COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 20 December 1990

Proposal for a

COUNCIL DIRECTIVE

on the liability of suppliers of services

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. General introduction

1.1 This sector is extremely important, not only in economic terms but also as regards consumer safety.

In economic terms, it is estimated that service activities account for more than half of the added value produced in the Community each year: ECU 1 396 791 million in 1986.

Naturally, this includes sectors like finance, which do not normally affect the health and safety of consumers and their property. However, many services, if defective, can injure the health or physical integrity of persons or the physical integrity of the material goods (movable of immovable property) of the consumers using these services. This obviously applies to health care, but also to services relating to products, like repairs of products, and the installation of products and related services, like playgrounds, hotels or leisure centres. It also applies to non-material services, like monitoring systems and combined services like transport and holidays.

1.2 Safety is an essential feature of completion of the internal market, partly because only safe products and services should be made freely available, but also because, if free movement is to be effective, consumer confidence must be increased.

On 25 July 1985, with this in view, the Council adopted the Directive on liability for defective products, which has now become law in most of the Member States. This Directive guarantees fair compensation for victims of defective products. The proposal for a Directive on general product safety now being discussed in the Council tackles product safety from the point of view of prevention.

1.3 Within this context, the Commission has carried out studies on the safety of services. These studies reveal a general tendency in Member States to take account of the safety of services.

Requiring prior authorization for certain types of installation and imposing conditions on admission to certain occupations are examples of efforts to achieve safety from the outset.

However, the diversity and complexity of these "upstream" regulations prompted the Commission, initially at least, to take action "downstream" and to channel its efforts into civil liability procedures and compensation for persons injured by defective services. Studies on national laws and legal precedents concerning the civil liability of suppliers of services have in fact shown that the situation is changing all the time in favour of persons injured by defective services, although to different extents in the different Member States.

From a legislative point of view, changes are occurring which may be general - e.g. the Spanish law on the protection of consumers and users[1] and the French law on consumer safety[2] - or specific to certain sectors.

However, the most significant changes are in case law.

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[1] General law on the protection of consumers and users, No 26/1984 of 19.7.1984, State Bulletin No 176 of July 1984.

[2] Law of 21 July 1983

Although these changes tend increasingly to take account of the fact that persons injured by defective services have no specific technical knowledge, there are still marked differences between one Member State and another and sometimes even within the same Member State.

These differences can relate to two out of the three things which have to be clearly proved by a person claiming compensation for damage caused by a defective service, namely: that damage has actually been caused, that the supplier of the service was at fault, that there is a causal relationship between the damage and the fault.

- As regards fault of the supplier, the Italian consumer - in some areas - and the British consumer - in all areas - has to prove that the supplier was at fault, whereas, for example, in Germany (by invoking the principle of positive isolation of contractual duty - PVV) Spain, Denmark, Greece and Belgium (where there is obligation regarding the end) the burden of proof is reversed to the consumer's advantage. In the United Kingdom, however, the principle of no-fault liability applies to suppliers of services in respect of defects in the products they use.

- As regards the causal relationship, in Germany the burden of proof is reversed in favour of the consumer in many cases on the basis of the notion of "sphere of risk" of the supplier, i.e. the factors which he is able to control.

The position of third parties also differs between Member States, since in Germany, Spain and Belgium reversal of the burden of proof that the supplier is at fault and of a causal relationship applies only to the co-contractor. It does not apply to third parties who are not party to the contract. In Denmark, on the other hand, third parties enjoy the same rights as co-contractors.

There are also differences in interpretation of the notion of "third party". In the United Kingdom, for example, it is possible to sue the supplier for damages suffered by persons with whom there is a contractual relationship (Jackson case) and in some cases the notion of a quasi-contract is applied to the family of the contractor.

In Germany, too, the notion of a quasi-contract allows the owner of a repaired good to claim against the repairer.

In France, case law allows some third parties to bring a contractual liability action against a debtor as if they themselves had been party to the contract.

Moreover, in France and Belgium, for example, interpretation of the notion of fault of the supplier will vary according to whether there is an obligation regarding the end (in which case it is sufficient in practice that the victim prove that there was no end) or an obligation regarding the means (in which case the victim will have to prove improvidence on the part of the supplier).

