to require the guarantor to provide a guarantee document that would conform to the guarantee requirements. This is also the option chosen by the majority of the Member States, as presented in Chapter III.

The PELS and the DCFR opted for a third solution. This solution is, in principle, anchored in the solution of the Consumer Sales Directive, as Article 6:103(3) PELS and Article IV. A. – 6:103(3) DCFR clearly state that the validity of the guarantee is not affected by any failure to comply with paragraphs (1) and (2), setting the transparency requirements, and accordingly the guarantee holder can still rely on the guarantee and require it to be honoured. However, both the PELS and the DCFR build further on this foundation. PELS Article 6:103(4) and DCFR Article IV. A. – 6:103(4) state that if the requirements of paragraphs (1) and (2) are not observed, the guarantee holder may, without prejudice to any right to damage that may be available, require the guarantor to provide a guarantee document conforming to those requirements (the right to specific performance). The comments clarify¹⁰¹⁵ that the damages that may be incurred as a result of the infringement of Article 6:103 include seeking legal assistance or translating the guarantee document.

9.12 Where the content of the guarantee should be presented – in relation to the advertisement – a mention

Since problems arising as a result of the fact that the guarantee, being among other things a competition tool, is very often used in advertising campaigns have been discussed in great detail in Chapter III, here I would like only to restate the findings.

First, it should be noted that the considerations here are restricted to the guarantee regulation and do not take into account rules that deal specifically with advertising. The crux of the problem here is the potential impact of the advertising on the guarantee content. Generally speaking there are two options: the advertisement can either be binding or not binding on the guarantor.

If the advertising is not binding, the content of the guarantee coverage is, in principle, presented in the guarantee document (if such a document exists). This approach may lead to a situation where a consumer who relied on statements relating to the content of the guarantee contained in the advertising, but not repeated in the guarantee document, would be misled as to the content of the guarantee he receives.

If the advertisement is binding, the problem of consumer being misled is solved to a certain degree; however, at the same time a number of other problems appear. First, there is the question whether any advertising, no matter how vague, is binding on the guarantor. Second, it needs to be addressed what happens if there is a discrepancy between the content of the guarantee document and the advertisement. In such a case it must be decided which prevails and why. Third, there is a question whether the guarantor or his representative can actually correct statements contained in the advertising, and whether there should be any limits in this regard.

¹⁰¹⁴ See Chapter III, part 2.5 Infringements on that.

¹⁰¹⁵ PELS 2008, p. 370, DCFR.

10. Conclusions

This chapter discusses the areas of guarantee that, due to their practical relevance for the market, could be of interest for the European legislator. In doing so, several various aims were pursued.

The first, very basic objective was to show that the consumer sales guarantee, even if perceived only from the EU market perspective, is not as simple and uncomplicated a legal construction as the EU legislator would like to see it. Second, on the basis of the analysis, the question may be asked whether any of the presented areas should be further regulated. If so, should the regulation be enacted at the EU level, or maybe the nature of the problem is so deeply entwined in the national legal system that, if further regulation is proposed, it should rather be carried out at the national level. The last point relates to the approach of the Consumer Sales Directive towards the guarantee. This is a question as to whether a regulation that is foremost concerned with ensuring the proper transparency of the guarantee, and is not involved in any way in regulating the content of the guarantor's undertaking, is sufficient.

Below, there is a summary of findings in all the areas that were the subject of analysis in this chapter.

1. If it comes to the parties engaged in a guarantee relationship, two issues should be addressed. First, there should be a clear decision as to who can be a guarantor. Here, considering how many different forms a guarantee can take, it seems that there is no point in introducing any limitations. The EU definition, which limits the number of potential guarantors, may actually be seen as going in the opposite direction as compared with the market developments. This is clearly a European sphere of regulation. Next, there is a problem relating to phenomenon of the possible discrepancy between the party who offers a guarantee, who transmits it to the buyer and the party who performs under the guarantee, as well as between the party who receives the guarantee and the party who claims under the guarantee. The issue of relations between the parties engaged in the guarantee relationship belongs to the area of national law (general contract law), and whether or not it should be specifically addressed depends on the reality of a given national market. There is, however, one issue that can be seen as having a European dimension, as it clearly impacts the position of the consumer. This is the question whether or not the guarantee should be attached to the goods, i.e. whether a transfer of the guarantee to a subsequent owner should be allowed. A possible solution, which could be proposed here, is a default rule that would allow the transfer (like in the PELS and in the DCFR).
2. Regarding the content of the guarantee, two issues are of the utmost importance. The first is the question whether or not there should be a regulation of the content of the guarantee (in the strict sense as well as in the wider sense) and if so, what form it should take. A second, related, question is whether or not there should be a minimum content established, possibly in the form of the additional benefit requirement. I am of the opinion that there should definitely be default rules dealing with the content of the guarantee at the EU level. There are several arguments to support this. First, the informational requirements alone, concerning the content of the guarantee are not really helpful for the consumer if there is a problem establishing the coverage of the guarantee. The content has to be reconstructed via interpretation, which is normally

problematic. Second, default rules do not impose anything on guarantors, which remain free to determine the content of their own undertakings. Third, with default rules on content, the guarantee is easier to understand by consumers, as it gains specific meaning. Fourth, the default regulation in fact forces the guarantors to clearly address the content of their own guarantees. The question whether or not there should be a minimum content (potentially the additional advantage requirement) is more problematic, because such a requirement does indeed limit the scope of freedom of the potential guarantors to a certain degree. Moreover, in this case there is a substantial difference between the guarantees provided by sellers (already bound by conformity rules) and other potential guarantors (where the simple fact of offering a guarantee can be seen as an advantage). Nevertheless, one should remember and recognise that guarantees signal the good quality of goods and consumers expect guarantees to offer something additional. If the additional advantage is too burdensome for the business, a compromise can be reached by introducing a requirement that the guarantor should inform the buyer about the advantage the guarantee offers.

3. In the area of remedies two main issues can be identified: first, is there a need for introducing rules on remedies, and second – if so – how detailed should such rules be? Similarly, as in the case of the strictly understood content, there should be a default regulation clearly establishing which remedies the consumer has, if the guarantee does not deal with this problem. The specific issues relating to the practicalities of invoking the remedial system could be left for the case and legal writing.
4. Free guarantees and guarantees against payment – here the question is whether the legislation should deal with guarantees provided against a price, which is clearly spelled out. In order to answer it, one must first ponder the question: what are the consequences of not dealing with guarantees against payment? Given that guarantees that are paid for separately are common on the market, and that the need to secure the position of consumer intensifies once he pays for the undertaking, extending the scope of application of reasonably constructed rules (mostly in the form of default rules) seems to be a good idea. Also, in the case of guarantees against payment, the question whether the guarantee should offer something extra to the consumer becomes more intensive, as compared with guarantees given “for free”. One could consider an obligation to provide the consumer with additional advantage in such a case, otherwise the consumer might be paying for the protection he already has under the law. The position of a non-seller guarantor remains sensitive in such a case. Another problem refers to payments relating to the guarantee that appear at a later point in time. As a default rule, a free guarantee should be for free, and if there are any additional potential payments, the consumer should be very clearly informed about it upfront, at the moment, when the guarantee is offered.
5. Concerning the duration of the guarantee, firstly, there should be a default duration established at the EU level. Secondly, one could also consider the possibility of addressing the issue of prolonging the guarantee duration if the consumer was deprived of the (use of) goods. This problem, however, could also be solved through non-legislative measures.
6. In the context of limitations on the guarantor’s liability under the guarantee, two problems should be addressed. First, this is the need to secure the proper transparency of the guarantee – i.e. to ensure that the consumer knows what he is getting with the guarantee, and under what conditions. Second, a question could be asked, referring to creating a default (or even a minimum) content of the guarantee. The question is whether such limitations should be allowed, or whether some restrictions should be imposed in this regard.

7. Regarding the transparency requirement, I would like to underline the following issues. First, it is undeniably important to grant as much transparency as it is possible. The question, however, is what measures should be used in order to achieve this. Certainly consumers should have a full knowledge regarding the content and the formal conditions of the guarantee as well as the claims-making procedure. There should be undisturbed access to the guarantee document (it should be attached to the goods). The consumer should be able to understand the point of getting a guarantee, i.e. there should be information on what the guarantee offers to him as compared with the statutory protection he enjoys. Also, the issue of the relation between the guarantee and the advertising should be clearly addressed. The transparency rules should be, nevertheless, supported with a default regulation setting (at least) a default content of the guarantee that applies if the guarantor does not establish the content of the guarantee, or does so in an insufficient manner.

Chapter VI Conclusions

1. Introduction

This chapter consists of three parts. The first part briefly presents the research questions of the thesis, summarises the content of the chapters and presents the conclusions of each chapter. The second part contains general conclusions of the thesis, within the ambit of the research questions, which go beyond the conclusions of the individual chapters. In the third part some further reflections are presented, which in principle exceed the scope of the research questions set for the thesis, but which are nevertheless interesting and important in the researched area, albeit from different perspectives.

2. Overview of the thesis

2.1 The aim of the thesis

As indicated in Chapter I, three main aims were set for this thesis. The first one was to present the current legislative situation with regard to the consumer sales guarantee in the European Union, as well as the process that led to accepting the assumptions concerning guarantees that laid the foundations for the rules on guarantee contained in the Consumer Sales Directive. The second aim was to analyse the EU rules on guarantees, as contained in the Consumer Sales Directive, to test the correctness of the assumptions that underlie the EU legislation on guarantees, and to check whether the rules as accepted in the Consumer Sales Directive are able to meet the objectives set for them. The third aim was to analyse the guarantee structure, while accepting the EU assumptions concerning the guarantee, which perceives the guarantee as a marketing and competition tool that creates a danger of misleading consumers, established on the basis of the sales contract. It was done in order to provide more background information on the question, whether or not the rules of the Consumer Sales Directive are sufficient in the area of consumer sales guarantee, even if the same assumption for the function of the guarantee is accepted.

2.2 Overview of the chapters and conclusions drawn on their basis

2.2.1 *The consumer sales guarantee in EU policies (Chapter II)*

This part of the thesis presents the evolution of the European policy on consumer sales guarantees, which was dealt with first in competition law and then in the area of consumer protection. In the sphere of competition law it presents respectively (what currently is) Article 101 TFEU, the European decisions and cases that expressly dealt with guarantees, as well as the regulations that somehow touch upon the issue of guarantee. It ends by presenting the principles established for guarantees in the area of competition law. The part that deals with consumer protection begins with an analysis of the initial views on guarantees expressed in various Community documents and goes on to present the subsequent developments in the area, whether or not they ended up with adopting legislation in the area: the Unfair Contract Terms Directive, the Green Paper of 1993, the Consumer Sales Directive and the Consumer Rights Directive, as well as all the consultation documents that were adopted at the European level. At the end, there is a brief comparison of the approach adopted in respect of consumer sales guarantee in the consumer and competition policies.

The main conclusion is that although the EU competition and consumer protection policies are intimately related, there are insufficient links between them when it comes to the consumer sales guarantees. Competition law established certain principles but it has never produced a complete policy regarding guarantees in the competition context. Its greatest value is that it accepted the bottom-up approach, and took care of some very practical aspects of offering guarantees throughout Europe, all while assuring that there are no barriers on the market. The principles established in competition law include for example that the guarantees must be effective throughout the EU, although there is no obligation to provide a guarantee in every Member State; that members of a distribution system are required to deal with claims under guarantees bought in other Member States and regardless of where the product is used; and that the guarantee should apply on the terms regarding the technical and safety standards of the country where the product is used. If a product does not meet the safety standards of the country where the consumer resides, the guarantee would be honoured if the consumer arranged and paid for the adaptation; and that the adaptation (when required by technical and safety standards) as well as installation by the buyer (unless it is against the law) does not invalidate the guarantee. These rules could be very beneficial if adopted also in the consumer law area, as they focus on real consumer problems. At the same time, competition law has its clear limits: as regards guarantees it does not deal with issues like the existence of the guarantee, its content or the conditions for invoking it. Also, it does not create any rights for the consumer to rely on directly, and it does not contribute in the field of harmonisation with regard to the transparency of guarantees either.

Concerning consumer policy, two main observations are made. The first is that, as compared with the competition policy, the relevance of the solutions proposed or considered within the ambit of European consumer protection policy are much less anchored in the market reality. Competition law starts with real life cases and builds upon them. Consumer law, which at the EU level mainly consists of private law regulation, tends to create reality rather than to reflect it. Initially (the Green Paper of 1993) the EU legislator tried to follow market developments closely, but later on more politically engaged arguments prevailed that gave shape to the EU guarantee rules. The second observation is that, regrettably and to the detriment of consumers, EU consumer law does not make any use of the principles established by EU competition law.

2.2.2 Consumer sales guarantees – European regulatory framework (Chapter III)

The next part of the analysis is devoted to Article 6 of the Consumer Sales Directive. The chapter begins with the presentation and analysis of the regulatory assumptions of the rules on guarantees contained in the Consumer Sales Directive against the background of the general assumptions of the Directive. Next it deals in detail with the Directive's rules on guarantees. Firstly, it is the scope of the rules on the guarantee in the Directive, where four subjects are discussed: the contracts covered, the object of the contract, the parties engaged in the guarantee relation and the free guarantee. The following part deals with the general issues: the name, the source, the legal nature and creation of the guarantee. Next, the contents of the guarantee are analysed, dealing with the content of the guarantee in a narrow sense, the remedies, the presentation of the content of the guarantee, as well as problems relating to advertising. The subsequent part discusses the transparency requirements: the scope of the information and the requirements concerning the presentation of the guarantee, followed with the part dealing with the problem of infringements. In the last part, the analysis takes up the

problem of issues omitted during the legislative process, as well as problems that have not been considered for regulation.

The conclusions in this part underline that the most important general effect of the Consumer Sales Directive is the recognition of the existence of the guarantee at the European level. At the same time, since the EU rules on guarantees are very modest, it suggests (especially in legal systems that did not have a regulation of the guarantee before the introduction of the Directive) that there is not much to regulate. The Directive presents an oversimplified vision of the guarantee.

The Directive made two assumptions concerning the consumer sales guarantee. Firstly, it assumed that the main, if not the only role the guarantee plays on the EU market is the role of a competition and marketing tool. Based on this assumption, the Directive recognises the second assumption, which is that the danger posed to consumers by the presence of the guarantees on the market is that of misleading consumers as to their rights.

These two assumptions are valid in the sense that the guarantee really is used as a marketing tool and it does indeed pose a threat of misleading consumers. The problem is, however, that these two assumptions present only part of the picture. They do not exhaust all the functions (or even the most important functions) that the guarantee plays on the market, and they do not address the possible problems that may arise as a result of the guarantee's presence on the market. The marketing tool is the perspective of the guarantor, whereas from the consumer perspective the guarantee may secure against loss, maintain the value of the goods and provide maintenance services not related to defects. As to the threats that the guarantee poses, one should also remember the widely understood problems with enforcing guarantees.

