

**Services Standards:
Defining the Core Consumer Elements and their Minimum Requirements**

Hans-W. Micklitz

University of Bamberg

Professor for German and European Private and Economic Law

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Summary and introduction

I. Summary

Standardisation of services will help to accomplish the Internal Market for Services. This is the overall message enshrined in the Services Directive¹ which was adopted in December 2006. However, the European Commission has not embedded standardisation of services into a concept that makes the well-known “New Approach” to technical standards and harmonisation to cover services as well. Instead the European Commission and the Standards Bodies are using the New Approach infrastructure to develop a whole set of standards on services. The old issue of how an adequate contribution by the consumer to the process of standardisation may be secured now requires adequate answers – in the field of services. Unlike products, services are much less subject to technical specifications. Standardisation of services quite necessarily affects the legal-contractual environment to a significant degree. This is in essence what the study is all about – it defines the core consumer elements which should ideally govern the standardisation of services in the future.

Services are not a new area of EC regulation. The EC legislator has adopted a whole series of directives and regulations on services, dealing either directly with consumer services (consumer credit, package tour, time sharing), or more indirectly by way of opening up sectoral markets for financial services (investments, insurances) or public goods (telecommunication, postal services, electricity, gas, transport). All in all there is a dense, though inconsistent, network of EC regulation of services available that frame the standardisation of services. Existing EC regulation, the existent technical standards elaborated at the European and the national level, as well as best practice legislation and non-binding codes and guides, provide the ground for the development of seven core consumer elements: education and skills, equipment and premises, the pre-contractual stage and contract conclusion, content of contract, post contractual stage, monitoring and inspection and, last but not least, democratic accountability of rule-making.

When viewed against the seven core consumer elements, EC regulation of services, European standards and national standards on services still reveal substantial deficiencies. All in all the EC legislator seems better prepared to take the consumer dimension into consideration. Standard-setting needs a

1 OJ L 376, 27.12.2006, 36.

substantial consumer contribution if the envisaged Internal Market for services is to bring benefits to the consumer as well.

- Information on professional qualifications is scarce. The reason might be found in Directive 2005/36/EC² on professional qualifications, which leaves it for Member States to decide over the education of the respective professions. However, this does not explain why European Standards Bodies do not make use of the leeway left to them, some notable examples set aside.
- Most of the directives, regulations and standards are dealing with equipment and premises in some form or the other. However, there is no systematic approach to equipment and premises, not even for the mandatory requirements under the General Product Safety Directive 2001/95/EC³.
- Information obligations are seen as a means by which to give shape to the substance of the service. There is a tendency to provide the information in writing, however, without making clear whether this could also mean providing the information in an electronic form. EC rules rely more heavily on pre-contractual mechanisms than technical standards.
- EC regulation on the content of contracts for services is patchy, in that it does not deal fully and comprehensively with the content, the quality, the safety requirements, billing and the payment modalities. It is rather deficient so far as remedies are concerned. However, there is a world of a difference between law making and standard-setting. Most of the standards do not spend a single word on the concrete obligations of the service providers or on consumers' rights in case of improper or insufficient performance.
- After sales services are largely disregarded, whereas rules against insolvency protection are relatively well-developed. Complaint handling and dispute settlement appear, but are not linked to Recommendations 98/257/EC and 2001/310/EC⁴. They could be linked to draft ISO DIS 10003⁵, once it is adopted, which, however, contrary to the official EC policy, put emphasis on in-house complaint handling.

2 OJ L 255, 30.9.2005, 22.

3 OJ L 11, 15.1.2002, 4.

4 OJ L 115, 17.4.1998, 31 and OJ L 109, 19.4.2001, 56.

5 The full title of the draft is 'Quality management – Customer satisfaction – Guidelines for dispute resolution external to organisations'.