As for determining when there is an obligation regarding the end and when there is an obligation regarding the means, case law varies not only from one Member State to another, but also from court to court within the same Member State.

1.4 In the opinion of the Commission, this rather confused situation, the differences between national laws and particularly the fact that it is through the courts that more is being done on behalf of injured persons, and, moreover, with important differences between Member States and even within the same Member State, cause prejudice to consumers and injured persons, on the one hand, and suppliers of services on the other.

- Consumers and injured persons are effectively already at a disadvantage since they do not have specific technical knowledge and because the service no longer exists when the damage occurs.

In this respect, persons injured by defective services are in a more difficult position than persons injured by defective mass-produced products since the latter can usually have tests carried out on the defective product, or a similar product still on the market.

Apart from these particular difficulties and the problem of access to justice, persons injured by defective services are more likely to be in a position where it is virtually impossible to assess their chances of winning a claim against the supplier of a defective service. They can not base their claim on clear standard principles and cannot know or predict the legal outcome of their particular case, either in their own Member State, or less still in another Member State where the service was supplied or where the supplier of the service is located. In Europe, all consumers and injured persons should have equal rights and their actual chances of receiving compensation should be based on standard principles.

- **The suppliers of services** are unable to assess the risks they run and thus can not take out proper insurance.

As the market in services becomes increasingly European, the fact that the situation varies from Member State to Member State could lead to distortions in competition which would harm the interests of those undertakings for which safety is an essential feature or which are subject to more protective laws or legal precedents. If the market is compartmentalized because of different rules on liability, this could also prevent undertakings from making the most efficient use of their resources and developing an effective marketing strategy.

This situation is unacceptable in the context of a single market in services, where the European nature of the service sector is the result not only of the organization of the supply of services and the fact that they are available in several Member States (transport, package holidays, etc.) but also of the mobility of suppliers and consumers of services.

In this context, and in view of the differences between national laws and legal precedents, Community action is essential.

1.5 The Commission considered that this action should take the form of a proposal for a Directive on the liability of suppliers of defective services to establish clear standard principles at European level for the compensation of persons injured by defective services. The proposal, which applies across the board, should, in the Commission's opinion, avoid excessive regulation and have the effect both of repairing any damage which does occur and, indirectly, helping to prevent its occurrence in the first place.

Initially, the Commission's consumer policy department envisaged a Directive designed to establish a standard system of no-fault liability in respect of damage offsetting the "physical" integrity of persons and property. The principle underlying this proposal was that damage is a risk to society and that the cost of repairing it should be distributed fairly between all those concerned.

However, since (a) some of the interest groups concerned had misgivings about such a Directive, (b) most national systems are still - except in certain specific areas - based on the principle that the supplier is at fault, although this principle is often interpreted very broadly, and (c) there was a certain reluctance to change this situation too radically at present, the Commission decided to propose a Directive based not on a system of objective liability but on a uniform system of liability based on reversal of the burden of proof to the advantage of the injured person. The principal aim being safety, it is confined to physical damage to persons and to consumers' property.

The proposal is based on the premise that it is extremely difficult for an injured person to prove that the supplier of a service is at fault in the case of damage resulting from defective service whereas the trader, with the technical knowledge at his disposal, can provide proof to the contrary much more easily.

In general, case law is tending more and more to grant injured persons compensation for damages caused by defective services, on the basis of the principle that the burden of proof lies with the supplier of the service.

Fault is an infinitely variable concept which is changing all the time. Increasingly courts are tending to interpret it very broadly. It relates to the behaviour of the supplier, which includes the means he uses to provide his service.
In order to take account of these developments, distinctions made by national courts between obligation regarding the end and obligation regarding the means, any agreed limitations placed on the service, and third party status, the proposal refers to the concept of the legitimate expectations of the consumer in respect of the safety of the service. Hence it is possible in any given case to assess the fault in terms of the safety aspect.

This principle is followed in the Directive on civil liability for defective products and is also used by some countries in national legislation (e.g. Spain, France, etc.). It is assessed in terms of the type of service, its subjects, its purpose, the laws and regulations which apply to it, the information given by those marketing the service and the terms of the contract signed by the consumer.