The question whether the Directive managed to meet the aims it set for itself has to be answered negatively. The Directive concentrated on ensuring formal transparency of the guarantee by imposing certain obligations on the guarantor, but without giving the consumer an effective remedy. The bare information that the guarantee does not infringe consumer legal rights is not sufficient in order to make the guarantee comprehensible to consumers, who normally do not know their own rights. In addition, consumers cannot effectively and simply seek a remedy if the guarantee does not provide information about its content.

2.2.3 Analysis of the consumer sales guarantee - general part (Chapter IV)

The next two chapters (Chapters IV and V) discuss the structure of the guarantee and seek to identify problems that may appear with respect to various aspects of the guarantee. They create one unit of the thesis: where the first of these chapters concentrates on matters that currently belong to the domain of national legislations and have a more general character, the other deals with issues of more obvious relevance for practice, and as such these issues are more suited for a regulation at the European level. They both take a wider perspective on discussing the guarantee. It is an approach that accepts a similar standing with regard to the guarantee as the Consumer Sales Directive: the guarantee as a device that constitutes a part of the regime of liability for defects in sales contracts, where it primarily provides relief to a consumer in the case of a defect, and as such it can mislead consumers, while at the same time performing mainly the function of a marketing tool. This part of the analysis is free from the restraints introduced by the perception of the existing minimal level of regulation of the guarantee on the European level, accepted in the Consumer Sales Directive.

Chapter IV is devoted to an analysis of the more general and theoretical aspects of the guarantee: the name, the dual nature of the guarantee, the possible sources of the guarantee, the legal form of the guarantee and the relations between the guarantee and the statutory regime of liability for sold goods in a legal system.

The conclusions confirm that the general issues relating to the guarantee are not in the centre of attention of the national legislator. Further, it observes that the lack of regulation may cause practical problems, especially given that the EU rules do not provide much guidance as to the interpretation. In principle, the case law and the legal writing may solve these problems, but assuming that all problems can be solved in this way might be overly optimistic. Consumer cases have a tendency not to reach the courts, so the problems rarely surface (the lack of cases in this area should not be interpreted as a lack of problematic areas). As to the specific findings, the name could probably be more effectively regulated at the EU level, bringing greater coherency to the way the guarantee is perceived across the EU. The issue of the legal character of the guarantee belongs to the sphere regulated by the laws of the Member States, but EU law provides guidance in this regard – the archetype of the guarantee is therefore a voluntary guarantee. If the Member States want to maintain the rules on obligatory guarantees, they must clearly indicate the scope of the obligation with regards to the object as well as the parties obliged by them. The question of legal form is decisive for establishing the rules applicable to the guarantee (formation, validity, interpretation etc.). Although EU law touches upon this problem (a guarantee is a binding undertaking according to the Consumer Sales Directive), it is definitely not precise enough to allow the effective operation of the guarantee in practice. However, as long as the EU rules remain fragmented, there is no need for further regulation. If it comes to the relationship between the statutory regime and the guarantee, the EU rules touch on the problem, but do not go into sufficient depth and it could turn out to be beneficial to bring about more clarity here. The question of whether legislative intervention would be required remains open.

2.2.4 Analysis of the consumer sales guarantee - general part (Chapter V)

The scope of the analysis here in principle reflects the areas considered for EU regulation in the Green Paper of 1993. It deals with aspects of the guarantee that have a clearly practical dimension and are potentially interesting from the point of view of the legislation at the EU level, which is focused on practical matters rather than on theoretical considerations. The analysis begins with the parties engaged in the guarantee relation, where the subjects that may participate in the guarantee relation are discussed. The next part investigates the issues related to the content of the guarantee, which means the widely understood guarantee cover (the covered defectiveness, the remedies, the payment for the guarantee, the guarantee duration and the limitations of liability). The third part concentrates on the transparency requirements. It deals respectively with: various perspectives of ensuring the guarantee's transparency, information allowing an informed choice by the consumer, putting the guarantee in the proper context, information that allows the enforcement of the guarantee, the guarantee document, language and formulation of the guarantee document, the situation when the transparency requirements are not met, and at the end it briefly mentions the problem with advertising.

When it comes to the conclusions, concerning the parties engaged in a guarantee relationship, there should be a clear decision on the European level that any party is allowed to offer a guarantee. Deciding whether the issue of relations between the parties engaged in the guarantee relationship should be specifically addressed depends on the reality of a given national market, though the question whether or not the guarantee should be attached to the goods could be regulated in the EU dimension. Default rules on the EU level should be

established with regards to the coverage of the guarantee in the strict sense, remedies and duration. The rules on guarantees should also cover guarantees provided against payment. Regarding the transparency requirement, it is undeniably important to grant as much transparency as is possible. Certainly consumers should have full knowledge regarding the content and the formal conditions of the guarantee, as well as the claims-making procedure. There should be undisturbed access to the guarantee document - it should be provided with the goods. The consumer should be able to understand what is the point of getting a guarantee, i.e. there should be information on what the guarantee offers to him as compared with the statutory protection he enjoys. Also, the issue of the relation between the guarantee and the advertising should be clearly addressed. The transparency rules should, nevertheless, be supported with a default regulation setting (at least) a default content of the guarantee that applies if the guarantor does not set the content or does so in insufficient manner.

3. General conclusions

This part presents the general conclusions of the thesis, which can be established on the basis of the analysis and the conclusions as contained in particular chapters. The general conclusion can be drawn on two different levels. The first one is close to the conclusions formulated on the basis of the chapters, and refers to the rules on consumer sales guarantee as contained in the Consumer Sales Directive. The second level is more universal and deals respectively with the conclusions that can be drawn on the basis of the analysis from the point of view of the national legal systems and conclusions regarding the EU legislative process.

3.1 Conclusions regarding the Consumer Sales Directive

3.1.1 *Are the assumptions of the Directive correct?*

Firstly, it must be stated that the guarantee could have (and has) functions other than as a marketing and competition tool. From the consumer's point of view, it may secure against loss, maintain the value of the goods and provide maintenance services not only related to defects. From the perspective of the seller, if the guarantee is provided by the producer it is able to bring more balance into the liability scheme of a sales contract, as it burdens with liability the person who causes the problem (i.e. the producer). Similarly, if the goods are distributed through a commercial chain, and the guarantee could be invoked against any member of the chain, who would have redress towards the person who issued the guarantee, it would also improve the position of the final seller.

Second, as to the various dangers the guarantee can cause for consumers, it is definitely true that the guarantee may mislead consumers as to their rights. The guarantee is not a treacherous institution by nature, but the contractual context in which it normally appears, as well as the social reality of the contemporary consumer market, may make it a complicated institution from the consumer's point of view (however the consumer who normally does not know his statutory rights may not be even aware of how complicated the guarantee is). It must be underlined that in the case of a guarantee (as in the case of consumer relations in general) assuring proper transparency of the transaction is not enough in order to secure the position of the consumer. The equally difficult problems spring from the fact that transparency requirements are very often not fulfilled and the consumer has to face an argument with the guarantor. It is, therefore, equally important to secure the consumer's position against the guarantor in the case the goods fail. First, strictly in the area of guarantee regulation it is necessary to provide the consumer with practical tools that may be used if the guarantor fails to establish the content of his undertaking properly (for example the guarantee document does

not say for how long the guarantee is given or what remedies and in what sequence are offered). It means that the content of the guarantee should be dealt with on a legislative level. Which legislative technique is used to address the issue is not really important – it may be default content, minimum content or the additional advantage requirement –, as long as the consumer is able to find out what his position is without the need to refer to the court. Second, in a wider context, there is a need to secure the effective enforcement mechanism, by using both, private and public law mechanisms, for example through promoting an effective small claims procedure and through market control by public offices established for monitoring the effectiveness of consumer protection on national markets. This subject, however, definitely exceeds the scope of the thesis, so it suffices if I only mention it here.

Introducing a more extensive regulation at the EU level would not have to change the assumptions concerning the aim the guarantee plays on the market. In fact, the question of what functions of the guarantee are recognised does not have much impact on the optimal scope of legislation. The areas not addressed currently in the legislation, which are particularly sensitive from the point of view of the consumer – i.e. those that provide assurance to the consumer in case the guarantor did not set the content of the guarantee –, are always important, no matter which function of the guarantee is taken into consideration. In the case of the Consumer Sales Directive, it seems that the recognised aim of the guarantee serves to explain the limited scope of the rules on guarantees.

3.1.2 Does the Directive meet the aims it sets for itself?

The aim that the Consumer Sales Directive sets for itself is that its rules should prevent situations where the consumer is mistaken about the statutory rights as a result of being offered a guarantee. In order to achieve this, the Consumer Sales Directive concentrates on ensuring formal transparency requirements. Generally speaking, the idea that the guarantee should provide information about the legal and practical consequences of receiving a guarantee is a correct one. However, effort must be made in order to give the formal transparency requirements meaning for the consumer in practice.

3.1.2.1 Lack of an effective solution as regards the information on legal rights

With regards to the information about the legal position of consumer, the Directive wrongly assumes that once the consumer is informed that the guarantee does not infringe his rights, the consumer will have a clear picture about the legal position. However, in this case, the consumer would have to know about his statutory rights, which is rarely the case. The Directive does not provide an effective solution, as it gives the consumer information lacking the context that would make it understandable. There are several possible solutions to remedy this. The first one can be established in the area of transparency rules. It could be required that the guarantee document summarises the statutory entitlements of the consumer. The second solution (the solution of the PELS and the DCFR) is that the guarantee document could indicate the advantages of the guarantee from the perspective of the buyer, as compared with the statutory regime. This solution is located at the border of the transparency and the substance regulation. The third solution, from the area of substantive law, is the requirement that the guarantee should offer the consumer advantages over and above the statutory rights. In such a case, even if the consumer does not fully understand the relation between the guarantee and the statutory regime, he is still better off with the guarantee.

3.1.2.2 Lack of effective solution as regards the content

When it comes to the information about the content, again the idea is absolutely correct, though putting it into practice is rather another matter. If the guarantee document contains the required information about the content of the guarantee, the consumer faces no problem in the context of transparency. However, if the guarantee document does not contain certain vital information regarding the content of the guarantee, the Directive states that the consumer may still rely on the guarantee and require it to be honoured. But the question is on what exactly the consumer should rely if the guarantee document does not state the remedies for example? Here, the EU rules fall short in providing effective means through which the consumer can face the guarantor. On the basis of the Directive's rules, the only way for the consumer is to ask the court to establish the content of the guarantor's undertaking. Moreover, the content of the guarantee can also be established in the advertisement and it is unclear as to how to approach the possible discrepancies between the guarantee document and the advertising.

3.1.2.3 Requirements concerning formulation

The requirements concerning language and formulation are, in my opinion, established correctly, subject to the assumption that there is no way to effectively address the multilingual European environment in the case of mass transactions.

3.1.2.4 Guarantee on request only

The requirement that the guarantee is to be provided on request only is a definite mistake. It requires action on the side of the consumer, who must know that the guarantee exists, that the guarantee document exists and that he has a right to ask for it and receive it. The market practice indicates that the obligation to attach the guarantee document to the goods is not overly burdensome on the guarantor who decides to provide a guarantee. It is, at the same time, extremely important that the buyer is in the possession of the guarantee document, because it facilitates the process of claiming under the guarantee.

3.1.2.5 Conclusions

All in all, it is very difficult to say that the Consumer Sales Directive is able to meet the aims it set for itself, i.e. to prevent consumers from being misled by the guarantee. It concentrates on the formal transparency requirements without any reflection as to how the rules will function in the practice, and whether or not they improve the position of the consumer.

3.1.3 *The positive aspects of the Directive's rules*

It is important to remember that the introduction of the Consumer Sales Directive in the area of guarantees did have a positive impact as well. First of all, with the Consumer Sales Directive the consumer sales guarantee has gained recognition in all Member States, which has meant further consolidation of the European legal sphere, since another element received a European regulation. Second, the idea that assuring the guarantee's transparency is important was transmitted to all legal systems of the EU. The problem of the relation between the national laws and the EU law and the difficulties it creates for the national legislator is discussed later on, but one can imagine that once the national legislator realises that the rules of the Directive do not answer sufficiently the needs of the market they might be extended, even if only at a national level. Third, for the UK in particular, the Directive brought about confirmation of the binding force of the producer's guarantee.

3.1.4 Other aspects of the Directive's rules

3.1.4.1 The cross-border dimension of the rules

The EU legislator, by definition, should deal with the EU legal sphere, and should focus on aspects of the regulated institutions that are relevant in the EU or in the cross-border context. The cross-border dimension of the regulated area is very important since the EU legislator sees the EU consumer law as a tool to build and facilitate the single market.

In the case of the EU rules on guarantees, the cross-border dimension of the regulated area is basically disregarded. The Green Paper of 1993 did consider the cross-border dimension of the guarantee, as it paid attention to the ideas like the Euroguarantee and the potential liability for guarantee in the commercial chain of distributors. However, the only reference to the cross-border character of the guarantee in the Consumer Sales Directive is that the Member States can require the guarantee to be drafted in one or more official languages of the Community, which can hardly be seen as embracing the EU dimension of the guarantee.

3.1.4.2 Reference to the competition policy achievements

The Consumer Sales Directive does not take into account any of the principles established for guarantees in the competition law area. However, including the competition law principles could enrich the regulation of guarantee in the area of consumer law. From the consumer's point of view, competition law accepts a very practical, market-oriented approach that answers the needs of consumers. Competition law also enhances the cross-border dimension of the guarantee, since the single market and its functioning is in the centre of its attention. Also, the principles of competition law already exist in the EU legal sphere, so it would not mean introducing new rules, but rather underlining their existence from another perspective. To give but two examples of such rules: first, the guarantees must be effective throughout the EU, although there is no obligation to provide a guarantee in every Member State, and second members of a distribution system are required to deal with claims under guarantees bought in other Member States and regardless of where the product is used.

3.1.4.3 Evaluation of the development trends within the guarantee area on the European market

The Consumer Sale Directive sees the guarantee merely as a marketing and competition tool. However, the guarantee is also developing in the direction of a self-standing service contract that can serve to meet various aims of the consumer. This direction of the guarantee's development is ignored by the EU legislator.

3.2 Conclusion from the point of view of national legal systems

It is worth underlining that the impact of the Consumer Sales Directive on the national legal systems varies depending on the state of the regulation in a given legislation before the implementation of the Directive. The Directive introduced rules on guarantees in the Member States where there were none, and that can be unequivocally declared as a positive impact. In the Member States where the guarantee was barely mentioned in the written law it could somehow systematise the rules. However, introducing the Directive in legislations where an elaborated system of guarantees existed before, may have resulted in simplifying the theoretical considerations behind the guarantee, its functions, construction and relation with other legal institutions, but it may also have resulted in lowering the level of consumer

protection, as has happened in Poland. Therefore the conclusion is that it is not possible to evaluate the EU rules on guarantees from the Member States' point of view in general, as the discrepancies between the systems are too great.

