The European Union's Consumer Guarantees Directive

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The recently enacted Consumer Guarantees Directive, when adopted into national law by member states, will provide Europe with reasonably uniform rules pertaining to warranties and guarantees in sales by merchants to consumers. These rules are roughly comparable to those in the United States and the Vienna Convention for the International Sale of Goods. The authors examine the differences between the European Union and major U.S. laws. They also suggest that the new directive leaves significant room for variation within Europe and is inconsistent with other European directives.

With the creation of (or continuing evolution toward) a single market in Europe, which is larger than the consumer market in the United States, U.S. marketers can no longer afford to ignore important developments in European marketing law. One such development is the long-awaited Consumer Guarantees Directive (Directive 99/44/EC of the European Parliament and of the Council on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, OJ 1999 7.7.99 L171/12) adopted on May 18, 1999. Member states have until January 1, 2002, to implement the directive into national law. This directive covers both consumer warranties that may be implied by law, including express warranties, and consumer guarantees that are voluntarily offered by marketers.

The latter typically involve a limited-time program for repair or replacement at no additional cost. The directive does not cover "extended warranties," or service contracts to cover an additional period of time for an additional fee (Day and Fox 1985). For clarity of discussion, contrary to normal interchangeable use, this article uses the term "warranty" to cover both express and implied warranties created by the operation of law and the term "guarantee" to refer to a voluntary program of repair, refund, or replacement.

Legally enforceable guarantees and warranties facilitate marketing by reducing the risk to consumers of purchasing a product that turns out not to meet reasonable or promised expectations. This risk is significant for experience and some credence attributes of expensive goods (Bloom and Pailin 1995; Petty 1992, pp. 36–38). Early studies found that better guarantee terms accurately signaled lower failure rates (Kelley 1988; Wiener 1985). Furthermore, offering an extensive guarantee for unknown brands appears to increase consumer perceptions of product quality, except perhaps for technologically complex products (Dowling 1985), but extended guarantees appear to have little effect on quality perceptions for well-known brands (Blair and Innis 1996).

Warranties implied by the sale or lease of a product reduce consumer risk of postpurchase disappointment by setting minimum quality standards. Because they apply to all sales (unless disclaimed in the United States), they typically are not an important component of promotion strategy. In contrast, express warranties derived from the marketer's statements about product quality or performance and guarantees often are important in a firm's marketing strategy (Barsky 1995). Consumers expect firms to remedy breaches of express warranties upon request and honor the terms of their guarantees.

This article examines the provisions and likely operation of the new directive. After briefly discussing the background of the directive, we first explain the basic application of the directive. The bulk of this article analyzes the directive's provisions addressing warranties and guarantees. In each case, we compare the directive's provisions with applicable U.S. law and often with existing laws in European Union (EU) member states. Finally, we present implications for marketers and conclusions.

Background on the Directive

In 1993, the European Commission issued a "green paper" on guarantees for consumer goods and after-sales service (Com [93] 509). The Commission recognized that for consumers to enjoy the benefits of a single European market in goods they needed to be confident of their legal rights and able to rely on those rights throughout the market.[1]

Evidence before the Commission suggested that consumers experienced considerable difficulties in making cross-border transactions, including uncertainty regarding conditions of sale, difficulties in exchanging and repairing goods, and difficulties in invoking manufacturer guarantees in consumers' home states (European Commission 1991). Consumers who purchased in another member state were unlikely to know the law of that state and would therefore be unaware of their consumer rights and how to invoke these rights.

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[1]For this reason, the EU recently enacted a rule that will allow consumers to sue online retailers in the consumer's home country (Meller 2000). This new rule may bypass the traditional question of whether the seller is actively soliciting sales in a particular member state so that subjecting that seller to the jurisdiction of its courts would be appropriate. The new rule also may vitiate any agreement in the sales contract as to which country's laws will apply to a distributor and where the dispute will be litigated.

The Commission therefore recommended a common approach to warranty legal rights and the guarantees offered to consumers so that consumers could confidently use the single European market. Guarantees would be enforceable everywhere, and the EU would enjoy common minimum standards of quality set by implied warranties. This approach also would benefit marketers, which would be able to market their products throughout the community (now the EU) on the basis of similar rules. Marketers would be able to develop a pan-European market strategy and would no longer incur costs involved with identifying and complying with different national laws.