This proposal will therefore mean that the person suffering damage will have to prove only that damage occurred and that there was a causal relationship between the damage and the supply of the service. The supplier will be exonerated only if he can prove that there was no fault on his part, this fault being interpreted very broadly in terms of the legitimate expectations of consumers as regards the safety of services. For example, he may disclaim liability by invoking *force majeure* or compliance with binding regulations, which would enable him to overturn the presumption of liability incumbent upon him.

1.6 As the Commission was concerned about the economic repercussions of this Directive on suppliers of services, it held discussions with insurance experts and studies were conducted.

The studies made it clear that only a relatively small increase in insurance premiums would be required to cover the introduction of an objective liability system, and that general adoption of the principle of reversal of the burden of proof would not entail excessive additional costs.

Even if additional premiums were charged, the extra costs would no doubt be added to the prices charged by suppliers for their services, and consumers are prepared to pay this price. The present position of persons suffering damages would thus be clarified without costing the suppliers of services an excessive amount of money. Moreover, suppliers would then all be in the same position and would enjoy the advantages of operating under the same conditions, which is not the case at present.

1.7 All the interest groups concerned have been consulted about the planned proposal for a Directive to establish the principle of objective liability.

The Consumers' Consultative Committee has delivered an opinion approving the Commission's proposal while at the same time making it clear that it provided only a minimum level of consumer protection.

The Commission also consulted, among others, UNICE, the European Confederation of Commerce and Distribution, the Small and Medium-sized Enterprises Consultative Committee, representing the small firms, the Committee for Commerce and Distribution, representing the interests of the business and retail trades, and the Committee of Doctors of the EEC.

These bodies recognized the need to do more to protect consumers injured as a result of defective services, and realized their position was difficult. In actual fact, these bodies wished to see a proposal which followed the lines of the Directive on civil liability for defective products as closely as possible in terms of excluding development risks and damage to undertakings affected, the possibility of maintaining services known to involve an element of risk, on the direct nature of the damages covered, on the non-liability of intermediaries who had not supplied services, on the need for a causal relationship between the fault and the damage and on the special position of franchisors. Despite their comments on the proposed text, these bodies did express general concerns about the introduction of the principle of no-fault liability.

These concerns and the fact that, as mentioned above, most national laws and courts maintain the concept of fault, except in certain sectors, prompted the Commission to propose a Directive which maintains the notion of fault but establishes the principle that the burden of proof of this fault should be reversed in favour of the injured person.

II. Links with other Community legislation

1. The proposal for a Directive applies across the board and lays down basic points of general application when there are no more specific provisions. There are more specific Community legal provisions which apply to package holidays and waste. Services in these sectors are thus excluded from the scope of this Directive.

2. It was necessary to propose a general Directive on liability for suppliers of services because there is no current legislation in the very important area of service safety. Because of the wide variety of different services, it is difficult to take effective action at Community level in the form of a Directive establishing a general principle of safety, as the Commission did with products. On the other hand, it is possible to take a posteriori action by guaranteeing compensation for victims of services, whatever the service concerned.

   There is already a general Directive covering the liability of manufacturers of defective products. So that consumers can take advantage not only of the internal market in products but also of the internal market in services under the best possible conditions, it is necessary to have a similar Directive on liability of suppliers of services.

3. There is obviously some duplication between the Directive on liability for products and the Directive on liability for suppliers of services. This is inevitable because in many cases services involve the use of products.

This duplication is acceptable and necessary if liability is to be covered in full. It is important to note that the proposed Directive in no way affects the rights of the victims of defective products.

4. A general Directive is an effective and necessary solution in spite of the variety of service sectors, because all the service sectors have features in common which can be covered by a text which sets out only to cover the basic aspects of consumer protection, but covers them properly.

The common features of all these service sectors relate to the problems facing an injured person without technical knowledge in proving that the supplier of the service was at fault, and this is made even more difficult by the fact that the service has disappeared when the damage occurs.

Obviously, the fact that generally adequate protection is guaranteed does not prevent specific provisions for a specific sector from being adopted at Community level.

There are currently Community provisions on package holidays and waste. If other specific Directives are required in the future, they could of course include a clause allowing derogation from this general Directive. Similarly, this proposal does not prevent injured persons from taking advantage of more favourable national rights.

III. Legal Basis

This proposal is based on Article 100A because it is related to completion of the single market.

The proposal is also designed to provide consumers with better protection and takes account of the Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy.

A number of discrepancies between the laws of the Member States have been identified and these discrepancies are undermining the establishment and operation of the internal market in many respects.