However, I am tempted to look at the EU rules on guarantees through the prism of the development of the guarantee regulation in my own legal system. It seems that there are great similarities in the development of the guarantee rules in Poland, where the guarantee was addressed through legislature and the rules evolved throughout the years, and the EU guarantee policy evolution in the area of private law. When reading the Green Paper of 1993 one can be only surprised by how similar the identified market failures are - in the EU and in Poland during the communist period. It can even provoke a conclusion that the market failures (the abusive behaviour of the market participants) in the area of guarantee are very similar, despite the differences in political and economic systems. Unlike the EU legislator, the Polish legislator decided for a more intense legislative intervention, though it must be underlined that legislative intervention was an accepted tool to deal with market failures in general, since there was no rule that would restrict the legislature in this respect. It will be very interesting to see whether the evolution of the rules on the EU level will take a pattern similar to the Polish one.

Also, I would like to underline that I believe that some of rules enacted in Poland, for example the regulation of the guarantee content or the clear rules on the relation between the statutory regime and the guarantee, could easily constitute part of a contemporary, effective EU legislation. The provenience of the rule should not be decisive in evaluating its usefulness, at least in the area of private law.

3.3 Conclusions regarding the legislative process at the EU level

The question how far legislation should follow the market, and how far it is allowed to create the market reality, is common to all legislators – be it at a national or a pan-national level. In the situation when legislative intervention is necessary, due to the failure of the self-regulation of the market (assuming that also other reasons for legislature can exist), there is probably more consent for the creationism of the legislator. Nevertheless, even in such a case the legislator should closely investigate the market in order to establish where the need to intervene is the most intensive, and what form should it take.

In the area of consumer sales guarantee rules, even though proper market research was done when preparing the Green Paper of 1993, due to political reasons its findings were largely ignored when enacting the Consumer Sales Directive. The guarantee exists in the shadow of the obligatory sales liability regime. It means that, although the guarantee may be frequently used in practice, from a legal policy perspective, it will normally be perceived as less important, due to its non-mandatory character. Politically it is more reasonable to deal with statutory obligatory liability regime than with the voluntary guarantee. However, the EU legislator has never really checked how effective the obligatory liability rules are in practice, and whether the protection granted to consumers by a statute is implemented in practice.

4. Conclusions reaching beyond the scope of research questions

Here I would like to point out certain conclusions that follow from my analysis, but which are beyond the scope of the research questions. These findings could be useful when investigating the EU legal sphere in the area of private (or consumer) law.

First, it is the problem of the relation between national law and EU law. The EU legislator cannot act in separation from the national law. The national solutions and traditions existing in the regulated area cannot be disregarded. In the area of the guarantee, the best examples would be Ireland, Poland or Hungary. The transposition and implementation of the EU rules is not exhausted if the rules contained in a directive are rewritten in the national legislation, there must be a connection established between the national and the European legislation. The area in the legal system when the EU legislation meets (or should meet) the national legislation is of crucial importance, because it has a decisive meaning for the way the EU rules function in the practice. EU law will function as desired only if the national legislation works properly in practice. Therefore, co-operation and dialogue between the national and European legislator is necessary, also (or maybe most of all) at the time when the EU legislation is drafted – the national law reality cannot not be ignored when creating EU law.

Second, it must be underlined that EU legislation can lower the level of consumer protection, even if the transposition is made in the format of minimum harmonisation, and in theory the Member States can maintain their own rules in the area. Implementation necessitates a need to adjust the national legislation, to create a connection with the EU rules, which would introduce then into the national system, to fill in gaps, etc. In this process the effective level of consumer protection may easily decrease.

Last, one can claim that the EU legislator (which is probably natural for legislators in general) acclaims a success when a legal act is adopted, without much attention being paid as to the content of the rules.

Consumer Sales Guarantees in the European Union – a summary

The aims of the thesis

The thesis pursues three main aims. The first aim is to present the current legislative situation in the European Union and the process that led to accepting the assumptions concerning guarantees that laid foundations for the rules on the guarantee contained in the Consumer Sales Directive. The second aim is to analyse the EU rules on guarantees, as contained in the Consumer Sales Directive. At the same time, the correctness of the assumptions that underlie the EU legislation on guarantees is tested, as well as whether the rules as accepted in the Consumer Sales Directive are able to meet the objectives set for them. The third aim is a thorough analysis of the guarantee structure, while accepting the EU assumption concerning the guarantee (the guarantee as a marketing and competition tool, which may mislead consumers, established on the basis of the sales contract). It is done in order to provide more background information as to the question, whether or not the rules of the Consumer Sales Directive are sufficient in the area of the consumer sales guarantee, even if the same assumptions as for the function of the guarantee are accepted. Here, the question is asked which other aspects of the guarantee should be dealt with by legislation and in what form.

The analysis

Chapter II presents the evolution of the European policy on consumer sales guarantees, which was dealt with first in competition law and then in the area of consumer protection. In the sphere of competition law it presents respectively (what currently is) Article 101 TFEU, the European decisions and cases that expressly dealt with guarantees, as well as the regulations that somehow touch upon the issue of guarantee. It ends by presenting the principles established for guarantees in the area of competition law. The part that deals with consumer protection begins with an analysis of the initial views on guarantees expressed in various Community documents and goes on to present the subsequent developments in the area, whether or not they ended up with adopting legislation in the area: the Unfair Contract Terms Directive, the Green Paper of 1993, the Consumer Sales Directive and the Consumer Rights Directive, as well as all the consultation documents that were adopted at the European level. At the end, there is a brief comparison of the approach adopted in respect of consumer sales guarantee in the consumer and competition policies.

The main conclusion of Chapter II is that although the EU competition and consumer protection policies are intimately related, there are insufficient links between them when it comes to consumer sales guarantees. Competition law established certain principles but it has never produced a complete policy regarding guarantees in the competition context. Its greatest value is that it accepted the bottom-up approach, and took care of some very practical aspects of offering guarantees throughout Europe, all the while assuring that there are no barriers on the market. The principles established in competition law include for example that the guarantees must be effective throughout the EU, although there is no obligation to provide a guarantee in every Member State; that members of a distribution system are required to deal with claims under guarantees bought in other Member States and regardless of where the product is used; and that the guarantee should apply on the terms regarding the technical and safety standards of the country where the product is used. If a product does not meet the safety standards of the country where the consumer resides, the guarantee would be honoured if the consumer arranged and paid for the adaptation; and that the adaptation (when required

by technical and safety standards) as well as installation by the buyer (unless it is against the law) does not invalidate the guarantee. These rules could be very beneficial if adopted also in the consumer law area, as they focus on real consumer problems. At the same time, competition law has its clear limits: as regards guarantees it does not deal with issues like the coming into existence of the guarantee, its content or the conditions for invoking it. Also, it does not create any rights for the consumer to rely on directly, and it does not contribute in the field of harmonisation with regard to the transparency of guarantees either.

Concerning consumer policy, two main observations are made. The first is that, as compared with the competition policy, the relevance of the solutions proposed or considered within the ambit of European consumer protection policy are much less anchored in the market reality. Competition law starts with real life cases and builds upon them. Consumer law, which at the EU level mainly consists of private law regulation, tends to create reality rather than to reflect it. Initially (the Green Paper of 1993) the EU legislator tried to follow market developments closely, but later on more politically engaged arguments prevailed that gave shape to the EU guarantee rules. The second observation is that, regrettably and to the detriment of consumers, EU consumer law does not make any use of the principles established by EU competition law.

Chapter III is devoted to Article 6 of the Consumer Sales Directive. It begins with the presentation and analysis of the regulatory assumptions of the rules on guarantees contained in the Consumer Sales Directive against the background of the general assumptions of the Directive. Next it deals in detail with the Directive's rules on guarantees. Firstly, it is the scope of the rules on the guarantee in the Directive, where four subjects are discussed: the contracts covered, the object of the contract, the parties engaged in the guarantee relation and the free guarantee. The following part deals with the general issues: the name, the source, the legal nature and creation of the guarantee. Next, the contents of the guarantee are analysed, dealing with the content of the guarantee in a narrow sense, the remedies, the presentation of the content of the guarantee, as well as problems relating to advertising. The subsequent part discusses the transparency requirements: the scope of the information and the requirements concerning the presentation of the guarantee, followed with the part dealing with the problem of infringements. In the last part, the analysis takes up the problem of issues omitted during the legislative process, as well as problems that have not been considered for regulation.

The conclusions in this part underline that the most important general effect of the Consumer Sales Directive is the recognition of the existence of the guarantee at the European level. At the same time, since the EU rules on guarantees are very modest, it suggests (especially in legal systems that did not have a regulation of the guarantee before the introduction of the Directive) that there is not much to regulate. The Directive presents an oversimplified vision of the guarantee.

The Directive made two assumptions concerning the consumer sales guarantee. Firstly, it assumed that the main, if not the only role the guarantee plays on the EU market is the role of a competition and marketing tool. Based on this assumption, the Directive recognises the second assumption, which is that the danger posed to consumers by the presence of the guarantees on the market is that of misleading consumers as to their rights.

These two assumptions are valid in the sense that the guarantee really is used as a marketing tool and it does indeed pose a threat of misleading consumers. The problem is, however, that these two assumptions present only part of the picture. They do not exhaust all the functions (or even the most important functions) that the guarantee plays on the market, and they do not

address the possible problems that may arise as a result of the guarantee's presence on the market. The marketing tool is the perspective of the guarantor, whereas from the consumer perspective the guarantee may secure against loss, maintain the value of the goods and provide maintenance services not related to defects. As to the threats that the guarantee poses, one should also remember the widely understood problems with enforcing guarantees.

The question whether the Directive managed to meet the aims it set for itself has to be answered negatively. The Directive concentrated on ensuring formal transparency of the guarantee by imposing certain obligations on the guarantor, but without giving the consumer an effective remedy. The bare information that the guarantee does not infringe consumer legal rights is not sufficient in order to make the guarantee comprehensible to consumers, who normally do not know their own rights. In addition, consumers cannot effectively and simply seek a remedy if the guarantee does not provide information about its content.

The next two chapters (Chapters IV and V) discuss the structure of the guarantee and seek to identify problems that may appear with respect to various aspects of the guarantee. They create one unit of the thesis: where the first of these chapters concentrates on matters that currently belong to the domain of national legislations and have a more general character, the other deals with issues of more obvious relevance for practice, and as such these issues are more suited for a regulation at the European level. They both take a wider perspective on discussing the guarantee. It is an approach that accepts a similar standing with regard to the guarantee as the Consumer Sales Directive: the guarantee as a device that constitutes a part of the regime of liability for defects in sales contracts, where it primarily provides relief to a consumer in the case of a defect, and as such it can mislead consumers, while at the same time performing mainly the function of a marketing tool. This part of the analysis is free from the restraints introduced by the perception of the existing minimal level of regulation of the guarantee on the European level, accepted in the Consumer Sales Directive.

Chapter IV is devoted to an analysis of the more general and theoretical aspects of the guarantee: the name, the dual nature of the guarantee, the possible sources of the guarantee, the legal form of the guarantee and the relations between the guarantee and the statutory regime of liability for sold goods in a legal system.

The conclusions confirm that the general issues relating to the guarantee are not in the centre of attention of the national legislator. Further, it observes that the lack of regulation may cause practical problems, especially given that the EU rules do not provide much guidance as to the interpretation. In principle, the case law and the legal writing may solve these problems, but assuming that all problems can be solved in this way might be overly optimistic. Consumer cases have a tendency not to reach the courts, so the problems rarely surface (the lack of cases in this area should not be interpreted as a lack of problematic areas). As to the specific findings, the name could probably be more effectively regulated at the EU level, bringing greater coherency to the way the guarantee is perceived across the EU. The issue of the legal character of the guarantee belongs to the sphere regulated by the laws of the Member States, but EU law provides guidance in this regard – the archetype of the guarantee is a voluntary guarantee. If Member States want to maintain the rules on obligatory guarantees in their legal systems, they should clearly indicate the scope of the obligation with regards to the object as well as the parties obliged by them. The question of legal form is decisive for establishing the rules applicable to the guarantee (formation, validity, interpretation etc.). Although EU law touches upon this problem (a guarantee is a binding undertaking according to the Consumer Sales Directive), it is definitely not precise enough to allow the effective

operation of the guarantee in practice. However, as long as the EU rules remain fragmented, there is no need for further regulation. If it comes to the relationship between the statutory regime and the guarantee, the EU rules touch on the problem, but do not go into sufficient depth and it could turn out to be beneficial to bring about more clarity here. The question of whether legislative intervention would be required remains open.

The scope of the analysis in Chapter V in principle reflects the areas considered for EU regulation in the Green Paper of 1993. It deals with aspects of the guarantee that have a clearly practical dimension and are potentially interesting from the point of view of the legislation at the EU level, which is focused on practical matters rather than on theoretical considerations. The analysis begins with the parties engaged in the guarantee relation, where the subjects that may participate in the guarantee relation are discussed. The next part investigates the issues related to the content of the guarantee, which means the widely understood guarantee cover (the covered defectiveness, the remedies, the payment for the guarantee, the guarantee duration and the limitations of liability). The third part concentrates on the transparency requirements. It deals respectively with: various perspectives of ensuring the guarantee's transparency, information allowing an informed choice by the consumer, putting the guarantee in the proper context with regard to the consumer's other possibilities and options, information that allows the enforcement of the guarantee, the guarantee document, language and formulation of the guarantee document, the situation when the transparency requirements are not met, and at the end it briefly mentions the problem with advertising.

When it comes to the conclusions, concerning the parties engaged in a guarantee relationship, there should be a clear decision on the European level that any party is allowed to offer a guarantee. Deciding whether the issue of relations between the parties engaged in the guarantee relationship should be specifically addressed depends on the reality of a given national market, though the question whether or not the guarantee should follow the goods could be regulated in the EU dimension. Default rules (from which the parties may derogate) should be established on the EU level with regard to the coverage of the guarantee in the strict sense, remedies and duration. The rules on guarantees should also cover guarantees provided against payment. Regarding the transparency requirement, it is undeniably important to grant as much transparency as is possible. Certainly consumers should have full knowledge regarding the content and the formal conditions of the guarantee, as well as the claims-making procedure. There should be undisturbed access to the guarantee document, which should be provided with the goods. The consumer should be able to understand what is the point of getting a guarantee, i.e. there should be information on what the guarantee offers to him as compared with the statutory protection he enjoys. Also, the issue of the relation between the guarantee and the advertising should be clearly addressed. The transparency rules should, nevertheless, be supported with a default regulation setting of (at least) a default content of the guarantee that applies if the guarantor does not set the content or does so in insufficient manner.

The conclusions

The conclusions of the thesis within the scope of the research questions are drawn on three different levels: specific conclusions regarding the Consumer Sales Directive, conclusions, which may be formulated from the Member States' point of view and conclusions for the EU legislative process.