Similar to much other European legislation, the directive finally approved by the European Parliament and Council is more modest than originally envisaged in the green paper. Gone is the proposal for joint manufacturer and dealer liability for breach of implied warranties of minimum standards; gone too are the proposals for minimum guarantee standards and the "Euroguarantee" and the proposals regarding after-sales service and parts availability.[2]

The dilution of the final directive from the original proposal increased the degree to which it is only a minimum harmonization measure. Consistent with the principle of subsidiarity, the directive is intended only to establish a common floor of rights, allowing member states to introduce or retain more protective national measures. For example, the United Kingdom has stated that it has no plans to reduce the six-year period for enforcing a claim for defective goods to the two-year minimum of the directive. For marketers, this reduces the advantages of uniformity of laws across borders and inhibits the development of global marketing strategies. Marketers will still need to be aware of differences in national laws beyond the minimum standards of the directive and must develop strategies that work within those national legal frameworks.

The Basic Definitions and Application of the Directive

The directive applies primarily to sellers who sell consumer goods to consumers. The basic substance of the directive is most comparable to two sets of U.S. laws. The Uniform Commercial Code (UCC) governs express and implied warranties for the sale or lease of goods, whether the buyer is a consumer or not. The Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301–12) is a federal consumer protection statute that does not require sellers to issue consumer guarantees but does establish certain information requirements if sellers choose to offer consumer guarantees.[3] The relationship between the directive and the UCC is summarized in Table 1.

This comparability means that U.S. marketers should not be caught by surprise by the minimum European legal requirements. Their familiarity should enable marketers to conform readily to the directive while recognizing that some member state differences will persist. The establishment of minimum ground rules across the EU regarding quality issues and consumer guarantees should present a greater opportunity for marketers to focus attention on penetration of the EU as an integrated market rather than penetration of disparate national markets with disparate product regulation rules.

Who?—Sellers

A seller is any natural or legal person who sells consumer goods in the course of his or her trade, business, or profession (Art 1[2][c]). This appears comparable to the UCC definition of a merchant (UCC 2-104) as someone who deals in goods. The UCC definition also covers those, such as consultants or independent purchasing agents, who hold themselves out as having expertise in particular types of goods even if they do not deal in such goods. In two other important aspects, U.S. law is broader than the directive. First, the UCC imposes certain warranty requirements (warranty of title, UCC 2-312, and express warranties, UCC 2-313) on mere sellers—any person, whether a merchant or not, who sells goods (UCC 2-103). Second, Article 2A of the UCC provides for similar warranty provisions by lessors of goods. Nonmerchant lessors are covered by comparable warranty provisions (warranties against interference and infringement, UCC 2A-211; and express warranties, UCC 2A-210).

At first glance, the definition of a seller in the directive would appear to include sellers at any level, from the original manufacturer to wholesaler to retailer. However, Article 2 requires the seller to deliver goods that conform to the sales contract. This suggests that only retailers that sell directly to consumers are covered by the directive. The latter interpretation is consistent with the legislative history noted previously in that provisions holding manufacturers liable to consumers were originally proposed but later removed from the final directive.[4]

In the United States, the requirement of privity of contract between seller and buyer has been eroding for years. Courts have long held manufacturers that make an express warranty in advertising liable for breach to buyers who did not purchase directly from them. Similarly, more and more states

[2]Similar to the earlier Directive on Unfair Terms in Consumer Contracts (Directive 93/13/EEC), the green paper proposals had the potential to "strike at the heartland" of national private laws. For this reason, it was subject to considerable debate and to some resistance at the member state level (Bradgate 1997; Howells and Wilhelmson 1997). In addition, the sensitivity of the Commission to member state antagonism to (yet more) legislation from Brussels can be seen from its introduction of the directive under Article 95 (formerly Article 100a), the fundamental internal market provision, rather than under Article 153 (formerly Article 129a), the more contentious consumer protection competence added only recently to the founding treaty in 1992 (Twigg-Flesner 1999). Criticism of the rather tenuous link between the provision of minimum quality requirements in goods and "enhancing the internal market" resulted in the insertion into the preamble to the directive of a statement emphasizing the growing opportunities for and importance of cross-border shopping through new information technology.

[3]State "lemon" laws covering the purchase of new cars and state deceptive trade practices and consumer sales practices acts may offer additional protection to consumers but are outside the scope of this article. Similarly, the Federal Trade Commission and Lanham Acts are often used to challenge false or misleading advertising claims (Petty 1992) that also may constitute express warranties as discussed in this article.