These differences between the legal systems which apply and their translation into economic terms (legal uncertainty, different trends as regards the risk of court action, differences in the insurance burden, etc.) are such as to affect the competitive position of suppliers on the market.

Moreover, these differences conflict with the freedom to provide services within the Community since it is in the interests of suppliers to provide their services to consumers resident in countries where the level of protection in terms of compensation for any damages is lower. Furthermore, the uncertainty arising from the lack of harmonization of the laws governing disputes means that undertakings tend to make less effort to develop Europe-wide marketing strategies.

In many cases, services are provided beyond frontiers, e.g. travel and tourism) and it is important to encourage as much mobility as possible on the part of suppliers and consumers. Approximation of national legislation will help to make undertakings more inclined to extend their activities within the Community and to gain the confidence of consumers so that they are increasingly prepared to use undertakings based outside their own national territory. There is no doubt that legal security is an essential factor in encouraging consumers to use the services of suppliers in other Member States.

These legal differences also result in different levels of consumer protection, whereas, in a single market, it is essential that consumers receive the same level of protection irrespective of the Member State in which they live.

IV. General structure of the proposal

Article 1 establishes the principle of subjective liability of the supplier with reversal of the burden of proof in favour of the injured person, and provides that the notion of fault shall be interpreted in terms of legitimate expectations.

The Article states that the mere fact that a better service existed or was available at the time the service was supplied, or subsequently, does not constitute fault.

Articles 2 to 4 define the concepts of services, suppliers and damages.

Article 5 states that the injured person is required to prove damage and the existence of a causal relationship between the supply of the service and the damage.

Article 6 makes provision for cases of joint fault.

Article 7 prohibits clauses which exempt the supplier from liability or limit that liability.

Article 8 establishes the principle of joint and several liability of all persons responsible in a given case of damage and for joint and several liability between franchisors, master franchisees and franchisees.

Articles 9 and 10 lay down time limits for prescription of the action and extinction of liability.

Articles 11 to 13 contain a transitional provision, a provision on incorporation into national legislation and a final provision.

V. Comments on individual articles

Article 1

The supplier of a service is liable for any damage caused by his own fault while supplying that service, unless he can prove that he was in no way at fault in supplying that service.

Fault is assessed in comparison with the behaviour of the supplier of a service who, under normal conditions which it would be reasonable to presume, provides a degree of safety which it would be legitimate to expect.

This Article thus establishes the principle of reversal of the burden of proof in favour of the injured person. This principle takes account of the fact that persons suffering damage as a result of defective services are in a difficult position since they do not have the requisite technical knowledge and the service concerned has often "disappeared" after the damage has been caused, and moreover that it is not possible to take a similar service and test it (as it would be a product). This principle, together with reference to legitimate expectations of safety, also takes account of the fact that national laws and courts are now tending to favour the consumer.

The Article states that the mere fact that a better service existed or was available at the time the service was supplied, or subsequently, does not constitute fault.

"As the Directive follows the principle of subjective liability, there is no point in including clauses on exemption in, for example, cases of *force majeure*, since in these cases the supplier will not have committed a fault and cannot therefore be held responsible for the damage."

Article 2: Definition of service within the meaning of the Directive

1. The Directive concerns the physical protection of persons and of their property, not their economic protection. The new system established is particularly apposite in this regard. At the very least, the service should not injure the health and physical integrity of persons, nor their material goods (movable or immovable property). This is a definite fact which is easy to establish and assess.

Services which do not injure the health and physical integrity of persons and their material goods are not therefore covered by this Directive (e.g. bad financial advice, investment advice or insurance advice, even if they result in a loss of property).

2. The authorities responsible for maintaining public order (police, prisons, etc.) are excluded from the scope of this Directive because their functions are so specific.

3. Package holidays and services concerned with waste, which are already covered by specific Community legislation, must be excluded. The same applies to damage covered by systems of liability governed by international conventions ratified by the Member States or by the Community.

4. There is no clear, general definition of services under national laws. The definition proposed here refers to the traditional distinction between a service and the manufacture of goods, or the transfer of rights in rem or intellectual property rights.

   This definition is intended to be comprehensive. It therefore includes all connected services which do not have as their direct and exclusive object the manufacture of goods or the transfer of rights in rem, an area where consumer rights are already covered by Directive 85/374/EEC on liability for defective products.

