UNICE
THE VOICE OF BUSINESS IN EUROPE

DIRECTIVE 99/44 ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

COMPARATIVE REPORT ON TRANSPOSITION

April 2002

UPDATE ON TRANSPOSITION OF DIRECTIVE 99/44 ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES

I. EU Directive on consumer goods and guarantees:

On 25 May 1999, the Council and the European Parliament adopted directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees.

This directive aims at ensuring consumer protection and strengthening consumer confidence in cross-border shopping by laying down a common set of minimum rules valid no matter where the goods are purchased.

In particular, it is worthy of note that the directive:

- harmonises minimum standards for consumer protection throughout the Internal Market, but allows Member States to apply stricter rules;
- applies to business-to-consumer sales (not B2B);
- applies only to goods which are not in conformity with the contract when delivered (defective goods);
- applies to all consumer goods, as set out in Article 1 of the directive;
- offers consumers a two-year legal protection period to secure a remedy (this can be reduced to one year for second-hand goods on a case-by-case basis). This includes a right to repair or replacement, or a price reduction;
- provides that, during the first six months, the consumer does not need to prove that the product was defective when delivered (i.e. reversal of burden of proof), thereafter the consumer must prove the existence of a defect *at the time of delivery;*
- provides that if the product was defective *at the time of delivery,* the consumer can ask the seller first to repair or replace the goods free of charge (this choice depends on cost); only if this is not feasible or the seller fails to do it can the consumer ask for a price reduction or refund (not for minor defects);
- provides that repair or replacement "free of charge" includes cost such as materials, labour and postage;
- allows Member States to opt to ask the consumer to report a defect within two months (notification period);
- allows Member States to opt to grant consumers a limited time to pursue their claim for a remedy (limitation period), which must be at least two years;
- entitles the seller to claim a remedy against the party responsible in the chain, including the producer (i.e. right of redress), but only within the limits of national law;
- provides that commercial guarantees can be granted over and above the conditions of this directive, but never undercut them, must be written in at least one of the official EU languages, must be clear and intelligible, need not cover the whole of the EU, but must state its duration and territorial scope.

There are also areas where Member States enjoy certain degree of manoeuvre. Hence, they can either choose among different options, or may adopt more stringent provisions, compatible with the Treaty, to ensure a higher level of consumer protection. This could be the case in the following issues:

- hierarchy of remedies: first repair whenever cheaper, in the last resort, refund, but they could introduce a "wear and tear" clause into national law to take account of use made of the good;
- definition of 'free of charge remedy': Member States could add costs other than materials (e.g. transportation costs);

- definition of consumer goods: it could be characterised by product type rather than intended use;
- beginning of the limitation period remains unclear: it could be interpreted differently (for industry, it should be at the time of delivery);
- Member States can allow interruption of limitation and legal protection period while consumer is receiving remedy (this would prove impracticable);
- Member States can allow a reduction of legal protection period for second-hand goods to as short as one year (industry would welcome such a reduction).

Member States had until 1 January 2002 to implement this Directive in national law. In this context, it is of general interest to know how the different Member States plan to adapt or have adapted the EC rules to their domestic systems. Companies are particularly interested in the transposition since the directive allows Member States to impose additional requirements and go beyond some provisions of the directive.

II. Current status of Member States' transposition

Implementation of the consumer guarantees directive

	A	B	Dk	Fin	F	D	EL	Irl	It	L	NL	P	E	Sw	UK
Progress in legislation															

Progress in legislation

transposition of the Directive and adoption in national law
official draft has been produced in national Parliament
no official draft

1. AUSTRIA

- Law adopted and published on 8 May 2001. It is close to provisions of the directive;
- hierarchy of remedies: first repair or replacement (unless it is impossible or disproportionate), both within "reasonable time"; second, price reduction or refund (except for minor defects);
- two-year protection for movable goods, three years for immovable goods, if so agreed one year for second-hand goods;
- right to claim "damage compensation" over and above remedy, but after ten years as of delivery; claiming party is to prove that damage was caused by the seller;
- right of redress to the next seller in the chain, but limited to once costs (not retail remedy); such claims within the chain to be made within two months after having satisfied previous claiming party in the chain; right of redress expires after five years;
- if the producer is liable, he has to pay for at least postage, labour and materials costs;
- the producer is also responsible if he wrongly installed the good;
- the transposing law entered into force on 1 January 2002.