[4]That manufacturers cannot be directly liable to the consumer does not mean that they are immune from action under this directive. Article 4 provides that when a seller is liable to a consumer, the seller can in turn pursue remedies back up the contractual chain (but subject to national law, which might, for example, allow parties to exclude or limit their liability in commercial contracts). It also is worth noting that some member states (Finland, France, Belgium, and Luxembourg) already provide for manufacturer liability under national law, and unless that national law is changed, such liability will continue even after implementation of the directive.

Table 1. Comparison of Warranty Rules

	Consumer Guarantees Directive	UCC	Comments
Applicability	Professional sellers contract with consumer buyer for sale of goods.	Merchants (any seller for some implied warranties) contract with all buyers and injured family for sale or lease of goods.	United States offers broader coverage.
Warranties	Comply with description, sample, or model. Fit for particular purposes known to seller. Fit for normal use. Normal quality for same type of goods considering public statements.	Same plus affirmation of fact. Same when buyer relies on seller selection. Fit for ordinary use. Fair average quality: pass without objection in trade, but must conform with label	Similar, but only the seller is liable in EU. In the United States, manufacturers are also liable.
Presumptions	Defect discovered in six months is presumed to exist at delivery. Faulty installation because of seller is covered.	— —	Innovations over U.S. law.
Defenses	Consumer is aware of lack of fitness. Seller is not bound by statements unknown to him or her or to consumer.	Warranties may be disclaimed. Statements must be the basis of bargain.	EU allows notice but not disclaimer. Seem similar.
Remedies	First repair or replace, otherwise give price reduction or refund. No consequential damages.	Remedies may be limited by seller. Consequential damages may be limited by seller except for personal injury.	Likely similar results for marketers in the United States and EU.
Time limit	Two years after delivery.	Four years from when problem is discoverable, reducible to one year by seller.	UCC appears more generous, but in practice?

find manufacturers liable to remote buyers for breach of the implied warranty of merchantability. Many states have extended this concept to cover property damages and some to cover other types of economic loss (loss of value) as well (e.g., *Morrow v. New Moon Homes* 1976).

Who?—Consumers

The directive gives rights only to consumers, not commercial buyers (although if the intent of the directive is to enhance the internal market, the rationale for not extending these rights to commercial buyers is not immediately obvious). Article 1(2)(a) provides, first, that a consumer is "any natural person." Companies are thereby excluded. Second, only natural persons "acting for purposes *not related to* their trade, business or profession" are covered (emphasis added).[5] The intention therefore is to benefit only people who buy for private use. This narrow definition would presumably exclude seller liability in situations in which goods are bought for use in a trade or business, even if they do not form an integral part of that trade or business. For example, a person who purchases a kettle for exclusive use in the office would not be a protected consumer under the directive. It would presumably also exclude liability for a defective computer purchased by a person for both private and business use.

The UCC does not define consumers, because it applies to all sale and lease transactions involving goods. The Magnuson-Moss Warranty Act defines consumers simply as any buyers of consumer goods other than resellers (15 U.S.C. 2301). The U.S. definition under this statute includes any company that purchases a consumer good, such as kettles. This act deals only with specifications for voluntarily offered consumer warranties; therefore, such a broad definition may be appropriate, because sellers are unlikely to void such warranties because the purchaser is a business.

The directive only applies to the contracting parties. However, Denmark's legislation, like the U.S. Magnuson-Moss Warranty Act, already goes beyond the directive and provides a remedy for subsequent purchasers against the seller. The U.S. statute limits the rights of subsequent purchasers to those falling within the duration of the guarantee.

The UCC, however, clearly extends warranty rights to at least some people beyond the immediate purchaser. Alternative A of UCC 2-318 allows personally injured household and

[5]It is worth noting the unfortunate lack of consistency between this definition of "consumer" and that used in other directives, particularly the Unfair Contract Terms Directive, which the Commission has said this new directive is intended to complement (European Commission 1996). The Unfair Contract Terms Directive's definition of a consumer as a natural person "acting for purposes which are *outside* his trade, business or profession" (emphasis added) arguably is an easier test to satisfy than that under this new directive. The kettle purchased for office use may be included under the Contracts Terms Directive unless the purpose of the business is to taste or serve tea.

family members to recover for breach of warranty, even though they did not purchase the product that caused the injury. Thus, if a spouse or child is injured while using a product bought by the other parent, the injured party may recover for breach of warranty. In Europe, this appears not to be the case, though recovery under the Product Liability Directive (85/374/EEC) for death, personal injury, or damage to other property may still be possible. Alternative B of UCC 2-318 extends the reach of breach of warranty to cover an injured person who is reasonably expected to use or be affected by the goods. Alternative C extends Alternative B to cover injury generally without specifying personal injury. Most states have adopted Alternative A. As noted previously, case law has gradually extended the reach of these provisions to cover property damage in most states and economic loss in some.