(4)

Having regard to the objective of the Directive which is to protect the consumer and compensate persons injured by services with a safety defect, the definition is in relation to the activity carried out by a commercial trader or public body. This activity must be carried out independently, in other words the Directive does not cover the liability of employees or workers bound by a contract of employment.

A distinction between services provided by private traders and those carried out by public bodies is neither justified nor in line with the general trend in the Member States.

Article 3: Definition of supplier of services

1. The supplier is the natural or legal person who provides a service within the meaning of Article 2 in the course of his commercial activities or public functions. As far as the injured person is concerned, the supplier is the person who derives the commercial or public gain from a service in the exercise of his occupation or powers.

   "If a supplier of services subcontracts all or part of these services, the independent subcontractor will also therefore be considered as a supplier of services and will be liable for damage caused by his fault."

2. The Directive states that a legally appointed representative or intermediary providing the service is liable only if the person providing the service is not established within the Community. This is the case with some commercial agents.

Article 4: Definition of damage

1. Damage means any damage to the health or physical integrity of persons or any damage to the physical integrity of their movable or immovable property, including animals.

2. Damage of a purely economic nature, loss of profit, ..., are not considered to be damage within the meaning of the Directive for the reasons set out in the comments on Article 2 above. However, where there is damage to the health or physical integrity of persons or private movable or immovable property, the total material damage resulting therefrom is also covered by the Directive.

   It is specified that damage must be direct. The proposal for a Directive does not therefore cover "knock-on" effects, i.e. damage that has no direct link with the damage to the health or physical integrity of persons or property, like suicide, the loss of an opportunity to sign a contract, etc.

   This Directive sets out to provide a basis for adequate consumer protection to cover material damage and does not cover consequential damage, which is thus covered by national definitions.

   In the case of damage to private movable or immovable property, the directive refers to the material value of the goods and not to their sentimental value. (The Directive does not prevent the suppliers of services from offering their customers more than is required by the Directive, provided that this does not limit the rights enjoyed by injured persons).

3. The Directive covers all physical and material damage. Damage to the object of a service (e.g. an item of property handed in for repairs) is therefore covered. Similarly the Directive does not lay down a minimum amount of damage, since the injured person is interested in obtaining full compensation for the loss suffered.

4. In accordance with the wishes of the interest groups concerned, the text of this article has been aligned on the text of the corresponding article in the Directive on liability for defective products so that it does not cover damage to property other than private property.

Article 5: Proof - presumption

The injured person has to prove that damage has occurred and that there is a causal relationship between supply of the service and the damage.

Article 6: Joint fault

Because of the respective positions of the parties, there is no justification for the supplier's liability being reduced if the damage is caused jointly by the fault of the supplier and through action by a third party, but it may be reduced or even annulled where the injured person is jointly at fault.

Article 7: Exclusion of liability

The proposal lays down that the supplier of services may not limit or exclude his liability under the Directive.

Article 8: Joint and several liability

It is provided that all the persons responsible for a specific damage are jointly and severally liable. This also applies to civil liability in respect of defective products.

It is also laid down that the franchisor, who gives the undertaking its name which is often a determining factor in the choice of the consumer and of the franchisee who directly supplies the service, is jointly liable.

Nevertheless, if the damage caused is due to a product which, pursuant to Commission Regulation No 4087/88 of 3 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements, they could not themselves have supplied or prescribed, the independent franchisor and the master franchisee may disclaim liability. In fact, it would have been unjust to penalize the franchisor or the master franchisee for an act which they could not legally have committed.

Articles 9 and 10: Limitation period

Periods of three years (limitation period) from awareness of the damage and five years (expiry of liability) from the provision of the service are laid. The three-year period is the same as the period laid down in Directive 85/374/EEC. The relatively short period of five years takes account of the nature of the services concerned.

However, periods of between 10 and 20 years are applied for services relating to the design and construction of buildings.

Article 11: Transitional provision

Services supplied before the date on which this Directive takes effect are not covered by this Directive.