Conclusions regarding the Consumer Sales Directive

Regarding the correctness of the assumptions of the Directive, it must be stated that the guarantee could have (and has) functions other than as a marketing and competition tool. From the consumer's point of view, it may secure against loss, maintain the value of the goods and provide maintenance services not only related to defects. From the perspective of the seller, if the guarantee is provided by the producer it is able to bring more balance into the liability scheme of a sales contract, as it burdens with liability the person who causes the problem (i.e. the producer). Similarly, if the goods are distributed through a commercial chain, and the guarantee could be invoked against any member of the chain, who would have redress towards the person who issued the guarantee, it would also improve the position of the final seller.

Second, as to the various dangers the guarantee can cause for consumers, it is definitely true that the guarantee may mislead consumers as to their rights. The guarantee is not a treacherous institution by nature, but the contractual context in which it normally appears, as well as the social reality of the contemporary consumer market, may make it a complicated institution from the consumer's point of view (however the consumer who normally does not know his statutory rights may not be even aware of how complicated the guarantee is). It must be underlined that in the case of a guarantee (as in the case of consumer relations in general) assuring proper transparency of the transaction is not enough in order to secure the position of the consumer. Equally difficult problems spring from the fact that transparency requirements are very often not fulfilled and the consumer has to face an argument with the guarantor. It is, therefore, equally important to secure the consumer's position against the guarantor in the case the goods fail. First, in the area of guarantee regulation itself, it is necessary to provide the consumer with practical tools that may be used if the guarantor fails to establish the content of his undertaking properly (for example the guarantee document does not say for how long the guarantee is given or what remedies and in what sequence are offered). It means that the content of the guarantee should be dealt with on a legislative level. Which legislative technique is used to address the issue is not really important – it may be default content, minimum content or the additional advantage requirement –, as long as the consumer is able to find out what his position is without the need to refer to the court. Second, in a wider context, there is a need to secure the effective enforcement mechanism, by using both, private and public law mechanisms, for example through promoting an effective small claims procedure and through market control by public offices established for monitoring the effectiveness of consumer protection on national markets. This subject, however, definitely exceeds the scope of the thesis, so it suffices if I only mention it here.

Introducing a more extensive regulation at the EU level would not have to change the assumptions concerning the aim the guarantee plays on the market. In fact, the question of what functions of the guarantee are recognised does not have much impact on the optimal scope of legislation. The areas not addressed currently in the legislation, which are particularly sensitive from the point of view of the consumer – i.e. those that provide assurance to the consumer in case the guarantor did not set the content of the guarantee –, are always important, no matter which function of the guarantee is taken into consideration. In the case of the Consumer Sales Directive, it seems that the recognised aim of the guarantee serves to explain the limited scope of the rules on guarantees.

The aim that the Consumer Sales Directive sets for itself is that its rules should prevent situations where the consumer is mistaken about the statutory rights as a result of being offered a guarantee. In order to achieve this, the Consumer Sales Directive concentrates on ensuring formal transparency requirements. Generally speaking, the idea that the guarantee

should provide information about the legal and practical consequences of receiving a guarantee is a correct one. However, effort must be made in order to give the formal transparency requirements meaning for the consumer in practice.

With regards to the information about the legal position of consumer, the Directive wrongly assumes that once the consumer is informed that the guarantee does not infringe his rights, the consumer will have a clear picture about the legal position. However, in this case, the consumer would have to know about his statutory rights, which is rarely the case. The Directive does not provide an effective solution, as it gives the consumer information lacking the context that would make it understandable. There are several possible solutions to remedy this. The first one can be established in the area of transparency rules. It could be required that the guarantee document summarises the statutory entitlements of the consumer. The second solution (the solution of the PELS and the DCFR) is that the guarantee document could indicate the advantages of the guarantee from the perspective of the buyer, as compared with the statutory regime. This solution is located at the border of the transparency and the substance regulation. The third solution, from the area of substantive law, is the requirement that the guarantee should offer the consumer advantages over and above the statutory rights. In such a case, even if the consumer does not fully understand the relation between the guarantee and the statutory regime, he is still better off with the guarantee.

When it comes to the information about the content, again the idea is absolutely correct, though putting it into practice is rather another matter. If the guarantee document contains the required information about the content of the guarantee, the consumer faces no problem in the context of transparency. However, if the guarantee document does not contain certain vital information regarding the content of the guarantee, the Directive states that the consumer may still rely on the guarantee and require it to be honoured. But the question is on what exactly the consumer should rely if the guarantee document does not state the remedies for example? Here, the EU rules fall short in providing effective means through which the consumer can face the guarantor. On the basis of the Directive's rules, the only way for the consumer is to ask the court to establish the content of the guarantor's undertaking. Moreover, the content of the guarantee can also be established in the advertisement and it is unclear as to how to approach the possible discrepancies between the guarantee document and the advertising.

The requirements concerning language and formulation are established correctly, subject to the assumption that there is no way to effectively address the multilingual European environment in the case of mass transactions.

The requirement that the guarantee is to be provided on request only is a definite mistake. It requires action on the side of the consumer, who must know that the guarantee exists, that the guarantee document exists and that he has a right to ask for it and receive it. The market practice indicates that the obligation to attach the guarantee document to the goods is not overly burdensome on the guarantor who decides to provide a guarantee. It is, at the same time, extremely important that the buyer is in the possession of the guarantee document, because it facilitates the process of claiming under the guarantee.

All in all, it is very difficult to say that the Consumer Sales Directive is able to meet the aims it set for itself, i.e. to prevent consumers from being misled by the guarantee. It concentrates on the formal transparency requirements without any reflection as to how the rules will function in the practice, and whether or not they improve the position of the consumer.

At the same time it is important to remember that the introduction of the Consumer Sales Directive in the area of guarantees did have a positive impact. First of all, with the Consumer Sales Directive the consumer sales guarantee has gained recognition in all Member States, which has meant further consolidation of the European legal sphere, since another element received a European regulation. Second, the idea that assuring the guarantee's transparency is important was transmitted to all legal systems of the EU. Moreover, once the national legislator realises that the rules of the Directive do not answer sufficiently the needs of the market these rules might be extended, even if only at a national level. Third, for the UK in particular, the Directive brought about confirmation of the binding force of the producer's guarantee.

On a more general level, three more remarks concerning the rules of the Directive can be made. First, the EU legislator, by definition, should deal with the EU legal sphere, and should focus on aspects of the regulated institutions that are relevant in the EU or in the cross-border context. The cross-border dimension of the regulated area is very important since the EU legislator sees the EU consumer law as a tool to build and facilitate the single market.

In the case of the EU rules on guarantees, the cross-border dimension of the regulated area is basically disregarded. The Green Paper of 1993 did consider the cross-border dimension of the guarantee, as it paid attention to the ideas like the Euro guarantee and the potential liability for guarantee in the commercial chain of distributors. However, the only reference to the cross-border character of the guarantee in the Consumer Sales Directive is that the Member States can require the guarantee to be drafted in one or more official languages of the Community, which can hardly be seen as embracing the EU dimension of the guarantee.

Second, the Consumer Sales Directive does not take into account any of the principles established for guarantees in the competition law area. However, including the competition law principles could enrich the regulation of guarantee in the area of consumer law. Competition law accepts a very practical, market-oriented approach that answers the needs of consumers. Competition law also enhances the cross-border dimension of the guarantee, since the single market and its functioning is in the centre of its attention. Also, the principles of competition law already exist at the European level. This means that no new rules need to be introduced, but rather existing rules need to be underlined from another perspective. To give but two examples of such rules: first, guarantees provided to the consumer must be effective throughout the EU, although there is no obligation to provide a guarantee to consumers in every Member State, and second members of a distribution system are required to deal with claims under guarantees bought in other Member States and regardless of where the product is used.

Third, the Consumer Sale Directive sees the guarantee merely as a marketing and competition tool. However, the guarantee is also developing in the direction of a self-standing service contract that can serve to meet various aims of the consumer. This direction of the guarantee's development is ignored by the EU legislator.

From the point of view of national legal systems it is worth underlining that the impact of the Consumer Sales Directive on the national legal systems varies depending on the state of the regulation in a given legislation before the implementation of the Directive. The Directive introduced rules on guarantees in the Member States where there were none, and that can be unequivocally declared as a positive impact. In the Member States where the guarantee was barely mentioned in the written law it could somehow systematise the rules. However,

introducing the Directive in legislations where an elaborated system of guarantees existed before, may have resulted in simplifying the theoretical considerations behind the guarantee, its functions, construction and relation with other legal institutions, but it may also have resulted in lowering the level of consumer protection, as has happened in Poland. Therefore the conclusion is that it is not possible to evaluate the EU rules on guarantees from the Member States' point of view in general, as the discrepancies between the systems are too great.

When it comes to the conclusions regarding the legislative probes at the EU level, the question how far legislation should follow the market, and how far it is allowed to create the market reality, is common to all legislators – be it at a national or a pan-national level. In the situation when legislative intervention is necessary, due to the failure of the self-regulation of the market (assuming that also other reasons for legislature can exist), there is probably more consent for the creationism of the legislator. Nevertheless, even in such a case the legislator should closely investigate the market in order to establish where the need to intervene is the most intensive, and what form should it take.

In the area of consumer sales guarantee rules, even though proper market research was done when preparing the Green Paper of 1993, due to political reasons its findings were largely ignored when enacting the Consumer Sales Directive. The guarantee exists in the shadow of the mandatory conformity regime. It means that, although the guarantee may be frequently used in practice, from a legal policy perspective, it will normally be perceived as less important, due to its non-mandatory character. Politically it is more reasonable to deal with the mandatory conformity regime than with the voluntary guarantee. However, the EU legislator has never really checked how effective the conformity rules are in practice, and whether the protection granted to consumers by a statute is implemented in practice.

The thesis include also certain conclusions that follow from the analysis, but which are beyond the scope of the research questions. These findings could be useful when investigating the EU legal sphere in the area of private (or consumer) law.

First, it is the problem of the relation between national law and EU law. The EU legislator cannot act in separation from the national law. The national solutions and traditions existing in the regulated area cannot be disregarded. In the area of the guarantee, the best examples would be Ireland, Poland or Hungary. The transposition and implementation of the EU rules is not exhausted when the rules contained in a directive are rewritten in the national legislation, there must be a connection established between the national and the European legislation. The area in the legal system when the EU legislation meets (or should meet) the national legislation is of crucial importance, because it has a decisive meaning for the way the EU rules function in practice. EU law will function as desired only if the national legislation works properly in practice. Therefore, co-operation and dialogue between the national and European legislator is necessary, also (or maybe most of all) at the time when the EU legislation is drafted – the national law reality cannot not be ignored when creating EU law.

Second, it must be underlined that EU legislation can lower the level of consumer protection, even if the transposition is made in the format of minimum harmonisation, and in theory the Member States can maintain their own rules in the area. Implementation necessitates a need to adjust the national legislation, to create a connection with the EU rules, which would introduce then into the national system, to fill in gaps, etc. In this process the effective level of consumer protection may easily decrease.

Last, one can claim that the EU legislator (which is probably natural for legislators in general) acclaims a success when a legal act is adopted, without much attention being paid as to the content of the rules.

Garanties bij de verkoop van consumptiegoederen¹⁰¹⁶ in de Europese Unie – samenvatting

Doelstellingen

Dit onderzoek heeft drie hoofddoelstellingen. Ten eerste wil het een overzicht geven van de actuele wetgeving die geldt in de Europese Unie en van het proces dat geresulteerd heeft in de aannames over garanties die de basis vormen voor de garantieregelgeving zoals vervat in de Richtlijn verkoop consumptiegoederen. De tweede doelstelling is een analyse te presenteren van de EU-regelgeving met betrekking tot garanties zoals die geldt volgens de Richtlijn verkoop consumptiegoederen. Tegelijkertijd wordt onderzocht in hoeverre de aannames waarop de EU-wetgeving over garanties is gebaseerd correct zijn, en of de regelgeving in de Richtlijn verkoop consumptiegoederen ook werkelijk in staat blijkt de daarvoor gestelde doelen te bereiken. De derde doelstelling is een diepgaande analyse van de garantiestructuur, uitgaande van de aannames van de Europese Unie met betrekking tot garanties (de garantie als marketinginstrument en concurrentiemiddel waarmee consumenten misleid kunnen worden, en die tot stand komt op basis van de verkoopovereenkomst). Dit onderzoek heeft tot doel om meer achtergrondinformatie te bieden over de vraag of de regels in de Richtlijn verkoop consumptiegoederen voldoen op het gebied van garanties bij de verkoop van consumptiegoederen, zelfs als voor de functie van de garantie dezelfde aannames gelden als de aannames in de Richtlijn. Ook wordt de vraag gesteld welke andere aspecten van garanties in wetgeving dienen te worden geregeld en in welke vorm.

De analyse

Hoofdstuk II geeft een overzicht van de ontwikkeling van het Europees beleid met betrekking tot garanties bij de verkoop van consumptiegoederen, een ontwikkeling die eerst plaatsvond in het mededingingsrecht en vervolgens in het consumentenrecht. Voor het mededingingsrecht behandelt dit hoofdstuk respectievelijk (het huidige) Artikel 101 VWEU, de Europese besluiten en zaken die expliciet ingaan op garanties, en ook de regelgeving die op enigerlei manier met het onderwerp garanties te maken heeft. Het hoofdstuk sluit af met een overzicht van de principes die voor garanties zijn vastgesteld in het mededingingsrecht. Het deel dat ingaat op consumentenbescherming begint met een analyse van de oorspronkelijke standpunten aangaande garanties zoals die in verschillende documenten van de Gemeenschap naar voren kwamen en geeft vervolgens een overzicht van de daaropvolgende ontwikkelingen op dat gebied, ongeacht of deze ook hebben geresulteerd in wetgeving: de Richtlijn betreffende oneerlijke bedingen in consumentenovereenkomsten, het Groenboek van 1993, de Richtlijn verkoop consumptiegoederen en de Richtlijn betreffende consumentenrechten, en ook alle consultatiedocumenten die op Europees niveau werden vastgesteld. Het hoofdstuk sluit af met een korte vergelijking tussen het consumentenbeleid en het mededingingsbeleid wat betreft hun benadering van garanties bij de verkoop van consumptiegoederen.