- Monitoring and inspection duties can be found in codes, guidelines and recommendations elaborated by coordinating committees set up under EC law or informal cooperation of national agencies. The concept of “best practice” requires a constant learning process, via evaluation of customer satisfaction and mechanisms for taking corrective action. Despite some promising tendencies, technical standards fall rather short of the draft ISO DIS 10001 on consumer satisfaction⁶.
- Representatives from consumer bodies, committees or councils of National Standards Bodies and/or from ANEC have accompanied the elaboration of a number of technical standards here under review. As consultation is confidential, it is hard to say to what extent the “consumers’ voice” has been heard. Whether or not consumers are satisfied with the relevant standards becomes clear only after the standard has been adopted and published in the Official Journal or made accessible via the National Standards Bodies.

The review process allows for general observations on standard-setting in the field of services. Regulation of services as well as standardisation of services is a relatively new field, for lawyers and for standardisers. In this respect observations drawn from the review process should rather be read as an invitation to more fully consider the core consumer elements in future standard-setting. For the time being the European legislator seems willing to integrate Standards Bodies into the shaping of appropriate rules on consumer related contracts for services. In this respect there is a chance for Standards Bodies to enter into new fields, provided they accept the consumer challenge.

- All existing sector-specific EC regulation of services puts emphasis on the regulation of the *content* of the service and its legal implications, – it is command and control regulation. Only the Services Directive leaves more room for the development of regulatory devices that are based on cooperation and voluntary compliance.
- Standard-setting via standardisation is characterised by soft wording, which is to say that it does not define how people *may* behave, but how people *might* behave. So the language is not that service providers *shall* have the obligation to do this and that but *should* have the obligation to do this and that.

6 ISO DIS 10001 – ‘Draft, Quality management – customer satisfaction – guidelines for codes of conduct for organisations’.

- The outlook of technical standards resembles very much a piece of legislation. However, despite the similarity standards are often not drafted by lawyers and they do not constitute 'law' in the proper sense. Problems arise, therefore, if legal concepts are redefined in technical standards.
- The world of standardisation appears to be separate from the legal world of binding or default regulation. The two worlds might coexist without too much overlap if standardisation is limited to defining technical issues in the proper sense. However, the more standardisation oversteps these boundaries – and it is the explicit policy of the European Commission that Standards Bodies are moving this way in particular in the field of services, – the greater the necessity to indicate the legal environment in which the standards have to be embedded.
- Standard-setting in the field of services therefore becomes less technical and much more political. This implies the need to link legal regulation to technical regulation and vice versa.
- Most of the rules and standards are sector-specific, although quite a number of issues bear a horizontal character. In law, the vertical approach leads to inconsistencies and to frictions. The same phenomenon may be observed in the field of standardisation. Sector-specific initiatives may not create friction as long as they are limited to simply standardising technical specifications. However, once they overstep these boundaries and enter into areas that affect public policy issues, such as safety or security, contract formation or complaint handling, sector-specific approaches on services may end up in confusion, if similar or identical issues are dealt with differently.
- National and European Standards Bodies often take action in the shadow of a forthcoming EC directive or regulation. They do not really benefit from the leeway which is left to them even by the legislator, e.g. in particular in education and skills, equipment and premises, and, last but not least, monitoring and inspection.

There are three initiatives which come near to what consumers might expect from such standardisation. Best practice is found in the EN⁷ 14804 on language tours⁸, the French initiative on standards for resident people (AFNOR⁹ NF X 50-

7 EN stands for European Standard.

8 EN 14804 – 'Language study tour providers – Requirements'.

9 AFNOR stands for Association de la Normalisation Française.

056¹⁰) and the German initiative DIN¹¹ 77800 on assisted living for the elderly¹², and EN 12522-2 on furniture removal¹³. The first initiatives more or less cover the full range of core consumer elements. The French AFNOR standard on services for resident people NF X 50-056¹⁴ has set a unique precedent in that it contains references to the French Code de la Consommation¹⁵. EN 12522-2 on furniture removal constitutes a rare example where the quality of services is not only circumscribed by a set of items, but where there are concrete rules foreseen on how the quality of the respective items could and should be processed.