Articles 12 and 13: Incorporation into national legislation and final provision

Proposal for a

COUNCIL DIRECTIVE

on the liability of suppliers of services

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas the Council Resolution of 9 November 1989 stressed the priority nature of the implementation at Community level of means of promoting the safety of services as part of the relaunching of the consumer protection policy;

Whereas there is a Community dimension to the market in services;

Whereas although the laws of the Member States concerning the liability of the suppliers of services for the damage caused by their services all seek to provide greater protection for persons for whom the services are intended and for third parties, they continue to differ in content and as regards the degree of protection provided; whereas such differences may create barriers to trade and unequal conditions in the internal market in services; whereas they do not guarantee the same degree of protection for

the injured person against all damage caused to the person, nor to the consumer against damage caused to movable or immovable property by a service;

Whereas action at Community level is the most appropriate in view of these divergences and the Community dimension of services;

Whereas the principle of reversing the burden of proof of a fault on the part of the supplier of the defective service is the most suitable in view of the level of protection afforded by national law in the Member States; whereas such a principle already exists in several national legislations, but should be formalized and applied in a standard manner;

Whereas the characteristics of services, including their "one-off" nature, which is sometimes intangible, the fact that the service "disappears" at the moment that damage is caused and the respective positions of the injured person with no specific technical knowledge and the trader who possesses such knowledge justify a reversal of the burden of proof of the fault on the part of the supplier of the service in favour of the injured person;

Whereas a fault on the part of the supplier of the service must be assessed in relation to the reasonable expectation that the service should not cause damage to the physical integrity of persons and of movable or immovable property, including the persons or property which were the object of the service;

Whereas the mere fact that a better service existed or might have existed at the moment of performance or subsequently does not constitute a fault;

Whereas having regard to the diversity of services on the one hand and the existence of Council Directive 85/374/EEC[1] concerning product liability on the other, a broad definition of service should be adopted based on the traditional distinction between service and the manufacture of goods, services and the transfer of rights in rem; whereas, on account of their

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1 OJ No L 210, 7.8.1985, p. 29.

special nature, public services intended to maintain public safety should be excluded from this Directive; whereas package travel services and waste services already governed by specific Community legislation should also be excluded; whereas the same applies for damage already covered by liability arrangements governed by international agreements ratified by the Member States or by the Community;

Whereas the objective of protecting consumers and compensating persons injured by defective services does not justify a distinction between private and public suppliers of services; whereas, however, only services provided by commercial traders should be covered and not those rendered by one individual to another;

Whereas protection of the injured person requires compensation for the damage to the health or physical integrity of persons; whereas protection of the consumer requires compensation for the damage to the physical integrity of their movable or immovable property; whereas any material damage resulting therefrom should also be compensated for;

Whereas it falls to the injured person to provide proof of the damage and of the causal relationship between that damage and the service supplied;

Whereas the respective positions of the parties provide justification that there be no reduction in the supplier's liability where damage is caused jointly by the fault of the supplier and the intervention of a third party, but that such liability may be reduced (or even waived) in the event of a joint fault on the part of the injured person;

Whereas the protection of the injured person implies that the supplier of the services should not be able to limit or exclude his liability in relation to the former;

Whereas when liability for a given damage is shared by several persons, protection of the injured person requires that they have joint and several liability;

Whereas the position of the consumer with regard to the franchisor giving his name to the services undertaking and the franchisee to whom he applies justifies joint and several liability of the franchisor, the franchisee and the master franchisee;

Whereas this Directive is without prejudice to the application of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work[2] and the specific Directives deriving therefrom;

Whereas the system of liability established by this Directive and the nature of the services justify reasonably short limitation periods for bringing proceedings for the recovery of damages and the termination of liability, except where services relating to the design and construction of immovable property are concerned,

HAS ADOPTED THIS DIRECTIVE:

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2 OJ No L 183, 29.6.1989, p. 1.

Article 1 - Principle

1. The supplier of a service shall be liable for damage to the health and physical integrity of persons or the physical integrity of movable or immovable property, including the persons or property which were the object of the service, caused by a fault committed by him in the performance of the service;

2. The burden of proving the absence of fault shall fall upon the supplier of the service.

3. In assessing the fault, account shall be taken of the behaviour of the supplier of the service, who, in normal and reasonably foreseeable conditions, shall ensure the safety which may reasonably be expected.

4. Whereas the mere fact that a better service existed or might have existed at the moment of performance or subsequently shall not constitute a fault.