De belangrijkste conclusie van Hoofdstuk II is dat hoewel er een nauw verband bestaat tussen het EU-beleid voor mededinging en dat voor consumentenrecht, er toch te weinig verbanden bestaan als het gaat om garanties bij de verkoop van consumptiegoederen. In het

¹⁰¹⁶ In lijn met de Europese regelgeving, beleid en rechtspraak wordt hier gesproken over ‘consumptiegoederen’ en niet over ‘consumentengoederen’. Een inhoudelijk verschil bestaat echter niet.

mededingingsrecht zijn weliswaar bepaalde principes vastgesteld, maar er is nooit een alomvattend beleid tot stand gekomen aangaande garanties in de context van mededinging. De grootste waarde ervan is dat hier de bottom-up benadering is gevolgd en er een aantal bijzonder praktische aspecten is geregeld met betrekking tot het bieden van garanties in heel Europa, en dat het bovendien ook de belemmeringen in de markt heeft opgeheven. De principes die voor het mededingingsrecht zijn vastgesteld zijn bijvoorbeeld dat de garanties in de hele EU moeten gelden, ook al bestaat er geen verplichting om in elke lidstaat een garantie te verschaffen; dat de leden van een distributienetwerk verplicht zijn om vorderingen af te handelen op basis van garanties die in andere lidstaten zijn gekocht en ongeacht waar het product wordt gebruikt; en dat de garantie dient te gelden volgens de voorwaarden van de technische en veiligheidsstandaarden van het land waar het product wordt gebruikt. Als een product bijvoorbeeld niet voldoet aan de veiligheidsstandaarden van het land waar de consument verblijft, zou de garantie geldig blijven als de consument zorg draagt en betaalt voor aanpassing ervan; en ook na deze aanpassing (indien vereist door technische en veiligheidsstandaarden) en installatie door de koper (tenzij in strijd met de wet) blijft de garantie geldig. Deze regelgeving zou zeer nuttig kunnen zijn als deze ook op het gebied van consumentenrecht zou worden ingevoerd, omdat deze ingaat op daadwerkelijke consumentenproblemen. Tegelijkertijd heeft het mededingingsrecht duidelijke beperkingen: wat betreft garanties gaat het niet in op zaken als de totstandkoming van de garantie, de inhoud ervan of de voorwaarden waaronder er beroep op kan worden gedaan. Het mededingingsrecht creëert ook geen rechten waarop de consument direct aanspraak kan maken en op het gebied van harmonisatie draagt het niets bij met betrekking tot de transparantie van garanties.

Met betrekking tot consumentenbeleid worden twee belangrijke zaken opgemerkt. Ten eerste is het zo dat in vergelijking met het mededingingsbeleid de oplossingen die binnen het Europese beleid voor consumentenbescherming worden voorgesteld of overwogen veel minder sterk gebaseerd zijn op de eigenlijke marktsituatie (de werkelijkheid). Het mededingingsrecht begint juist bij werkelijke geschillen en bouwt daar op voort. Het consumentenrecht daarentegen, dat op EU-niveau voornamelijk bestaat uit privaatrechtelijke regelgeving, creëert vaker een nieuwe werkelijkheid in plaats van de bestaande werkelijkheid te weerspiegelen. In eerste instantie (zie het Groenboek van 1993) probeerde de EU-wetgever de marktontwikkelingen op de voet te volgen, maar later gingen meer politieke argumenten overheersen die vorm gaven aan de Europese garantieregelgeving. Ten tweede is het helaas zo, ten nadele van consumenten, dat het EU-consumentenrecht geen gebruik maakt van de principes zoals vastgesteld in het EU-mededingingsrecht.

Hoofdstuk III behandelt Artikel 6 van de Richtlijn verkoop consumptiegoederen. Het begint met een overzicht en analyse van de aannames die golden bij het tot stand brengen van de garantieregelgeving zoals vervat in de Richtlijn verkoop consumptiegoederen, tegen de achtergrond van de algemene aannames van de Richtlijn. Vervolgens wordt gedetailleerd ingegaan op de garantieregelgeving van de Richtlijn. Eerst komt de reikwijdte van de garantieregelgeving aan bod, waarbinnen vier onderwerpen worden besproken: de overeenkomsten die eronder vallen, het product dat onderwerp is van de overeenkomst, de partijen die bij de garantierelatie betrokken zijn en de 'gratis' garantie (de garantie waarvoor niet extra hoeft te worden betaald). Het volgende deel behandelt de algemene aspecten: de naam, de bron en het juridische karakter van de garantie, en de manier waarop deze tot stand wordt gebracht. Daarna volgt een analyse van de inhoud van de garantie, waarbij wordt ingegaan op de inhoud van de garantie in enge zin, de vormen van genoegdoening, de weergave van de inhoud van de garantie, en problemen die te maken hebben met reclame. Het

daaropvolgende deel beschrijft de eisen voor transparantie: de omvang van de informatie en de eisen voor de weergave van de garantie, gevolgd door het deel dat ingaat op het probleem van inbreuk. In het laatste deel gaat de analyse in op het probleem van zaken die in het wetgevingsproces werden weggelaten, en problemen die voor regelgeving niet in aanmerking werden genomen.

In de conclusies van dit deel wordt benadrukt dat het belangrijkste algemene resultaat van de Richtlijn verkoop consumptiegoederen de erkenning van de totstandkoming van de garantie op Europees niveau is. Aangezien de omvang van de EU-regelgeving voor garanties bijzonder beperkt is, wordt er echter tegelijkertijd gesuggereerd (vooral in rechtssystemen waarin garanties vóór de invoering van de Richtlijn niet gereguleerd waren) dat er weinig te reguleren valt. De Richtlijn geeft een sterk versimpeld beeld van de garantie.

De Richtlijn is gebaseerd op twee aannames over garanties bij de verkoop van consumptiegoederen. Ten eerste ging de Richtlijn er vanuit dat de voornaamste, zo niet enige, rol van de garantie op de EU-markt die van marketinginstrument en concurrentiemiddel is. Op basis van deze aanname erkent de Richtlijn de tweede aanname: dat consumenten door het bestaan van garanties in de markt het risico lopen dat zij worden misleid ten aanzien van hun rechten.

Deze twee aannames kloppen in de zin dat garanties ook werkelijk als marketinginstrument worden gebruikt en dat ze ook echt het risico opleveren dat consumenten worden misleid. Het probleem is alleen dat deze twee aannames slechts een deel van het hele plaatje vormen. Niet alle functies die garanties in de markt hebben (of zelfs maar de belangrijkste functies) komen in deze aannames naar voren, en er wordt niet ingegaan op de mogelijke problemen die kunnen ontstaan als gevolg van het bestaan van garanties in de markt. Het marketinginstrument is het perspectief van de garantieverstrekker, terwijl vanuit het perspectief van de consument de garantie zekerheid biedt tegen verlies, de waarde van de goederen handhaaft en onderhoudsdiensten biedt die niets te maken hebben met defecten. Waar het gaat om de risico's van garanties, moet men in gedachten houden hoe moeilijk het vaak is om nakoming van een garantie af te dwingen.

Het antwoord op de vraag of de Richtlijn erin geslaagd is om zijn doelstellingen te bereiken is 'nee'. De Richtlijn richt zich voornamelijk op het creëren van formele transparantie van garanties door bepaalde verplichtingen op te leggen aan de garantieverstrekker, maar dit zonder de consument een effectieve vorm van genoegdoening te bieden. De enkele informatie dat een garantie geen inbreuk maakt op wettelijke consumentenrechten is onvoldoende om de garantie ook begrijpelijk te maken voor de consument, die meestal helemaal niet weet wat zijn rechten zijn. Bovendien beschikken consumenten niet over een effectieve en eenvoudige vorm van genoegdoening als een garantie geen informatie verschaft over de inhoud ervan.

In de volgende twee hoofdstukken (Hoofdstukken IV en V) worden de elementen van de garantiestructuur behandeld en wordt een poging gedaan om de problemen te identificeren die zich kunnen voordoen bij de verschillende aspecten van garanties. Deze hoofdstukken vormen samen een geheel binnen dit proefschrift: Hoofdstuk IV gaat in op kwesties die op dit moment vallen binnen het domein van nationale wetgeving en van wat algemenere aard zijn, en Hoofdstuk V behandelt kwesties die voor de praktijk relevanter zijn en als zodanig eerder in aanmerking zouden komen voor regelgeving op Europees niveau. Beide hoofdstukken bespreken de garantie vanuit een breed perspectief. Deze benadering gaat uit van een vergelijkbaar standpunt over garanties als het uitgangspunt van de Richtlijn verkoop

consumptiegoederen: de garantie als instrument dat onderdeel vormt van het aansprakelijkheidsregime wat betreft tekortkomingen in verkoopovereenkomsten, waar het voornamelijk verhaalmogelijkheden verschafft aan de consument in het geval van defecten (en voor consumenten misleidend kan zijn) en tegelijkertijd vooral de functie van marketinginstrument vervult. Dit deel van de analyse houdt geen rekening met de beperkingen die voortkomen uit het beeld van het bestaande minimale niveau van de regelgeving op het gebied van garanties op Europees niveau, zoals in de Richtlijn verkoop consumptiegoederen.

Hoofdstuk IV omvat een analyse van de meer algemene en theoretische aspecten van een garantie: de naam, de tweeledige aard van een garantie, de mogelijke bronnen van de garantie, de juridische vorm van de garantie en de verbanden tussen de garantie en het wettelijke kader aangaande aansprakelijkheid voor verkochte goederen in het betreffende rechtssysteem.

De conclusies bevestigen dat de algemene aspecten van garanties voor de nationale wetgever geen prioriteit vormen. Verder wordt er opgemerkt dat het gebrek aan regelgeving tot praktische problemen kan leiden, vooral doordat de Europese regels weinig richting bieden wat betreft de interpretatie ervan. In principe kunnen deze problemen door jurisprudentie en juridische literatuur worden opgelost, maar het zou wat al te optimistisch zijn om aan te nemen dat alle problemen daardoor kunnen worden opgelost. Consumentengeschillen bereiken meestal de rechtbank niet, dus komen de problemen zelden duidelijk naar voren (het gebrek aan rechtszaken betekent dan ook zeker niet dat er geen problemen zijn). Wat betreft specifieke bevindingen: de naam zou waarschijnlijk op Europees niveau effectiever gereguleerd kunnen worden, om ervoor te zorgen dat in de gehele EU een coherenter beeld ontstaat ten aanzien van garanties. De juridische aard van de garantie is een aspect dat behoort tot het domein van de rechtssystemen van de lidstaten zelf, maar het EU-recht geeft hier wel richting – het normaal-type van de garantie is een vrijwillige garantie. Als lidstaten de regels wat betreft verplichte garanties willen handhaven in hun rechtssystemen, zouden ze de reikwijdte van de verplichting duidelijk moeten aangeven met betrekking tot het product en de partijen die verplichtingen hebben onder deze garanties. De kwestie van de juridische vorm is beslissend voor het vaststellen van de regelgeving die van toepassing is op de garantie (totstandkoming, geldigheid, interpretatie etc.). Hoewel het Europees recht hier wel iets over zegt (een garantie is volgens de Richtlijn verkoop consumptiegoederen een bindende toezegging), is het zeker niet specifiek genoeg om ervoor te zorgen dat de garantie in de praktijk effectief werkt. Zolang de Europese regels zo fragmentarisch blijven, bestaat er echter geen noodzaak tot verdere regelgeving. Het verband tussen het wettelijke kader en de garantie speelt wel een kleine rol in de Europese regels, maar deze regels zijn niet gedetailleerd genoeg en het zou goed zijn om hierin meer helderheid te brengen. De vraag of er wetgevende interventie nodig is, blijft onbeantwoord.

De analyse in Hoofdstuk V omvat in principe de gebieden die in het Groenboek van 1993 in overweging werden genomen voor Europese regelgeving. Deze analyse gaat in op aspecten van garanties die een duidelijk praktische dimensie hebben en interessant zouden kunnen zijn voor Europese wetgeving, die zich meer met praktische zaken bezig houdt dan met theoretische overwegingen. De analyse begint met de partijen die betrokken zijn bij de garantierelatie, waarin de personen worden beschreven die hiervan deel uit kunnen maken. Het volgende deel gaat in op de zaken die te maken hebben met de inhoud van de garantie, waar de ruime betekenis van de (garantie)dekking wordt bedoeld (de dekking van defecten, de remedies, de betaling van de garantie, de garantietermijn en de beperking van aansprakelijkheid). Het derde deel behandelt de eisen voor transparantie en gaat

achtereenvolgens in op: verschillende perspectieven op manieren om de garantie transparant te maken, informatie waarmee de consument een gefundeerde keuze kan maken en waarmee de garantie in het juiste perspectief wordt geplaatst ten opzichte van andere mogelijkheden waar de consument over beschikt, informatie waarmee naleving van de garantie kan worden afgedwongen, het garantiebewijs, taal en formulering van het garantiebewijs, de situatie die zich voordoet als de garantie niet voldoet aan de eisen voor transparantie, en ten slotte kort iets over de problemen met reclame.

Wat betreft de partijen die betrokken zijn bij een garantierelatie is de conclusie dat er op Europees niveau een duidelijk besluit dient te komen dat iedere willekeurige partij een garantie mag aanbieden. Of de relatie tussen de partijen die betrokken zijn bij de garantie specifiek aan bod moet komen hangt af van de situatie in de betreffende nationale markt, maar de vraag of de garantie aan de goederen dient te worden vastgehecht (d.w.z. of de garantie de goederen volgt) kan op Europees niveau worden geregeld. Op Europees niveau dienen er regels van aanvullend recht (waarvan partijen dus kunnen afwijken) te worden vastgesteld wat betreft de dekking van de garantie in enge zin, vormen van genoegdoening en duur. De garantieregelgeving dient ook te gelden voor garanties die tegen betaling worden aangeboden. Wat betreft transparantie is het ontegenzeggelijk belangrijk dat garanties zo transparant mogelijk zijn. Consumenten dienen volledige informatie te krijgen wat betreft de inhoud en de formele voorwaarden van de garantie, en over de procedure om verhaal te nemen. De consument dient vrije toegang te krijgen tot het garantiebewijs en dit zou bij de goederen dienen te worden meegeleverd. De consument moet kunnen begrijpen waartoe een garantie dient: hij zou dus informatie moeten krijgen over wat de garantie hem biedt vergeleken met de wettelijke bescherming die hij sowieso al geniet. Het verband tussen de garantie en de reclame zou ook duidelijk moeten worden gemaakt. De regels voor transparantie zouden echter versterkt moeten worden door de standaard-eis dat de garantie (ten minste) een bepaalde standaardinhoud heeft die geldt indien de garantieverstrekker de inhoud niet of onvolledig vermeldt.

Conclusies

De conclusies van dit proefschrift als het gaat om de onderzoeksvragen liggen op drie verschillende niveaus: specifieke conclusies met betrekking tot de Richtlijn verkoop consumptiegoederen, conclusies die geformuleerd kunnen worden vanuit het perspectief van de lidstaten, en conclusies met betrekking tot het wetgevingsproces van de EU.

Conclusies met betrekking tot de Richtlijn verkoop consumptiegoederen

Wat betreft de juistheid van de aannames waarop de Richtlijn gebaseerd is, moet worden gezegd dat de garantie ook andere functies kan hebben (en heeft) behalve die van marketinginstrument en concurrentiemiddel. Vanuit het perspectief van de consument kan de garantie verzekeren tegen verlies, de waarde van de goederen handhaven en onderhoudsdiensten bieden die niet alleen verband houden met defecten. Vanuit het perspectief van de verkoper geldt dat als de garantie wordt gegeven door de producent dit de aansprakelijkheidsverdeling van een verkoopovereenkomst evenwichtiger kan maken, omdat dit de aansprakelijkheid legt bij de persoon die het probleem veroorzaakt (de producent). Als de goederen via een commerciële keten worden gedistribueerd en er een beroep kan worden gedaan op de garantie bij een onderdeel van deze keten, dat op zijn beurt beroep kan doen op de persoon die de garantie heeft afgegeven, dan zou dit bovendien de positie van de eindverkoper verbeteren.