These findings are translated into a policy which permits an increased contribution by the consumer and meets the challenge consumer representatives have to face as well. Minimum or baseline requirements are defined which should serve as a guide in the standardisation process. For each of the six core consumer elements (education and skills, equipment and premises, pre-contractual stage and contract conclusion, content of contract, post contractual stage, monitoring and inspection) the study identifies basic parameters which could be used independent of the type of the service offered.

The minimum and baseline requirements are supplemented by procedural requirements which have to be taken into consideration in standard-setting, thereby distinguishing between the drafting process, the elaboration of the standard and the building of links between the technical standard and contract formation.

II. Introduction

In December 2006 the European Council and the European Parliament have adopted Directive 2006/123/EC¹⁶ on Services. This Directive will give pace to the overall objective of completing the Internal Market for services. Standardisation is given an explicit stand in this Directive. The well established interplay between binding law and voluntary standards through European and National Standards Bodies meets a new challenge. Standardisation of services

10 NF X 50-056 – ‘Services aux personnes à domicile’.

11 DIN stands for Deutsches Institut für Normung.

12 DIN 77800 – ‘Qualitätsanforderungen an Anbieter der Wohnform “Betreutes Wohnen für ältere Menschen” ’ – Quality requirements for providers of “Assisted living for the elderly”.

13 EN 12522-2 – ‘Furniture removal activities – furniture removal for private individuals, Part 1 Service specifications and Part 2: Provision of service’.

14 NF X 50-056 – ‘Services aux personnes à domicile’.

15 Loi n° 93-949 du 26 Juillet 1993 relative au Code de la consommation, <http://www.legifrance.gouv.fr/WAspad/UnCode?code=CCONSOML.rcv>.

16 OJ L 376, 27.12.2006, 36.

is less technical and more political than standardisation of products. That is why standardisation of services and legislative regulation of services are closely intertwined.

It is indispensable to get to know the existing EC directives and regulations on services, not only in the field of services covered by Directive 2006/123/EC, but all sorts of services where the European legislator has intervened in the last decades. These sector-specific rules provide a deep insight into the choice of instruments, the role and function of old and new regulators and old and new instruments. However, the sector-specific rules contain an additional message which is addressed to standardisers: voluntary standards have an increasing role to play in order to complement the already existing European regulatory frame. The Service Directive and the envisaged revision of the New Approach to technical harmonisation and standards¹⁷ fit all too well into such a picture. The European Commission wants Standards Bodies to become key players in particular in areas where the European regulatory net is less tight. The stocktaking of existing national¹⁸, European and international consumer-related technical standards of services demonstrates that Standards Bodies are ready to meet the challenge.

The key question is how to define the yardstick against which existing or forthcoming standards could be measured. The best practice rhetoric is more and more governing the political debate, in particular in areas where clear-cut legal requirements are missing. This author will make clear that the concept of best practice can be used as a starter to develop so-called core consumer elements. Core consumer elements are deduced from existing regulatory concepts where best practice show up as well as from non-regulatory voluntary codes, guidelines, recommendations and standards. These core consumer elements will then be put into practice in order to review the relevant existing EC regulation of services and the major existing national¹⁹, European and international technical standards of services. For analytical purposes the set of rules are grouped together in six categories.

The rather disappointing outcome of the review process serves as a starter for more general observations on the strength and weaknesses of standardisation in the field of services. The weaknesses are identified and serve as a starter to

17 OJ C 136, 4.6.1985, 100.

18 Only UK, Germany, France and to some extent Finland are taken into account, see Chapter III, III, 2.

19 Only UK, Germany, France and to some extent Finland are taken into account, see Chapter III, III, 2.

break down the core consumer elements into minimum or baseline requirements which will ideally guide ANEC as well as national consumer representatives in their standardisation work. The strengths are highlighted in the identification of already existing standards which deserve to be denominated as “best practice”. The minimum or baseline requirements shall contribute to define the consumer input into the standardisation of services.