What?—Consumer Goods

Whereas the UCC covers all goods, the directive applies to consumer goods.[6] Although this suggests that the directive only applies to certain types of goods, it defines consumer goods as any tangible movable good, with the exception of electricity and of water and gas unless they are sold in limited quantity or volume (e.g., bottled) (Art 1[2][b]). Therefore, any good (new or secondhand), even a piece of industrial machinery, may constitute a consumer good, so long as it is a tangible movable. In contrast, under Magnuson-Moss, consumers are broadly defined, but consumer goods are limited to "any tangible personal property normally used for personal, family or household purposes" (15 U.S.C. 2301). The directive applies to almost any goods sold to consumers, whereas the Magnuson-Moss Act applies to consumer goods sold to anyone other than a reseller. For example, if a consumer purchased a dentist chair, it would be covered under the directive (and the UCC that applies to all sales) but not by Magnuson-Moss. In contrast, the ordinary kettle (noninstitutional) described previously, purchased for use in an office, would be covered by Magnuson-Moss (and the UCC) but not by the directive.

When?—Sale

The directive is specifically targeted at contracts of sale. Sale is not defined in the directive, and whether a contract constitutes a contract of sale will be defined by national laws. One of the most common ways in which consumers obtain goods on credit is through "hire purchase," known as a lease in the United States. In the United Kingdom, hire purchase contracts are not contracts of sale, but other types of credit agreements (e.g., credit sales) are considered sale contracts. Both are covered under the UCC, and the Magnuson-Moss Act covers all warranties of consumer products without mention of whether they are leased or purchased.

Another problem for defining sale-of-goods contracts is when the sale includes both goods and services. For example, will the seller of a mobile telephone, which is sold with one year's free subscription to a service provider, be liable to the consumer buyer under this directive? Similarly, what if the seller gives away the mobile telephone with the purchase of a service contract? The directive provides no guidance on this issue and therefore the answer may vary from state to state. Sellers who provide elements of service in connection with the sale of goods need to be aware that the law pertaining to liability for this element is not clear at either the European or the member state level.

Conformity with the Contract

The heart of this directive is contained in Article 2. It provides that the seller must deliver goods that are "in conformity with the contract" (conformity is a concept used by the Vienna Convention on the International Sale of Goods). Goods are presumed to be in conformity if they

- 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 (Art 2[2][a]);
- are fit for any particular purpose for which the consumer requires them, for which the consumer has made known to the seller at the time of the conclusion of the contract, and for which the seller has accepted (Art 2[2][b]);
- are fit for the purposes for which goods of the same type are normally used (Art 2[2][c]); and
- show the quality and performance that are normal in goods of the same type and that the consumer can reasonably expect, given the nature of the goods and any public statements on the specific characteristics of the goods made by the seller, the producer, or the producer's representative, particularly in advertising or labeling (Art 2[2][d]).

The first three presumptions generally match UCC 2-313, which defines express warranties; UCC 2-315, which defines the implied warranty of fitness of a particular purpose; and UCC 2-314, which creates the implied warranty of merchantability, respectively. The fourth presumption initially appears to augment the implied warranty of merchantability but then notes that consumer expectations may be changed by "public statements," that is, advertising and labeling of the goods. This innovation appears to hold sellers liable for statements made by the manufacturer in labeling or advertising.[7] Otherwise, the first presumption requires only conformity to descriptions or models given by the seller, which may be the retailer. United States law simply treats the warranty of merchantability as a promising minimum quality distinct from any additional express warranties that would be enforceable against the party that makes the express warranty.

Express Warranties

There are differences between the directive and U.S. law as well as likely differences between the directive and the existing laws of member states, such as the United King-

[6]European definitions of "consumer goods" are not consistent across directives. The definition of "product" under the Product Liability Directive (85/374) means all movables (tangible and intangible), including electricity (Art 1), making a seller liable for death, injury, or damage to other property caused by a defective intangible movable (arguably including defective software obtained online). The Consumer Guarantees Directive, similar to U.S. law, would impose no liability on the software seller because it is an intangible license. This lack of consistency between consumer directives is something that even members of the Commission themselves have commented on adversely (Tenriero 1997, p. 61) as an inhibition to the development of a "complete and coherent" set of European rules governing defective products. Meanwhile, sellers will need to look to each directive, as well as to relevant national laws, to determine their European obligations.