2. BELGIUM

- Preliminary draft text by the Ministry of Justice still to be approved internally, is not finalised as of today;
- the draft text is reported to follow the directive provisions without alarming divergences;
- the transition deadline of 1 January 2002 will be significantly exceeded.

3. DENMARK

- In principle, the latest draft seems to be fairly close to the directive. However, some more stringent consumer-oriented provisions have been added;
- a final draft was tabled before the Danish Parliament and will be finalised by May 2002 at the latest;
- choice between three remedies: repair, replacement and refund;
- industry promotes repair within one week as first choice;
- expected: seller to offer repair as first remedy for large and high-range appliances; replacement for small-end products; no replacement with refurbished product;
- two-year legal "guarantee" starts again after replacement and repair;
- legal guarantee to be increased from one to two years also for second-hand goods;
- consumer to make his claim within "reasonable time" (e.g. two months);
- right of redress already practice for one year;
- transport of small appliances to be paid by consumer;
- transposing law will have retroactive effects as from 1 January 2002.

4. FINLAND

- National transposing law in place as from January 2002. Its content is fairly close to the directive.

5. FRANCE

- No official transposing draft has been produced; a department of the Ministry of Justice commissioned a working group to draw up a report and a draft proposal to transpose the directive;
- the working group submitted both a report and a legislative proposal in November 2001;
- the working group's proposal intends to go well beyond simple transposition of the Directive and is tending towards a deeper reform of the French civil code that would lead to a modification of the French system for guarantees (this discussion has been stimulated further by the Viney report);
- salient points of the working group's draft law:
  - Scope: provision of the transposing law would cover B2C and B2B relations as well as movable goods and real property.
  - Time limits: inclusion of the six months for the presumption of prior existence.
  - Time limit for action: the purchaser would have five years from delivery to notify a defect (ten years for real property), and would be able to act after the statutory limitation for notification (prescription) – ten years for commercial matters and thirty years for civil matters.
  - Repair: within a period of one month (three months for real property) of the complaint, the vendor may decide to replace or repair the good and, in this case, the purchaser may not ask for the contract to be rescinded or for a price reduction. In return, if the purchaser asks for the good to be replaced or repaired, the vendor must do it within one month (three months for real property). If he fails to do it or the time limit elapses, the purchaser recovers right to ask for any of the available remedies (contract rescission or price reduction). The vendor is expected to pay compensation to the purchaser.
  - An action based on absence of conformity does not rule out an action based on contractual or non-contractual liability.
  - There are no specific arrangements for second-hand goods.

- Due to the nearness of the French Presidential and Parliamentary elections in May and June 2002, it appears that the draft law will not be immediately adopted.

6. GERMANY

- New government draft was approved on 9 May 2001, following protests from industry concerning the first draft;
- legal guarantee has been reduced to two years (no longer three), but limited to repair and refund, price reduction can be claimed up to three years later;
- applies to B2C and to B2B; currently there is a debate as to whether the two years guarantee in B2B can be reduced, doctrine is divided;
- clearer hierarchy of remedies: refund only when other remedies have been refused by seller or are inconvenient to the consumer;
- when customer receives price reduction, he has exhausted all entitlement to further remedy if consumer resigns from contract, he can still claim damage refund;
- limitation period up to ten years;
- right of redress within business chain, including all parties, but not consumer towards producer, right of redress expired de facto after five years;
- for buildings: five-year "legal/statutory guarantee";
- the German Bundestag (Lower House of the Parliament) approved the law transposing the directive on 11 October 2001. The Bundesrat (Upper House) endorsed this law in November 2001;
- the transposing law entered into force on January 1, 2002.

7. GREECE

- Draft transposing law is in preparation, the official draft is not available yet;
- transposition of the directive will exceed the official deadline.

8. IRELAND

- Government is expected to bring forward a draft transposing law shortly. Industry will be consulted;
- national transposing rules are not expected to diverge significantly from the directive provisions and therefore they will not add much more to the existing national consumer protection regulations;
- given the forthcoming elections, legislative activities will slow down considerably so transposition of the directive will be notably delayed.