Ten tweede, wat betreft de verschillende risico's die de garantie kan opleveren voor consumenten is het zeker waar dat garanties voor consumenten misleidend kunnen zijn als het gaat om hun rechten. De garantie is niet per definitie een 'verraderlijk instituut', maar de contractuele context waarin garanties gewoonlijk voorkomen en de sociale werkelijkheid van de hedendaagse consumentenmarkt kunnen er samen toe leiden dat de garantie voor de consument een ingewikkeld verschijnsel is (zij het dat de consument, die normaliter niet op de hoogte is van zijn wettelijke rechten, zich misschien niet eens bewust is van de complexiteit van een garantie). Benadrukt moet worden dat voor garanties (net als voor consumentenrelaties in het algemeen) het waarborgen van de juiste transparantie van een transactie niet voldoende is om de consument zekerheid te geven wat betreft zijn positie. Problematisch is ook dat aan de eisen voor transparantie vaak niet wordt voldaan en de consument in discussie moet gaan met de garantieverstrekker. Het is daarom net zo belangrijk om de positie van de consument ten opzichte van die van de garantieverstrekker te waarborgen indien de goederen ondeugdelijk blijken. Ten eerste is het op het gebied van garantieregelgeving zelf nodig om de consument praktische instrumenten te verschaffen die kunnen worden ingezet als de garantieverstrekker de inhoud van zijn verplichting niet volledig vermeldt (bijvoorbeeld als het garantiebewijs niet vermeldt hoe lang de garantie geldig is of welke vormen van genoegdoening er bestaan en in welke volgorde deze gelden). Dit betekent dat de inhoud van de garantie op wettelijk niveau geregeld zou moeten worden. Welke vorm van wetgeving hiervoor wordt gebruikt is niet echt van belang – eisen voor standaardinhoud of minimuminhoud, of de eis dat een garantie altijd méér biedt dan wettelijk verplicht is – als het voor de consument maar duidelijk is wat zijn positie is zonder dat hij dit via een rechtbank hoeft te achterhalen. Ten tweede is het in ruimere zin nodig om een effectief mechanisme voor de naleving van garanties in te stellen, met zowel privaatrechtelijke als publiekrechtelijke elementen, bijvoorbeeld door het gebruik van een effectieve procedure voor kleine vorderingen te bevorderen en door middel van marktcontrole door publieke instellingen die de effectiviteit van consumentenbescherming in de nationale markten monitoren. Dit onderwerp ligt echter duidelijk buiten het bereik van dit proefschrift, zodat ik het bij deze opmerking laat.

Voor invoering van uitgebreidere regelgeving op EU-niveau hoeven de aannames aangaande de doelstelling die garanties hebben in de markt niet te worden veranderd. De vraag welke functies van de garantie wel of niet erkend worden, heeft feitelijk weinig invloed op de optimale reikwijdte van wetgeving. De zaken die op dit moment niet in wetgeving zijn vastgelegd en die voor de consument van bijzonder belang zijn – nl. de elementen die de consument zekerheid bieden als de garantieverstrekker de inhoud van de garantie niet heeft vermeld – zijn altijd belangrijk, onafhankelijk van de functie van de garantie. Bij de Richtlijn verkoop consumptiegoederen lijkt het erop dat de erkende doelstelling van de garantie ertoe dient de beperkte reikwijdte van de regels voor garanties te rechtvaardigen.

De Richtlijn verkoop consumptiegoederen heeft tot doel te voorkómen dat de consument zich vergist wat betreft zijn wettelijke rechten als hij een garantie krijgt aangeboden. Om dit te bereiken, bevat de Richtlijn verkoop consumptiegoederen voorschriften voor formele transparantievereisten. In het algemeen klopt het idee dat garanties informatie dienen te verschaffen over de juridische en praktische gevolgen van het ontvangen van de garantie. Er moet echter nog wel het een en ander gebeuren om de formele transparantievereisten ook voor de consument praktische betekenis te geven.

Wat betreft de informatie over de rechtspositie van de consument gaat de Richtlijn van de onjuiste veronderstelling uit dat zodra de consument ervan op de hoogte is gesteld dat de

garantie geen inbreuk maakt op zijn rechten, de consument een helder beeld heeft van zijn rechtspositie. De consument zou dan echter moeten weten wat zijn wettelijke rechten zijn, wat zelden het geval is. De Richtlijn levert geen effectieve oplossing, omdat deze de consument alleen informatie geeft, maar niet de context die deze informatie ook begrijpelijk zou maken. Er zijn verschillende oplossingen om dit tegen te gaan. De eerste oplossing ligt op het gebied van regels voor transparantie. Een mogelijke eis is dat het garantiebewijs een overzicht bevat van de wettelijke rechten van de consument. De tweede oplossing (de oplossing van de *Principles of European Law on Sales* (PELS) en de *Draft Common Frame of Reference* (DCFR)) is dat het garantiebewijs de voordelen vermeldt die de garantie de koper biedt, vergeleken met de bij wet geregelde rechten. Deze oplossing ligt op de grens tussen het reguleren van transparantie en het reguleren van inhoud. De derde oplossing, die materieelrechtelijk van aard is, is de eis dat een garantie de consument voordelen moet bieden boven zijn wettelijke rechten. In dat geval is de consument, ook al begrijpt hij het verband tussen de garantie en het wettelijk regime niet volledig, nog steeds beter af met de garantie.

Als het gaat om de informatie over de inhoud, is ook hier het idee helemaal goed, maar het ook in praktijk te brengen is een geheel andere zaak. Als het garantiebewijs de vereiste informatie vermeldt over de inhoud van de garantie, heeft de consument geen probleem in de context van transparantie. Echter, als het garantiebewijs bepaalde belangrijke informatie over de inhoud van de garantie niet vermeldt, stelt de Richtlijn dat de consument nog steeds een beroep kan doen op de garantie en kan eisen dat deze wordt nagekomen. Maar de vraag is waar de consument precies op een beroep op moet doen als het garantiebewijs bijvoorbeeld de rechten niet vermeldt waar de koper een beroep op kan doen bij een gebrek? De Europese regels slagen er hier niet in om effectieve middelen te bieden waarmee de consument de garantieverstrekker kan aanspreken. Op basis van de Richtlijn kan de consument de rechtbank slechts vragen om de inhoud van de verplichting van de garantieverstrekker vast te stellen. Bovendien kan de inhoud van de garantie ook worden vastgesteld in de reclame en is het onduidelijk hoe er moet worden gekeken naar mogelijke verschillen tussen het garantiebewijs en de reclame.

De eisen wat betreft taal en formulering zijn goed vastgesteld, uitgaande van de aanname dat er geen mogelijkheden bestaan om effectief het hoofd te bieden aan de veeltalige Europese omgeving als het gaat om massatransacties.

De eis om garantie alleen op verzoek te verschaffen is daarentegen zonder meer een vergissing. Dit vereist actie van de kant van de consument, die dan eerst moet weten dat de garantie bestaat, dat het garantiebewijs bestaat en dat hij het recht heeft er om te vragen en het ook daadwerkelijk te ontvangen. De praktijk van de markt toont aan dat de verplichting om het garantiebewijs tegelijk te verstrekken met de goederen waar zij betrekking op hebben, niet bovenmatig lastig is voor garantieverstrekkers die besluiten een garantie te bieden. Het is tegelijkertijd voor de koper bijzonder belangrijk het garantiebewijs in zijn bezit te hebben, omdat dit het gemakkelijker maakt om verhaal te nemen op basis van de garantie.

Alles bij elkaar is het erg moeilijk te stellen dat de Richtlijn verkoop consumptiegoederen erin slaagt haar doelstellingen te bereiken, namelijk het voorkómen dat consumenten door garanties worden misleid. De Richtlijn concentreert zich op de formele eisen voor transparantie, zonder na te gaan hoe de regels in de praktijk zullen uitpakken en of ze de positie van de consument verbeteren.

Het is echter belangrijk te bedenken dat de invoering van de Richtlijn verkoop consumptiegoederen op het gebied van garanties zeker ook positieve effecten heeft gehad. Ten eerste heeft met de Richtlijn verkoop consumptiegoederen de garantie bij de verkoop van consumptiegoederen in alle lidstaten erkenning gekregen, wat verdere consolidatie van de Europese rechtssfeer heeft opgeleverd, doordat er weer een nieuw onderwerp op Europees niveau gereguleerd is. Ten tweede is het idee dat het belangrijk is om garanties transparant te maken overgenomen in alle rechtssystemen in de EU. Bovendien zou de nationale wetgever die concludeert dat de regels van de Richtlijn niet voldoende tegemoetkomen aan de behoeften van de markt, kunnen besluiten om deze regels uit te breiden, al was het maar alleen op nationaal niveau. Ten derde, en dit was met name voor het Verenigd Koninkrijk van belang, heeft de Richtlijn bevestiging opgeleverd van de bindende kracht van de garantie van de producent.

In algemener opzicht kunnen er drie dingen worden opgemerkt over de regels van de Richtlijn. Ten eerste is het uiteraard de EU-wetgever die zich bezig zou moeten houden met de Europese rechtssfeer en die zich zou moeten concentreren op aspecten van de geregleerde instellingen die binnen de EU of in grensoverschrijdende context relevant zijn. De grensoverschrijdende dimensie van het geregleerde onderwerp is erg belangrijk, omdat de EU wetgever het Europese consumentenrecht ziet als instrument om de Europese markt vorm te geven en te faciliteren.

In de Europese garantieregelgeving wordt de grensoverschrijdende dimensie van het geregleerde onderwerp buiten beschouwing gelaten. Het Groenboek van 1993 ging wél in op de grensoverschrijdende dimensie van garanties, omdat hierin aandacht was voor ideeën zoals de Euro-garantie en de mogelijke aansprakelijkheid voor garanties in de commerciële distributielij. De enige verwijzing naar het grensoverschrijdende karakter van garanties in de Richtlijn verkoop consumptiegoederen is echter dat de lidstaten kunnen eisen dat de garantie wordt opgesteld in één of meer officiële EU-talen, wat moeilijk kan worden beschouwd als inachtneming van de Europese dimensie van de garantie.

Ten tweede houdt de Richtlijn verkoop consumptiegoederen geen rekening met de principes die zijn vastgesteld voor garanties op het gebied van mededingingsrecht. Als dit wel zou gebeuren, zou dit een verrijking opleveren voor de regulering van garanties in het consumentenrecht. Het mededingingsrecht volgt een zeer praktische, marktgeoriënteerde benadering die aan de behoeften van consumenten tegemoetkomt. In het mededingingsrecht wordt ook de grensoverschrijdende dimensie van de garantie versterkt, omdat hierin het idee van één Europese markt en de werking daarvan centraal staat. Bovendien bestaan de principes van het mededingingsrecht al op Europees niveau. Dit betekent dat er geen nieuwe regels zouden hoeven worden ingevoerd, maar dat bestaande regels vanuit een ander perspectief zouden moeten worden benadrukt. Ik geef hier twee voorbeelden van dergelijke regels: ten eerste dienen aan de consument afgegeven garanties in de gehele EU te gelden, ook al bestaat er geen verplichting om in iedere lidstaat een garantie te geven aan consumenten, en ten tweede zijn leden van een distributienetwerk verplicht om vorderingen af te handelen onder garanties die in andere lidstaten zijn gekocht, ongeacht waar het product wordt gebruikt.

Ten derde beschouwt de Richtlijn verkoop consumptiegoederen garanties slechts als marketinginstrument en concurrentiemiddel. Garanties worden echter ook steeds meer een zelfstandig servicecontract dat voor de consument verschillende doelstellingen dient. Deze ontwikkeling wordt door de EU-wetgever buiten beschouwing gelaten.

Vanuit de nationale rechtssystemen gezien is het nuttig te benadrukken dat de invloed van de Richtlijn verkoop consumptiegoederen op de nationale rechtssystemen varieert afhankelijk van de mate waarin deze het onderwerp al gereguleerd hadden voordat de Richtlijn geïmplementeerd werd. De Richtlijn introduceert garantieregelgeving in lidstaten die voorheen geen regelgeving hadden, en dat kan zeker worden beschouwd als een positieve ontwikkeling. In de lidstaten waar garanties nauwelijks in wetgeving waren gereguleerd, kan de Richtlijn de regelgeving enigszins systematiseren. De invoering van de Richtlijn in rechtssystemen waar al een uitgebreid garantiesysteem bestond, kan echter hebben geresulteerd in een simplificatie van de theoretische uitgangspunten achter de garantie, de functie en structuur ervan en het verband ervan met andere rechtsfiguren, maar kan ook hebben geresulteerd in een afkalving van de consumentenbescherming, zoals in Polen is gebeurd. De conclusie is daarom dat het onmogelijk is de Europese regelgeving over garanties te evalueren voor de lidstaten in het algemeen, omdat de systemen daarvoor te verschillend zijn.

Wanneer het gaat om de conclusies van de onderzoeken naar wetgeving op EU-niveau, geldt voor alle wetgevers de vraag in hoeverre wetgeving de markt moet volgen en in hoeverre deze ook marktwerkelijkheid zou mogen creëren – hetzij op nationaal hetzij op Europees niveau. Als interventie via wetgeving noodzakelijk is doordat de markt er niet in slaagt zichzelf te reguleren (ervan uitgaande dat er voor wetgeving ook andere redenen kunnen zijn), zal er waarschijnlijk meer goedkeuring zijn voor het ‘creationisme’ van de wetgever. Maar zelfs in dat geval dient de wetgever de markt diepgaand te onderzoeken om vast te stellen waar de noodzaak tot interventie het grootst is en welke vorm deze zou moeten krijgen.

Hoewel er bij de voorbereiding van het Groenboek van 1993 wel adequaat marktonderzoek was verricht op het gebied van de regelgeving voor garanties bij de verkoop van consumptiegoederen, werden de bevindingen hiervan om politieke redenen voor het grootste deel buiten beschouwing gelaten bij de vaststelling van de Richtlijn verkoop consumptiegoederen. De garantie bestaat nu in de schaduw van het dwingendrechtelijke conformiteitsregime bij de verkoop van goederen. Dit betekent dat, hoewel de garantie in de praktijk veelvuldig gebruikt wordt, deze vanuit juridisch beleid door zijn niet-verplichte karakter als minder belangrijk zal worden beschouwd. Politiek gezien ligt het meer voor de hand om het dwingendrechtelijke conformiteitsregime te regelen dan de vrijwillige garantie. De Europese wetgever is echter nooit echt nagegaan hoe effectief de conformiteitsregels in de praktijk zijn, en of de wettelijke consumentenbescherming in de praktijk ook echt wordt uitgevoerd.

Dit proefschrift bevat ook andere conclusies op grond van de analyses, die echter niet relevant zijn voor de onderzoeksvragen. Deze bevindingen kunnen van nut zijn bij onderzoek naar de Europese rechtssfeer op het gebied van privaatrecht of consumentenrecht.