[7]For a comparison of European and U.S. advertising law, see Petty (1997).

dom. For example, UCC 2-313 states that express warranties are created by any affirmation of fact, description of goods, or sample or model from the seller that is made part of the basis of the bargain. Although the exact meaning of "basis of bargain" is unclear, comment 3 makes it clear that proof of reliance is not necessary. Similarly, the EU requires only that the seller hold out the description, sample, or model to the consumer. The directive will require modification of some existing member state laws, such as current U.K. law that requires that the buyer must have relied on the description (U.K. Sale of Goods Act, 1979, s13).

Article 2(4) provides that the seller will not be bound when it was not and could not reasonably have been aware of the statement in question, when the statement had been corrected by the time of the conclusion of the contract, or when the seller can show that the buyer cannot have been influenced by the statement. These limitations appear similar to the vague UCC requirement that an express warranty be part of the basis of the bargain. The question remains, in what circumstances can a seller claim that it could not reasonably have been aware of the statement? Will a seller be held liable for statements made by the manufacturer through Internet advertising, perhaps from the United States? Or will a seller in one member state be liable to a cross-border consumer buyer for statements made in a television advertisement in that consumer's home state? The potential for seller liability in these as yet uncertain circumstances should cause sellers to consider obtaining promises of indemnity from the manufacturer.

Sellers are bound only by statements pertaining to the specific characteristics of the goods. Mere "advertising puff" (particularly if unconnected with any specific characteristic of the good) is unlikely to bind the seller. Similarly, promotional offers ("Buy one and get one free") are unlikely to bind (not being connected with a specific characteristic). Only statements about performance or quality characteristics, such as "Guaranteed to last for 100 hours" or "Gets 50 miles to the gallon" are likely to be enforceable. Nevertheless, Beale and Howells (1997) note that this may represent the beginning of an attempt to develop a general European Community principle that all advertising shall have legal effect. Such an effect might be particularly compelling under the new directive that allows comparative advertising (Spink and Petty 1998). It remains to be seen whether this new directive will cause courts in member states that find advertising to be mostly puffing (e.g., Italy) to change their interpretation or the courts in member states that strictly construe advertising (e.g., Germany) to limit their interpretations to allow some puffing (Petty 1997).

The express warranty provisions of the UCC have long been applied to advertising in the United States. However, UCC 2-313, Section 2, states that a mere affirmation of value or statements purporting to be merely the seller's opinion or commendation do not create an express warranty, thereby creating an exception of puffery. Preston (1997) notes that the advertising industry heavily criticized attempts to redraft this provision, which were intended to create a presumption of warranty from advertising with an apparent burden of proof on the seller to disprove that presumption.

Implied Warranties

The warranty of fitness for a particular purpose under the directive is consistent with the UCC, because neither requires that the buyer reasonably rely on the seller's skill. If, for example, the goods prove unsuitable for a particular purpose but the buyer had greater expertise in the matter than the seller, the warranty may still be violated. The additional requirement that the sellers have accepted their fitness for that purpose, however, may protect the sellers in situations in which they have not recommended the goods. (Some writers also argue that the European Court of Justice would likely apply the general principle of good faith, familiar in many European jurisdictions, to restrict the buyer's rights in such situations; see Beale and Howells 1997.) In the United States, the comparable requirement is that the seller selects the appropriate goods and the buyer relies on the seller's selection.

As noted previously, the third and the first part of the fourth presumptions in Article 2 are similar to UCC 2-314, the implied warranty of merchantability. The UCC requires that goods be fit for ordinary purposes for which such goods are used. The use of the plural ("purposes") suggests that goods must be suitable for all such ordinary uses.

The directive creates a defense for sellers if, at the time the contract was concluded, the consumer was aware or reasonably should have been aware that the goods were not suitable for ordinary purposes or if the problem in fitness or quality is caused by materials supplied by the consumer (Art 2[3]). This appears to be consistent with UCC 2-316, which allows sellers to exclude or limit their warranties. However, Article 7 provides that the parties cannot directly or indirectly contract out of the rights provided for in this directive. A simple exclusion or limitation clause will therefore be ineffective against the consumer (under both this directive and the Unfair Terms in Consumer Contracts Directive if that clause is preformulated). It remains to be seen in Europe whether a description of the goods that describes their lack of fitness would be considered an indirect attempt to contract out of the directive.