Article 2 - Definition of service

For the purpose of this Directive, 'service' means any transaction carried out on a commercial basis or by way of a public service and in an independent manner, whether or not in return for payment, which does not have as its direct and exclusive object the manufacture of movable property or the transfer of rights in rem or intellectual property rights.

This Directive shall not apply to public services intended to maintain public safety. It shall not apply to package travel or to waste services.

Nor shall it apply to damage covered by liability arrangements governed by international agreements ratified by the Member States or by the Community.

Article 3 - Definition of supplier of services

1. The term "supplier of services" means any natural or legal person governed by private or public law who, in the course of his professional activities or by way of a public service, provides a service referred to in Article 2.

2. Any person who provides a service by using the services of a representative or other legally independent intermediary shall continue to be deemed to be a supplier of services within the meaning of this Directive.

3. If the supplier of the service referred to in paragraph 1 is not established within the Community, and without prejudice to his liability, the person carrying out the service in the Community shall be considered as the supplier of that service for the purpose of this Directive.

Article 4 - Definition of damage

The term "damage" means:

(a) death or any other direct damage to the health or physical integrity of persons;

(b) any direct damage to the physical integrity of movable or immovable property, including animals, provided that this property

(i) is of a type normally intended for private use or consumption, and

(ii) was intended for or used by the injured person, principally for his private use or consumption;

(c) any financial material damage resulting directly from the damage referred to at (a) and (b).

Article 5 - Proof

The injured person shall be required to provide proof of the damage and the causal relationship between the performance of the service and the damage.

Article 6 - Third parties and joint liability

1. The liability of the supplier of the service shall not be reduced where the damage is caused jointly by a fault on his part and by the intervention of a third party.

2. The liability of the supplier of the service may be reduced, or even waived, where the damage is caused jointly by a fault on his part and by the fault of the injured person, or a person for whom the injured person is responsible

Article 7 - Exclusion of liability

The supplier of a service may not, in relation to the injured person, limit or exclude his liability under this Directive.

Article 8 - Joint and several liability

1. If, in applying this Directive, several people are liable for a given damage, they shall be jointly liable, without prejudice to the provisions of national law relating to the law of recourse of one supplier against another.

2. The franchisor, the master franchisee and the franchisee, within the meaning of Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements[3] shall be deemed to be jointly and severally liable within the meaning of paragraph 1.

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3 OJ No L 359, 28.12.1988, p. 46.

However, the franchisor and the master franchisee may absolve themselves of liability if they can prove that the damage is due to a product which, on the basis of Regulation (EEC) No 4087/88, they themselves had not been able to supply or impose.

Article 9 - Extinction of rights

The Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of five years from the date on which the supplier of services provided the service which caused the damage, unless in the meantime the injured person has instituted legal, administrative or arbitration proceedings against that person.

However, this period shall be extended to 20 years where the service relates to the design or construction of immovable property.

Article 10 - Limitation period

1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive, beginning on the day on which the plaintiff became aware or should reasonably have become aware of the damage, the service and the identity of the supplier of the service.

   However, this period shall be extended to 10 years where the service relates to the design or construction of immovable property.

2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.

Article 11 - Transitional provision

This Directive shall not apply to services provided before the date on which the provisions referred to in Article 12(1) enter into force.

Article 12 - Implementing provisions

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992.

   They shall immediately inform the Commission thereof.

   When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the area governed by this Directive.

Article 13 - Final provision

This Directive is addressed to the Member States.

Done at Brussels, For the Council

STATEMENT OF IMPACT ON COMPETITIVENESS AND EMPLOYMENT

I. What is the main justification for the measure?

- To provide better protection for consumers suffering damage from services which injure the physical integrity of their person or their private property and to eliminate discrepancies between national laws and legal precedents which could prejudice the efficient operation of the internal market in services.

II. Details of the undertakings concerned.

In particular:

(a) Is there a large number of small businesses?

Many small businesses supply services and are therefore covered by this Directive.

(b) Are they concentrated in regions which are:

(i) eligible for regional aid from Member States?

(ii) eligible under the ERDF?

- No noticeable concentration.

III. What obligations are imposed directly on undertakings?

The proposal aims to reverse the burden of proof that the supplier of the service is at fault in the case of injury to the physical integrity of persons and private property to the benefit of the injured person.

The supplier may not limit or deny liability vis-à-vis the injured person.