Ten eerste is er het probleem van de relatie tussen nationaal recht en EU-recht. De Europese wetgever kan geen actie ondernemen die los staat van het nationaal recht. De nationale oplossingen en tradities die al bestaan voor het geregleerde onderwerp mogen niet buiten beschouwing worden gelaten. Op het gebied van garanties zijn de beste voorbeelden waarschijnlijk Ierland, Polen en Hongarije. De omzetting en implementatie van EU-regelgeving is nog niet volledig op het moment dat de regels in een richtlijn in nationale wetgeving zijn overgenomen; er moet een verband worden gelegd tussen de nationale en de Europese wetgeving. De plaats in het rechtssysteem waar EU-wetgeving samenkomt (of zou moeten samenkomen) met nationale wetgeving is cruciaal, omdat dit van doorslaggevende

betekenis is voor de wijze waarop de EU-regels in de praktijk werken. Europees recht werkt alleen zoals het bedoeld is als het nationaal recht in de praktijk goed functioneert. Daarom zijn samenwerking en dialoog tussen de nationale en de Europese wetgever noodzakelijk, ook (of misschien juist) tijdens de ontwerpfase van EU-wetgeving: de werkelijkheid van het nationale recht mag niet worden genegeerd bij het creëren van EU-recht.

Ten tweede moet worden benadrukt dat EU-wetgeving het niveau van consumentenbescherming ook kan verslechteren, zelfs als de omzetting de vorm van minimumharmonisatie aanneemt, en in theorie kunnen de lidstaten ook hun eigen regels op dit gebied handhaven. Voor implementatie moet de nationale wetgeving worden aangepast om een verband aan te brengen met de EU-regels, om ze zo in het nationale systeem in te voeren, gaten te dichten, etc. Tijdens dit proces is het zeer wel mogelijk dat het effectieve niveau van consumentbescherming verslechtert.

Als laatste kan worden gesteld dat de EU-wetgever (iets wat waarschijnlijk geldt voor wetgevers in het algemeen) zich al op een succes beroept als er een wet is aangenomen, zonder veel aandacht te geven aan de inhoud van de regels.

Literature

Agrawal, Richardson & Grimm 1996

Agrawal J., Richardson P. S. & Grimm P.E., “The relationship between warranty and product reliability“, *Journal of Consumer Affairs*, 1996 (30), pp. 421-443

Akerlof 1970

Akerlof G., “The market for ‘Lemons’: Quality Uncertainty and the Market Mechanism“, *Journal of Law and Economics*, 1970 (84), pp. 488-500

Ämmälä 1996

Ämmälä T., *Uudistunut Kuluttajansuoja*, Helsinki, 1996, pp. 138-139

Astola 1984

Astola T., “Manufacturers’ guarantees and EEC Competition Law“, *Journal of Consumer Policy*, 1984 (7), pp. 65-80

Averitt & Lande 1997

Averitt N. W. & Lande R.H., “Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law“, *Antitrust Law Journal*, 1996-1997 (65), pp. 713-756

Augenhofer 2009

Augenhofer S., “Public Statements by Producers, Commercial Guarantees and the Right of Redress in Austrian Law after the Transposition of Directive 99/44“, in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 171-194

Beale & Howells 1997

Beal H. & Howells G., “EC harmonisation of consumer sales law – A missed opportunity?“, *Journal of Contract Law*, 1997 (12), pp. 21-46

Beale 1996

Beal H., “Consumers, Chains and Networks“ in *Aspects of Fairness in Contracts* (ed.) Willett C., Glasgow, Blackstone Press Limited: London, 1996

Beale, Craswell & Salop 1981

Beale H., Craswell R. & Salop S., “The efficient Regulation of Consumer Information“, *Journal of Law and Economics*, 1981 (24)

Bianca & Grundmann (2002)

Bianca M. C. & Grundmann S. (eds.), *EU Sales Directive. Commentary*, Antwerp, Oxford, New York: Intersentia, 2002

Bird 2001

Bird T., “Directive 99/44/EC on certain aspects of the sale of consumer goods and associated advertising: Its impact on existing Irish sale of goods law“, *European Review of Private Law*, 2001 (9), pp. 279-295

Bittner & Rott 2009

Bittner S. & Rott P., “Direct Producer's Liability and the Final Seller's Right of Redress in Germany“, in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 323-340

Bradgate 1997

Bradgate R., “Consumer Guarantees: the EC’s draft Directive“, Web JCLI, 1997 (1) <<http://webjcli.ncl.ac.uk/1997/issue1/bradgate1.html>>

Bradgate, Twigg-Flesner 2002

Bradgate R., Twigg-Flesner C., "Expanding the boundaries of liability for quality defects", *Journal of Consumer Policy*, 2002 (25), pp. 345-377

Bridge 2003

Bridge M., "What is to be done about Sale of Goods?", *The Law Quarterly Review*, Volume 119, April 2003

Bruun 2001

Bruun N. A.-D., "Directive 1999/44 of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees and its influence in Danish law", *European Review of Private Law*, 2001 (9), pp. 189-196

Calais-Auloy 1985

Calais-Auloy J., "Towards the New laws for consumer protection: proposals of the French Reform Commission", *Journal of Consumer Policy*, 1985 (8), pp. 53-76

Calais-Auloy 1985(1)

Calais-Auloy J., Vers un nouveau droit de la consommation. Rapport de la commission de réforme du droit de la consommation au secrétaire d'Etat auprès du ministre de l'Economie, des Finances et du Budget chargé de la consommation. Paris, 1985, *La documentation française*,

Cannarsa & Moréteau 2009

Cannarsa M. & Moréteau O., "The French 'Action Directe': The Justification for Going beyond Privity", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 311-322

Chen & Ross 1994

Chen Z. & Ross T. W., "Why are extended warranties so expensive?", *Economics Letters*, 1994 (45), pp. 253-257

Cranston 1995

Cranston R., "The Green Paper on Guarantee", *Consumer Law Journal*, 1995 (3) (110), pp. 110-116

Craig & Harlow

Craig P. & Harlow C. (eds.), "The Function of Soft Law in EC consumer Law", in *Law Making in the European Union*

Craswell 1985

Craswell R., "Interpreting Deceptive Advertising", *Boston University Law Review*, 1985 (65), p. 658

Craswell 1991

Craswell R., "Interpreting Deceptive Advertising: The Role of Cost-benefit Analysis", *Southern California Law Review*, 1991 (64), p. 549

Czachórski 1994

Czachórski W., "Zobowiązania. Zarys wykładu", 1994

Davis 1994

Davis J., "Ethics in Advertising Decision-making: Implications for Reducing the incidence of Deceptive Advertising", *Journal of Consumer Affairs*, 1994 (28), p. 380

Deards 1998

Deards E., "The Proposed Guarantees Directive: Is It Fit for the Purpose?", *Journal of Consumer Policy*, 1998 (21), pp. 99-119

DTI 2001

DTI (2001). EC Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, First consultation, 2001. London: Department of Trade and Industry, www.dti.gov.uk/cacp/ca/consultation/saleofgoods.htm

DTI 2001(1)

DTI (2001). EU Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantee, Regulatory Impact Assessment, Initial Views, 4 January 2001

DTI 2002

DTI (2002). EC Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, Second Consultation, 2002. London, Department of Industry

Duivenvoorde & Hondius 2009

Duivenvoorde B. & Hondius E., "Recourse and Direct Action in the Netherlands: a Dutch Treat?", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 445-460

European Consumer Law Group 1998

European Consumer Law Group, "European Consumer Law Group Opinion on the Proposal for a Directive on the Sale of Consumer Goods and Associated Guarantees", *Journal of Consumer Policy*, 1998 (21), pp. 91-97

Fazekas & Sós 2009

Fazekas J. & Sós G., "The Implementation of the Directive 99/44 into Hungarian Law and the Legal Institution of the Direct Producers' Liability", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 353-370

Fine 1989

Fine F., "EEC Consumer Warranties: A new anti-trust hurdle facing exporters", *European Competition Law Review*, 1989, pp. 233-255

Fogt 2009

Fogt M. M., "Direct Liability of Previous Seller, Supplier and Producer in Danish Law", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 223-254

Bianca & Grundmann 2002

Bianca M. C. & Grundmann S. (eds.), *EU Sales Directive. Commentary*, Antwerp, Oxford, New York: Intersentia, 2002

Gomez 2002

Gomez F., "The European Directive on Consumer Sales: An Economic Perspective", in Grundman S. & Bianca C.M. (eds.), *EU Sales Directive Commentary*, Oxford and Portland, 2002

Gomez 2004

Gomez F., "EC Consumer Protection Law and EC Competition Law: How Related are They? A Law and Economics Perspective" in: (ed.) Collins H., *The Forthcoming EC Directive on Unfair Commercial Practices. Contract, Consumer and Competition Law Implications*, Kluwer Law International, 2004

Grogan, King, and Donelan 1983

Grogan V., King T., Donelan E.J., "Sale of Goods and Supply of Services, A Guide to Legislation", *The Incorporated Law Society of Ireland*, 1983

Goyder 1996

Goyder J., "Consumer guarantees and competition issues", in Lonbay J. (ed.) *Enhancing the legal position of the European consumer*, London, BIICL, 1996, pp. 80-95

Goyens 1993(1)

Goyens M., "Where there's a will there's a way", *Journal of Consumer Policy*, 1993 (16), pp. 375-386

Goyens 1993(2)

Goyens M., "Cross-boarder disputes: A legal quagmire", *Consumer Product Review*, no 3 (2), 1993, pp. 92-97

Grundmann 2001

Grundmann S., "European sales law – Reform and adaptation of international models in German sales law", *European Review of Private Law*, 2001 (9), pp. 239-258

Grundmann, Kerber & Weatherill 2001

Grundmann S., Kerber W. & Weatherill S., "Party Autonomy and the Role of Information in the Internal Market", Berlin: de Gruyter, 2001

Grundmann 2002

Grundmann S., "Information, Party Autonomy and Economic Agents in European Contract Law", *Common Market Law Review*, 2002 (39), pp. 269-293

Grundmann 2003

Grundmann S., "Consumer Law, Commercial Law, Private Law: How can the Sales Directive and the Sales Convention be so similar?", *European Business Law Review*, 2003, pp. 237-257

Grundmann 2004

Grundmann S., "EC Consumer and EC Competition Law: How Related are they? Examining the Existing EC Contract Law Sources", in (ed.) Collins H., *The Forthcoming EC Directive on Unfair and Commercial Practices*, Kluwer Law International, 2004, p. 212

Hall 1994

Hall H., "The National Consumer Council and Consumer Guarantees", *Consumer Law Journal*, 1994 (XXX), pp. 151-154

Heal 1977

Heal G., "Guarantees and Risk-sharing", *Review of Economic Studies*, 1977 (44)

Herre 1999

Herre J., *Konsumentköplagen: En kommentar*, 1999

Hogg 2001

Hogg M., "Scottish law and the European Sales Directive", *European Review of Private Law*, 2001 (9), pp. 337-350

Hondius 1996

Hondius E. H., "Consumer Guarantees: Towards a European Sale of Goods Act", *Roma: Centro di studi e ricerche di diritto comparato e straniero*, 1996

PELS 2008

Hondius E.H., Heutger V., Jeloschek Ch., Sivesand H. & Wiewiorowska A., *Principles of European Law on Sales*, Munich: Sellier European Law Publishers, 2008

Hondius & Jeloschek 2001

Hondius E. H. & Jeloschek Ch., "Towards a European sales law – legal challenges posed by the Directive on the sale of consumer goods and associated guarantees", *European Review of Private Law*, 2001 (9), pp. 157-161

Hondius & Schelhaas 2001

Hondius E. H. & Schelhaas H., "In conformity with the Consumer Sale Directive?", *European Review of Private Law*, 2001 (9), pp. 327-336

Howells & Bryant 1993

Howells G. & Bryant C., "Consumer Guarantees: Competition or Regulation?", *Consumer Law Journal*, 1993 (1), pp. 3-11

Howells 1995

Howells G., "Consumer Guarantees Editorial", *Consumer Law Journal*, 1995

Howells & Wilhelmsson 1997

Howells G. & Wilhelmsson T., "EC and US Approaches to Consumer Protection – Should the Gap be Bridged?", *Yearbook of European Law*, 1997, p. 207

Howells & Wilhelmsson 1997(1)

Howells G. & Wilhelmsson T., "EC Consumer Law", Dartmouth, Aldershot, 1997

Howells & Weatherill 2005

Howells G. & Weatherill S., *Consumer Protection Law*, Dartmouth, Aldershot 2005

Howells 2006

Howells G., "The Role of the Acquis Communautaire in Consumer Law" in ed. Grundman S. & Schauer M., "The Architecture of European Codes and Contract Law", Kluwer Law International, 2006, pp. 271-280

Jarmin 1994

Jarmin A., "Consumer Product Testing" in John R. (ed.) *The Consumer Revolution – Redressing the balance*, London: Hodder & Stoughton, 1994

Jolowicz 1969

Jolowicz J. A., "The protection of the consumer and purchaser of goods under English law", *Modern Law Review*, (1969) 32, pp. 1-18

Jongeneel 1995

Jongeneel R. H. C., "The Sale of Goods in the Netherlands Civil Code: A Contribution to the Discussion about the Green Paper on Guarantees for Consumer Goods and After Sales Services", *Consumer Law Journal*, 1995, pp. 143-148.

Karlsson 2003

Karlsson N., "Consumer Self-Control Strategies: An Empirical Study of Their Structure and Determinants", *Journal of Consumer Policy*, 2003 (26), pp. 23-41

Karakostas & Voulgari 2009

Karakostas I. K. & Voulgari A. Ch., "Direct Producers' Liability, Commercial Guarantees and the Seller's Right of Redress in Greek Civil Law", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 341-352

Kelly & Conant 1991

Kelly C. & Conant J., "Extended warranties: Consumer and Manufacturer Perception", *The Journal of Consumer Affairs*, 1991, pp. 68-83

Kingisepp 2006

Kingisepp M., *Consumer Sales Guarantees in Estonia*, 2006, www. [...]