Additional Warranty Provisions

Consistent with the desire for greater specificity in civil law systems, the directive goes beyond the UCC in several respects. First, the directive specifies that any defect that becomes apparent within six months from delivery shall be presumed to have existed at the time of delivery (but taking into account the nature of the goods and the nature of the nonconformity) (Art 5[3]). The rationale is that it is easier for the seller to show that the defect occurred after delivery than for the consumer to prove the contrary. Sellers would be advised to establish comprehensive quality control procedures to better their chances of challenging this reversal of the normal burden of proof.

Second, if a defect is due to the faulty installation by the seller or someone under the seller's control, the seller will be liable. In addition, the seller also will be liable if the consumer incorrectly installed the goods because of shortcomings in the installation instructions (and presumably including any oral instructions) (Art 2[5]). This provision represents one of the few incursions into after-sales territory

by the directive, but it represents at least one attempt by the directive to recognize that consumer grievances often arise in relation to after-sales service as much as in relation to the nature of the goods themselves. Sellers will need to ensure that any installation instructions given to consumers are clear and comprehensible and that installers are competent.

Breach of Warranty Remedies

Traditionally, the remedy for breach of contract in Europe had been rejection of the goods (repudiation) and/or damages. Some consumer organizations have argued that these two remedies are not always appropriate—in many cases, the consumer would prefer to have the goods repaired or replaced (National Consumer Council 1996). For this reason, the directive provides that in the event of nonconformity, four remedies will be available: repair, replacement, rejection of the goods, or a reduction in the purchase price (Art 3). However, in the face of persistent hostility by the business community, the availability of these remedies is subject to important limitations. In practice, the seller will determine what remedies are available to consumers. The directive provides that "in the first place" the consumer can demand repair or replacement, free of charge, unless repair or replacement is "impossible" or "disproportionate" (Art. 3 [3]).[8] If this is so, the consumer will then be entitled to a refund or reduction in the price.

Only when repair or replacement is not available, when the seller has not completed the repair within a reasonable time, or when the consumer is "significantly inconvenienced" will the consumer be able to insist on a refund (for a nonminor defect, Art 3[6]) or a price reduction (Art 3[5]). The interpretation of a reasonable time, significant inconvenience, and minor defect will be matters for the member states to determine (at least in the absence of any European Court of Justice interpretation).

Therefore, if marketers in Europe insist on repair or replacement, that remedy must be timely and must not significantly inconvenience the consumer. Although the directive does not provide that a consumer should be offered a temporary replacement during a replacement or repair period, sellers who can offer one are unlikely to find themselves needing to grant an alternative remedy (at least provided that any repair is carried out within a reasonable time). In contrast, the marketer that insists on a refund or price reduction must be able to show that the repair or replacement is too costly or is impossible.

The directive does not provide for consequential damages. However, if such consequential loss is physical injury or physical damage to other goods (e.g., a videotape damages a video recorder), the consumer may be able to claim such damage under the Product Liability Directive. If the consequential loss is merely economic loss (e.g., the cost of bus fares while a car is being repaired), recovery of such loss is not covered by either directive and will be a matter for the individual member states to regulate.

Allowing the seller to determine the remedy and to avoid consequential damages is consistent with UCC 2-719, which allows sellers to limit remedies for breach of warranty, at least if no physical injury has been caused by the breach. Should the limited remedy fail in its essential purpose, other remedies are available. Similarly, if a limitation of consequential damages is found to be unconscionable, the limitation is ignored. This will always be true when consequential damages include physical injury. Therefore, as in Europe, marketers in the United States may limit warranty remedies to repair and replacement, and in most cases these limitations will be enforced.

The directive provides for a two-year statute of limitation from the date of delivery of the goods. After two years, the seller will no longer be liable for any nonconformity, except if the national laws of the member states provide for longer periods. In the United Kingdom, the limitation period under contract is six years and is intended to remain so (though in reality few, if any, buyers would try to exercise a remedy so long after delivery). In member states such as Germany, in which a buyer is currently given only six months to complain, the directive will extend the potential liability period to two years.

In some member states, there exists a requirement under national law that any nonconformity be notified to the seller within a certain period of time (e.g., eight days in Italy). The directive states that member states may provide that the consumer must inform the seller within two months of becoming aware of the lack of conformity (Art 5[2]). Member states must inform the Commission if they wish to implement this requirement, and the Commission will monitor the impact of such requirements on consumers and the internal market generally. This suggests that this matter may be revisited in subsequent Community legislation, particularly if the notification requirement proves to be a significant barrier to consumer redress.