9. ITALY

- Transposing law adopted, it is close to directive's provisions. It was published in the Italian Official journal on 2 February 2002 and entered into force on 23 March 2002;
- two-year guarantee as of time of delivery, only applicable to B2C transactions (literal transposition of the directive);
- consumer can choose free of charge between repair or replacement, unless either is impossible or excessive; in addition, the consumer can have two other choices: price reduction of the product or cancellation of the contract (the consumer returns to the seller the product and is reimbursed);
- both within reasonable timeframe;
- cost includes postage, labour and material cost;
- notification period of two months in place;

- limitation period: two years;
- reversal of burden of proof in first six months unless this is incompatible with the nature of the good and of the defect of conformity;
- the final seller has one year from remedying the defect to ask for redress from a previous seller, the producer or any intermediary in the distribution chain who is responsible for the defect of conformity which is claimed by the consumer, unless there is express agreement or renunciation.

10. LUXEMBOURG

- This is still under discussion in the Ministry of Economic Affairs; no draft available yet;
- transposition running beyond deadline of 1 January 2002.

11. NETHERLANDS

- Current Dutch legislation already stricter than EU Directive, hence there are no drastic changes expected;
- draft text under discussion in the Ministry of Justice:
  - Legal guarantee as long as "normal expected lifetime" of a product: concept of lifetime that reasonably may be expected, taking into account all circumstances (it can be longer than two years).
  - Article 5.2: the two-month period is implemented to a certain extent. It is proposed that a new requirement may be added to the existing legislation which will say that notification to the consumer shall take place within an appropriate period after discovery of the non-compliance; notification within two months is considered in good time.
  - No hierarchy of remedies: some adjustments will be made according to the directive.
  - Refund only if all other remedies have been exhausted (and difficult, due to conditions attached).
  - Possibly no transportation costs to be paid.
- Current law may be maintained with new annex for interpretation;
- consultation with industry is over, the draft has been passed on to the Parliamentarians; Dutch industry has persuaded the Government to write a letter to the Parliament asking for the introduction of a provision entitling business, when the defect exists (specially after two years) and the consumer asks for remedy, to ask the consumer for money for the period during which the product functioned without any problem;
- draft law will be approved by the Dutch Second Chamber during April 2002 and transmitted to the First Chamber. Final adoption expected shortly.

12. PORTUGAL

- Administration said to have started internal process, but no draft available yet;
- possibly final draft available by end of 2002;
- industry association AGEFE in contact with Ministry;
- expected to run well beyond deadline of 1 January 2002.

13. SPAIN

- Three Ministries involved in process: Ministry of Justice, as different laws to be adjusted (consumer law, trade law, etc.), Ministry of Economic Affairs, but lead is Ministry of Consumer Affairs;

- consolidated draft is now available;
- informal consultations with industry started;
- draft law is reasonably close to directive text with some specifics that are already included in existing legislation;
- one interesting point: if consumer does not get remedy from the seller, he can address the importer or manufacturer directly;
- final adoption of the draft law expected in autumn 2002.

14. SWEDEN

- Responsible: Ministry of Justice;
- initial drafting of report was delayed due to Swedish EU presidency;
- industry in informal contacts;
- first draft expected for consultation in August 2001;
- beginning of parliamentary adoption process in October 2001 at the earliest;
- industry is currently looking at reducing the repair time to make it a more attractive remedy.

15. UNITED KINGDOM

- Further to an initial consultation document issued in December 2000, the DTI (Trade and Industry Department) has issued a second consultation document setting out the proposed draft regulations and a regulatory impact assessment. The deadline for comments is 23 May 2002;
- CBI responded in detail to the DTI initial consultation, *inter alia* calling for the directive to be implemented at the same time throughout the EU;
- the draft regulations provide that any guarantee given free of charge to consumers will become legally binding;
- second-hand goods and good sold at auction may be excluded from law;
- the DTI seeks comments on whether in the interests of consistency the directive remedies should be available for the entire six-year limitation period, it thus goes beyond the two years envisaged in the directive itself. This would align remedies with the period for which consumers can currently claim damages if goods are faulty; business will be opposing this approach;
- no clear indication on which limitation and liability periods to maintain, pending responses to the consultation;
- a key provision is the presumption of a lack of conformity where a defect is discovered within six months of delivery, this will imply a cost increase for manufacturers and retailers;
- DTI has decided no to introduce the optional two-month notification period under which the consumer must inform the seller of the lack of conformity on the basis that it would reduce current consumer protection. Industry strongly argues for its introduction;
- implementation of the directive is expected in autumn 2002.

✸ SWITZERLAND

- The Federal Counsel presented a draft transposing law for consultation in 2001. The final report on the consultation is not yet published and no decision on further proceedings has been taken yet. This is expected to take place in summer 2002.