Krauss 1997

Krauss J., "Zmiany Kodeksu cywilnego w odniesieniu do rękojmi za wady i gwarancji", *Przegląd Prawa Handlowego*, 1997 (1)

Krümmel & D'sa 2001

Krümmel T. & D'sa R. M., "Sale of consumer and associated guarantees; a minimalist approach to harmonised European Union Protection", *European Law Review*, 2001 (26), pp. 312-322

Kull 2009

Kull I., "Direct Producers' Liability and the Sellers' Right of Redress in Estonia", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 275-294

Landon & Smith 1997

Landon S. & Smith C. E., "The Use of Quality and Reputation Indicators by Consumers: The Case of Bordeaux Wine", *Journal of Consumer Policy*, 1997 (20), pp. 289-323

The Law Society of Scotland 1984

The Law Society of Scotland, *Memorandum of Comments on Consumer Guarantees*, December 1984

Lete 2001

Lete J., "The impact on Spanish contract law of the EC Directive on the sale of consumer goods and associated guarantees", *European Review of Private Law*, 2001 (9), pp. 331-337

Lilleholt 2009

Lilleholt K., "The Consumer's Direct Claims against Parties to Previous Contracts and the Seller's Right of Redress in Norway", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 461-474

Lindell-Frantz 2009

Lindell-Frantz E., "Direct Producers' Liability and the Seller's Right of Redress According to Swedish Law", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 547-562

Loos 2003

Loos M. B. M., "Consumentenkoop en garanties volgens het herziene consumentenkooprecht", *NTER* nr 6, juni 2003

Loos 2004

Loos M. B. M., Consumentenkoop, *Mon. Nieuw BW* B-65b, Deventer: Kluwer, 2004, no 19, pp. 36-37

Loos (XXX)

Loos M. B. M., Molengraafer NBW 13-65b, no 19, pp. 36-37

Lutz 1989

Lutz N. A., "Warranties as Signals under Consumer Moral Hazard", 20 *RAND Journal of Economics*, 1989, pp. 239-255

Łętowska 1990

Łętowska E., "Pluralizm źródeł prawa w zakresie rękojmi (gwarancji) i jego znaczenie dla praktyki sądowej", *Studia Prawnicze*, no 2 (104), 1990, pp. 179-197.

Madsen 1995

Madsen P. B., "Commercial guarantees in Consumer Contracts", *Consumer Law Journal*, 1995, pp. 149-152

Malinvaud 2002

Malinvaud, P., "Guarantees", in Bianca M. C. & Grundmann S. (eds.), *EU Sales Directive*, Antwerp, Oxford, New York: Intersentia, 2002, pp. 219-234

Meyer 1993

Meyer J., "Vergleichende Werbung und Markttransparenz", *Zeitschrift für Rechtspolitik*, 1993, p. 290

Micallef & Mercieca 2009

Micallef P. E. & Mercieca G., "Direct Producers' Liability and Sellers' Rights of Redress under Maltese Law", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 427-444

Micklitz 2002

Micklitz H.-W., "The new German sales law: changing patterns in the regulation of product quality", *Journal of Consumer Policy*, 2002 (25), pp. 299-328

Mitchell, Kutin & Macgeorge 2001

Mitchell J., Kutin B. & Macgeorge A., "Guidelines for consumer policy in Central and Eastern Europe", *Journal of Consumer Policy*, 2001 (24), pp. 83-109

Monti 2007

Monti G., "The Revision of the Consumer Acquis from a Competition Law Perspective", *European Review of Contract Law*, 2007 (3), pp. 295-314

Moorman 1996

Moorman C., “A Quasi Experiment to Assess the Consumer and Informational Determinants of Nutrition Information Processing Activities: The Case of the Nutrition Labeling and Education Act“, *Journal of Public Policy and Marketing*, 1996 (15), pp. 28-44

Mota Pinto 2009

Mota Pinto P., “Direct Producers' Liability and the Sellers' Right of Redress in Portugal”, in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 491-504

Nassal 1995

Nassal W., “Die Anwendung der EU-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen”, *Juristenzeitung*, 1995, p. 689

Norros 2009

Norros O., “A Finnish Perspective on Producers' Liability”, in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 295-310

Navas Navarro 2009

Navas Navarro S., “Direct Liability of the Producer and the Seller's Right of Redress in Spain”, in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 515-546

Nurminen 2002

Nurminen S., “Consumer Guarantees in Finnish Law”, in (ed.) Hondius E., *Consumer Guarantees, Towards a European Regime*, Molengraaff Institute, 2002

OFT 1984

Office of Fair Trading Consumer Guarantees, A Discussion Paper August 1984

OFT 1986(1)

Office of Fair Trading, Consumer Guarantees, A Report by the Director General of Fair Trading, June 1986

OFT 1986(2)

Office of Fair Trading, „Consumer Guarantees, A discussion Paper”, August 1986

OFT 1994

Office of Fair Trading (OFT 1994) Extended Warranties on Electrical Goods (London OFT)

OFT 1996

Office of Fair Trading (OFT 1996) Price Transparency in the Sale of Extended Warranties by Electrical Retailers (London OFT)

OFT 2002(1)

Office of Fair Trading (OFT 2002) OFT 387 – Extended Warranties on Domestic Electrical Goods – A report on an OFT investigation (London OFT)

OFT 2002(2)

Office of Fair Trading Report Survey on the survey of independent repairers, July 2002

OFT 2002(3)

Office of Fair Trading Report Survey on the consumer survey about extended warranties, July 2002

Oughton & Willet 2002

Oughton D. & Willet Ch., “Quality Regulation in European Private Law”, *Journal of Consumer Policy*, 2002 (25), pp. 299-328 +

Padmanabhan 1995

Padmanabhan V., “Usage Heterogeneity and Extended Warranties”, *Journal of Economic and Marketing Strategy*, 1995 (4), pp. 33-53

Paparseniou 2007

Paparseniou P., "The Legal Rights of the Consumer in Cases of Lack of Conformity of Goods with the Sale Contract and His/Her Contractual Rights According to Guarantee Statement", in Twigg-Flesner C., Parry D., Howells G. & Nordhausen A. (eds.), *The Yearbook of Consumer Law 2008*, Ashgate 2007, pp. 257-270

Pranevičius 2009

Pranevičius G., "Direct Producers' Liability and the Sellers' Right of Redress - Lithuanian Perspective", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 417-426

Priest 1981

Priest L. G., "A Theory of the Consumer Product Warranty", *The Yale Law Journal*, Volume 90, Number 6, May 1981, pp. 1297-1252

Reich 1996

Reich N., *Europäisches Verbraucherrecht*, Baden-Baden, Nomos, 1996

Reifner 2000

Reifner U., "The future of consumer education and consumer information in a Market Economy", in *Consumer Law and the Information Society*, (eds.) Wilhelmsson, Tuominen, Tuomola, Kuver Law International, 2000.

Riesenhuber 2001

Riesenhuber K., "Party Autonomy and Information in the Sales Directive", in Grundmann S., Kerber W. & Weatherill S. (eds.), *Party Autonomy and the Role of Information in the Internal Market*, Berlin-New York: Walter de Gruyter, 2001, pp. 348-370

Rott 2001

Rott P., "The Protection of Consumers' Interests After the Implementation of the EC Injunctions Directives Into German and English Law", *Journal of Consumer Policy*, 2001 (24), pp. 401-442

Rutten S., Straetmans Q. & Wuyts 2009

Rutten S., Straetmans Q. & Wuyts D., "Rights of Redress and Direct Producer's Liability in Consumer Sales in Belgium: a Critical Appraisal", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 195-210

Salop 1977

Salop S., "The Noisy Monopolist: Imperfect Information, Price Dispersion and Price Discrimination", *Review of Economic Studies*, 1977 (44), pp. 393-406

Scott & Black 2000

Scott C. & Black J., "Cranston's Consumers and the law", Third edition London: Butterworths, 2000

Scotton 2001

Scotton M., "Directive 44/99 on certain aspects of the sale of consumer goods and associated guarantees", *European Review of Private Law*, 2001 (9), pp. 297-307

Singleton 1994

Singleton S., "The Consumer Guarantees Directive 1999/44", *Trading Law Volume 18* no 2, 1994, pp. 126-136

Sivesand 2005

Sivesand H., *The Buyer's Remedies for Non-Conforming Goods. Should there be a Free Choice or are Restrictions Necessary*, München: Sellier European Law Publishers, 2005

Simpson 1985

Simpson A., "Quackery and Contract Law: the Case of Carbollic Smoke Ball", *Journal of Legal Studies*, 1985 (14), p. 345

Staudenmayer 2000

Staudenmayer D., "The Directive on the sale of consumer goods and associated guarantees – A milestone in European consumer and private law", *European Review of Private Law*, 2000 (8), pp. 547-564

Takov 2009

Takov Ch., "The Producer's and Seller's Liability under Bulgarian Law", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 211-222

Tenreiro 1995

Tenreiro M., "Guarantees and After-Sale Service: Brief Analysis of the Green Paper presented by the European Commission", *Consumer Law Journal*, 1995, pp. 79-93

Tenreiro 1997

Tenreiro M., "Product Liability and Consumer Guarantees in the European Union", *Consumer Law Journal*, 1997, pp. 56-61

Thomas 1996

Thomas B., "A universal consumer law regime", *The Legal Executive Journal*, 1996 (12), pp. 22-23

Treitel 2003

Treitel G., "*The law of contract*", Sweet & Maxwell, 11th, 2003

Troiano & Bisazza 2009

Troiano S. & Bisazza G., "Direct Producers' Liability and the Final Seller's Right of Redress in Italy", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 391-416

Tunney 2002

Tunney J., "The neglected Tension between Disclosure of information and Competition Law Context", *Journal of Consume Policy*, 2002 (25), pp. 329-343

Twigg-Flesner 1999

Twigg-Flesner C., "The E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees", *Consumer Law Journal*, 1999, (), pp. 177-192

Twigg-Flesner 1999(1)

Twigg-Flesner C., "Network liability for manufacturer's guarantees – remedying legislative shortcomings with a legal jigsaw", *Journal of Business Law*, 1999, pp. 569-580

Twigg-Flesner 1999(2)

Twigg-Flesner C., "Consumer Product Guarantees and Insurance Law", *Journal of Business Law*, 1999 (May issue), pp. 279-285

Twigg-Flesner & Bohling 1999

Twigg-Flesner C. & Bohling H., "Insurance Regulation: When A Warranty Is Not a Guarantee", *Consumer Policy Review*, 1999 (9), p. 193

Twigg-Flesner 2000

Twigg-Flesner C., "The Unfair Terms in Consumer Contracts Regulations 1999 – New Powers For The Regulators and the Consumers" Associations, 11, *Utilities Law Review*, 41

Twigg-Flesner & Bradgate 2000

Twigg-Flesner C. & Bradgate, R., "The E.C. Directive on Certain Aspects of Consumer Goods and Associated Guarantees – All Talk and No Do?", *Web Journal of Current Legal Issues*, issue 2, <<http://webjcli.ncl.ac.uk/2000/issue2/flesner2.html>>

Twigg-Flesner, Weatherill & Willet 2002

Twigg-Flesner C., Weatherill S. & Willet C., "Law, Information and Product Quality. Introductory Remarks by the Editors of the Special Issue", *Journal of Consumer Policy*, 2002 (25), pp. 291-296

Twigg-Flesner 2002

Twigg-Flesner C., "Dissatisfaction Guaranteed? The Legal Issues of Extended Warranties Explored", *Web Journal of Current Legal Issues*, 2002 (4), Available online at <<http://webjcli.ncl.ac.uk/2002/issue4/twigg-flesner4.html>>

Twigg-Flesner 2003

Twigg-Flesner C., *Consumer Product Guarantees*, Aldershot, U.K./Burlington, U.S.: Ashgate, 2003

Twigg-Flesner 2003(1)

Twigg-Flesner C. & Bradgate R., "Blackstone's Guide to Consumer Sales and Associated Guarantees", Oxford University Press, Oxford, 2003

Twigg-Flesner 2009

Twigg-Flesner Ch., "An English Perspective on Producers' Liability", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 255-274

Tunney 2002

Tunney J., "The Neglected Tension Between Disclosure of Information in Consumer and Competition Law Context", *Journal of Consumer Policy*, 2002 (25), pp. 329-343

Udell & Anderson 1968

Udell J. G. & Anderson E., "The product Warranty as an element of Competitive Strategy", *Journal of Marketing*, 1968 (32), pp. 1-8

d'Usseaux 1998

d'Usseaux F.B., "Formal and Substantive aspects of the transparency principle in European private law", *Consumer Law Journal*, 1998, p. 324.

Walley 2000

Walley A., "The Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – Implications for Irish Consumer Sales Law", *Irish Law Times*, 2000(18)

Watterson 2001

Watterson S., "Consumer Sales Directive 1999/44/EC – The impact on English law", *European Review of Private Law*, 2001 (9), pp. 197-221

Weatherill 1994

Weatherill S., "The role of the informed consumer in EC law and policy", *Consumer Law Journal*, 1994 (2), pp. 49-69

Weatherill 1994

Weatherill S., "Consumer guarantees", *Law Quarterly Review*, 1994 (110), pp. 545-549

Wein 2001

Wein T., "Consumer Information Problems – Causes and Consequences" in Grundmann S., Kerber W. & Weatherill S. (eds.) *Party Autonomy and the Role of Information in the Internal Market*, Berlin: de Gruyter, 2001

Whincup 1999

Whincup M., *Sales Law and Product Liability, A business guide*, Gover 1999

Whitaker 2000

Whitaker S., "Unfair contract terms, public services and the construction of a European conception of law", *Law Quarterly Review*, 2000 (116), pp. 95-120

White 2000

White F., "The EC Directive on Certain Aspects of Consumer Sale and Associated Guarantees: One Step Forward Two Steps Back?", *Commercial Law Practitioner*, 2000 (7), pp. 3-13

White 2009

White F., "The Buyer, the Seller, the Producer and the Law in Ireland", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 371-390

Whish 2005

Whish R., *Competition Law*, Oxford University Press, Oxford 2005

Wilhelmsson 2004

Wilhelmsson T., "The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law", *Journal of Consumer Policy*, 2004 (27), pp. 317-337

Willett 1992

Willett C., "Consumer Guarantees, Citizens Charter's and Access to Justice", 1992 (11), *Civil Justice Quarterly*, pp. 99-105

Willett 1993

Willett C., "The quality of goods and the rights of consumers", *Northern Ireland Legal Quarterly*, 1993 (44), pp. 218-323

Willett 1991

Willett C., "The unacceptable face of the Consumer Guarantees Bill", *Modern Law Review*, 1991 (54), pp. 552-560

Willett 2007

Willett C., "The role of contract law in product liability" In: Howells G. (ed.), *The law of product liability*, London: Butterworths 2007, pp. 39-142

Willett 2009

Willett Ch., "Producers' Liability for Non-conformity in Scots Law", in Ebers M., Janssen A., Meyer O. (eds.), *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, 2009, pp. 505-514

Włodyka 1979

Włodyka S., "Cywilnoprawna ochrona jednostki jako nabywcy wadliwego produktu", *ZNUJ Prace Prawnicze*, 1979, z. 85

Żukowski 2002

Żukowski W., "Wzajemny stosunek odpowiedzialności z tytułu rękojmi i gwarancji", *Przegląd Sądowy*, 2002 (2)

Żuławska 1975

Żuławska C., *Gwarancja przy sprzedaży*, Warszawa 1975

Żuławska 1975(1)

Żuławska C., *Gwarancja – studium prawne*, Warszawa 1975

DCFR 2009

Principles, definitions and Model Rules of European Private Law, draft Common Frame of Reference, Interim Outline Edition, ed. C. Von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Storne, S. Swann, P. Varul, A. Valenziano, F. Zoll, Sellier, European Law Publishers, 2008