Under the UCC 2-725, the parties may agree to reduce the statute of limitation from four years to as low as one year. Normally the time period begins upon delivery, but if warranties extend to future performance, the statute of limitations clock for breach of warranty does not begin until the breach is or should have been discovered.

Consumer Guarantees

In addition to imposing obligations of conformity on sellers, the directive also imposes obligations on any manufacturer, importer, or retailer that voluntarily offers a guarantee at no additional charge to consumers in connection with the sale of goods. Similar to U.S. law, the directive does not require sellers to offer guarantees for their products, but many appear to find it advantageous to do so.

The primary directive obligation is that any such guarantee will be legally enforceable, a questionable proposition today in some member states, but only sellers who offer a guarantee are bound. Therefore, in contrast to the warranty provisions that bind only the seller, if a manufacturer offers a guarantee, it is bound to honor the terms of the guarantee. The retail seller is not bound, unless it has agreed with the manufacturer to perform services or receive the goods for return.

[8]Whether the provision of a repair or replacement is disproportionate is determined according to whether it imposes unreasonable costs on the seller compared with an alternative remedy, taking into account the value of the goods if they were not defective, the significance of the defect, and whether provision of an alternative would significantly inconvenience the consumer. Impossibility is not defined, but presumably repair/replacement will be impossible if, for example, the goods are custom made and the seller has no spare parts.

The guarantee also must state that it does not affect any other legal rights of the consumer. Regulations under Magnuson-Moss require that written guarantees include a similar statement: "This warranty gives you specific legal rights, and you may also have other rights, which vary from state to state" (16 C.F.R. 701.3). These provisions appear to be aimed at the common problem of consumers being misled by limited guarantees into thinking that the guarantee is their only legal recourse should the goods be unsatisfactory.

Unfortunately, neither jurisdiction requires a positive informational statement regarding alternative legal recourse. In Europe, for example, any consumer product purchased "at a distance" may be returned within seven days for a full refund. Moreover, implied warranties may not be limited, and the Products Liability Directive provides additional recourse for defective products that cause physical injury.

The directive does not control the content of the guarantee except to provide that it must contain the name and address of the guarantor, the duration and territorial scope of the guarantee, and the essential particulars for making a claim. In addition, it requires that the content be in plain and intelligible language. The guarantee must be made available to consumers, in writing or some other durable form, but only on request. Arguably, this represents a lost opportunity to improve competition among providers of such guarantees by requiring the terms to be clearly and conspicuously disclosed to consumers before purchase. Magnuson-Moss requires that guarantees be made available to consumers before purchase and be written in plain English (16 C.F.R. 702). However, according to Moore, Shuptrine, and Kelly (1993), most guarantees can be understood only by consumers with at least a high school education, yet half of U.S. adults read only at the eighth grade level. It remains to be seen whether European marketers will do better under the directive.

The substance of guarantees may be subject to other European laws. For example, it may be possible to use the Unfair Contract Terms Directive to challenge the content of a guarantee that limits manufacturer liability. The two directives combined now mean that such guarantees are legally binding and that the content of such guarantees may be subject to challenge on the basis of unfairness.

In Europe, as under section 110(d)(2) of Magnuson-Moss, if the consumer successfully litigates the terms of a guarantee, the marketer must pay the consumer's legal costs. Therefore, in both Europe and the United States, small consumer-guarantee cases may be brought because the consumer, if successful, does not bear the financial cost of litigation. In contrast, in a UCC warranty lawsuit, the successful consumer plaintiff in the United States would likely still have to bear the legal expenses. The U.S. legal system provides that if a class action of similar claims can be formed, the cost of litigation can be spread among a large number of plaintiffs. Furthermore, deliberate misconduct by the marketer may earn punitive damages to provide some additional resources for paying litigation costs.

United States law attempts to encourage the use and promotion of consumer guarantees by defining requirements for a full warranty ("guarantee" as used in this article) (15 U.S.C. §104). However, casual observation suggests that such efforts by marketers are rare and that most are satisfied to offer a limited guarantee. The most important features of a full guarantee are that (1) implied warranties may not be limited in either time or effect, nor may consequential damages be excluded; (2) transfer of the product does not terminate the guarantee period (though periods for as long as consumers own the product are permissible); and (3) the seller must provide remedies within a reasonable time and without additional charge.