If several suppliers are liable, they are jointly liable.

"These provisions could result in an increase in the insurance premiums paid by undertakings. However, these increases should be only slight, should not disrupt competition and should be reflected in the price of services."

IV. What obligations may be indirectly imposed on undertakings via the local authorities?

None.

V. Are there special measures for small businesses?

None.

What are they?

VI. What is the likely effect on the competitiveness of undertakings?

- The proposal should have a beneficial effect in that it establishes a system of liability based on a common principle applying to all Member States and hence should reduce legal uncertainty. Any increases in the amount of insurance premiums paid by suppliers of services would be common to all undertakings and in any case would be reflected in the price paid by consumers for services.

The cost of adopting the principle of reversing the burden of proof of fault

The civil liability of suppliers of services is usually insured by two types of policy, one covering the liability of the supplier for damage caused in the context of and as a result of activities connected with the service (civil liability during service), and the other covering liability of the supplier for damage caused by supply of the service after it has been provided (civil liability after service). The premiums for policies covering civil liability during service are generally calculated on the basis of a company's total salary burden whereas the premiums for policies covering civil liability after service are generally calculated on the basis of a company's turnover.

However, there are mixed policies for small businesses covering civil liability during and after service. The amount of these policies is estimated to be in the order of 0.2% to 2% of the total salary bill.

A precise estimate of any increase in the premium charged to companies because of the introduction of a system reversing the burden of proof of fault in favour of the injured person will be arrived at on a case by case basis as a function of the type and severity of the risks run in each case and as a function of the insurance policies signed before this principle was adopted.

Moreover, there is no reason to expect an increase in the number of accidents as a result of tighter rules on liability since it can be assumed that these measures will prompt suppliers of services to do more to prevent accidents.

It is also worth mentioning that trends in legislation and case law in many Member States are towards reversal of the burden of proof.

In conclusion, it is likely that although the Directive may have the effect of increasing the insurance premiums paid by small businesses, this increase should be slight. Moreover, this increase is likely to be borne by consumers as the result of a slight increase in the price of services, which will not affect companies adversely since they will all be in the same situation.

Expected benefits from introduction of the principle of reversal of the burden of proof

"This proposal will reduce the legal uncertainty of undertakings supplying services and will make conditions of competition equal for all such undertakings in the Community."

VII. Have both sides of industry been consulted?

What are their opinions?

- Yes, particularly UNICE, small businesses and the Committee of Commerce and Distribution. Account was taken of their opinions to a large extent by rewriting certain articles of the proposal for a Directive and particularly by abandoning the original principle of no-fault liability.

STATEMENT OF IMPACT ON THE PUBLIC

The proposal for a Directive should make it possible considerably to enhance protection of the public in Europe as its main objectives are to prevent damage occurring and to provide reparation when it does occur.

In terms of prevention, a system whereby the burden of proof that the supplier is at fault has been reversed should in fact encourage suppliers of services to improve their quality control and to do more to comply with the safety and operational standards in force. This preventive effect is made even more necessary by the fact that there is practically no harmonization or approximation of national legislation on services, nor have any urgent requirements or rules been formulated. In fact, it is difficult to do this because of the wide range of different services available and the fact that they are not bound by standard rules. The consumer is entitled to expect a service not to harm his health or his property. Hence consumers in all Member States will be encouraged to purchase services in respect of which they know they will not have to bear the cost of any unreasonable damage, even if this added safety will, to begin with, mean a slight increase in the price of the services supplied.

In terms of reparation, the injured person will be in a better position since it will be much easier to make a claim before judges and courts.

Whereas traders are profiting from the modernization of the processes and materials they use and while their activities are causing new risks (there are some very complex ways in which the health and safety of consumers can be affected), persons injured by defective services are at a disadvantage because they do not have the special technical knowledge nor the financial resources to prove that the supplier was at fault, and in many cases the service "disappears" at the time damage occurs. Before the damage is

repaired, it is often difficult to establish a causal relationship between the damage and the service, particularly when, in addition, the injured person first has to provide proof that the supplier was at fault.

The proposed Directive will allow persons suffering damage as a result of defective services to claim more easily, since their burden of proof will be lighter. Since the same legal provisions will apply, they will thus be able to receive compensation in the same way in any Member State in which they bring their case.

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