Implications for Marketers

Before concluding, it is worth highlighting some important implications for marketers. The good news is that the new directive's minimum warranty rights are reasonably comparable to those of U.S. law. Both systems include express warranties and the implied warranties of merchantability and fitness for a particular purpose—all terms familiar to U.S. marketers. Marketers should be cautioned that because the U.S. UCC has been in place longer than the new directive and the new directive only provides for minimum harmonization, it seems likely that there will be more interstate differences in Europe than in the United States. Perhaps even more important are three significant differences for marketers who cross the Atlantic:

1. The directive only covers sales by business sellers to consumers. The UCC covers all sales and leases of any sort of goods by any seller to any buyer for express warranties and only sales and leases by business sellers for implied warranties. Magnuson-Moss covers all guarantees offered on the sale of consumer products, defined by normal use, regardless of purchaser identity. Therefore, U.S. firms, being used to broader coverage, should be able to adapt readily to Europe, but European merchants marketing in the United States must be aware that all sales and leases are subject to warranty rules.
2. Unlike U.S. law, which allows marketers to disclaim both express and implied warranties if they follow the dictates of UCC 2-316, the directive does not allow parties to contract directly or indirectly out of the warranty rights. However, the directive provides for the defense that the buyer knew or should have known that the product was not suitable for ordinary purposes. It thus appears that in Europe, buyers could be notified in a warning that a product is not suitable for ordinary purposes. If the notice also explained the purposes for which the product was suited (e.g., this ladder is only suitable for children weighing less than 80 pounds), it may have a greater chance of not being interpreted as an indirect method of contracting out of warranty rights. Alternatively, marketers seeking to avoid warranty rules in the EU should consider offering products for lease rather than for purchase.
3. In the United States, it is commonplace for marketers to limit remedies to replacement, repair, or sometimes refund of the purchase price. Often, sellers expressly disclaim liability for consequential damages. In Europe, the latter would be acceptable because consequential damages, other than for personal injury (or physical damage to other goods under the Products Liability Directive), are not available. The former, however, might be viewed as an attempt to contract out of warranty rights and therefore deemed unenforceable. Again, the answer might be a simple notice, rather than disclaimer, informing the consumer of the seller's policy on remedies. The directive prefers repair or replacement, so if the seller also prefers those remedies, the notice is consistent with the directive. If the seller prefers refund or price reduction, however, the notice should explain that preference in terms of the directive's language; that is, repairs would be disproportionately expensive.

Conclusion

Given European interest in consumer protection, which often leads to stronger protection than is offered in the United States (i.e., the inability to disclaim warranties, the Data Directive's privacy protections, and the Distance Selling Directive's seven-day cooling-off period for all distance sales), it is somewhat surprising that U.S. law offers broader warranty protection in many respects, such as covering all sales and leases of goods, not allowing limitations of remedies in cases of personal injury, and covering nonpurchasers and subsequent transferees. European law appears content to cover personal injury cases only under the Products Liability Directive (which, unlike U.S. law, covers damage to other property).

Note that despite the continuing differences among member states, the minimum rights provided for under the directive represent a step forward for consumers in some member states where enforcement of warranties and guarantees has been questionable. Other examples of improvements include Germany being required to extend its statute of limitations from six months to two years, Italy allowing two months rather than eight days to provide notice of nonconformity, and the United Kingdom being required to drop its requirement of actual reliance on express warranties.

Last, the recitals to the directive indicate that more European legislation in this area may yet result, and Article 12 of the directive requires the European Commission to review the operation of the directive by mid 2006 and specifically consider whether manufacturer's direct liability should be added.[9] The Commission also may consider whether seller liability should be extended past the first consumer buyer to subsequent owners. Both proposals initially were included in the green paper but subsequently were dropped from the directive. Such reconsiderations seem particularly likely given the ultimate failure of the directive to tackle issues that are arguably of more importance to shoppers (particularly cross-border shoppers), such as the availability of after-sales service or problems associated with enforcing these standards in cross-border situations. The failure to introduce the Euroguarantee or control the content of voluntary guarantees has led some to question the directives ultimate practical utility in this respect (Beale and Howells 1997; Bradgate 1997).

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[9]If manufacturer liability ultimately is added, then in the case of goods manufactured outside the EU, the first importer into the EU, rather than the actual manufacturer in a foreign country, is likely to be deemed the manufacturer. This would mean that consumers could enforce their rights within the EU without resorting to the expense of litigation in the jurisdiction of the foreign manufacturer. Importers facing potential manufacturer liability claims are therefore likely to demand a contractual right of indemnity against the actual manufacturer.