Bearing in mind the on-going activities under the Second Programming Mandate M/371 addressed to CEN by the European Commission, and, in particular, the BSI led cross-sectorial service standardisation feasibility study²⁰, it should be noted that the purpose of this study is to not only define core consumer elements and their minimum requirements in service standards, but to also analyse service standardisation in its broader, regulatory framework. As such, the study at hand and the feasibility study led by BSI should be considered as complementary.

Chapter I: European Integration and Standardisation of Services

20 See for more details Chapter III, III, 2, a).

Standardisation of services is a challenge, for policy makers at the European level, for the Member States, and last but not least, for the Standards Bodies, be they national, European or international. The history of standardisation is old, it goes back to the Roman times, but it has always and entirely focused on products. In the second half of the last century services have gained an ever growing importance. Rosecrance²¹ published in 1986 his book on “the service society” which became known around the millennium as the so-called information or information services society. The European Community followed the two-fold basis, from products to services. The first three decades of the European integration policy were marked by the strong impetus to strike down tariffs and quantitative restrictions (Article 28 ET)²². The famous Single European Act²³, forestalled by the White Paper on the Completion of the Internal Market²⁴ constituted the turning point in the European integration policy, both for products and services. However, it took until the elaboration of the so-called Service Directive²⁵, before the subject gained the importance it deserved.

I. The existing EC approach on the regulation of products – the blueprint for services

In the late seventies the European Commission had to recognise that it does not suffice to turn down tariffs and quantitative restrictions to establish a common market, but that there are numerous non-tariff barriers to trade which hindered the free flow of cross border trade, amongst others technical standards. The first reaction of the European Commission was to attempt to adopt product related directives which contained technical standards the producers had to comply with if they wanted to enter the Common Market. However, this burdensome procedure turned out to be a failure. The European Parliament was and is not the appropriate forum to discuss technical properties. It is here where the famous New Approach to technical harmonisation and standards²⁶ comes in, being a *horizontal* device to elaborate European standards. Up to today the New Approach still determines EC policy on standardisation.

21 Commerce and Conquest in the Modern World, 1986.

22 European Treaties, here in the version of the Treaty of Nice, which entered into force on the 1.2.2003; OJ C 80, 10.03.2001, 1.

23 The SEA, signed in Luxembourg on 17 February 1986 by the nine Member States and on 28 February 1986 by Denmark, Italy and Greece, is the first major amendment of the Treaty establishing the European Economic Community (EEC); OJ L 169, 29.06.1987; 1, see http://europa.eu/scadplus/treaties/singleact_en.htm.

24 COM (1985) 314 final, 23.7.1985.

25 OJ L 376, 27.12.2006, 36.

26 OJ C 136, 4.6.1985, 100.

As early as 1985 the European Commission developed its influential so-called “New Approach” to technical harmonisation and standards in order to break down the non-tariff or the technical barriers to trade whose importance came clear once the customs and tariffs in the Common Market had vanished. The New Approach has boosted standardisation in Europe. Its success lies in the combination of binding European requirements and voluntary technical standards elaborated by European Standards Bodies on the basis of a Memorandum of Understanding concluded with the European Commission. The European Commission may mandate CEN/CENELEC²⁷, and later, ETSI²⁸ to elaborate a specific standard when and where there is a need, in exchange for providing the necessary funds. In democratic terms, the New Approach entailed a delegation from statutory lawmaking to private entities²⁹. The participation of consumers in the technical standard-making is meant to legitimise the power shift³⁰.

However, neither in 1985 nor after have the European Commission and Member States have made any effort to grant consumers and consumer organisations a specific legal status. Participation is not even hammered down in Directive 98/34/EC³¹ or the General Guidelines³², concluded between the European Commission, EFTA, and the European Standards Bodies. ANEC’s status depends firstly from the willingness of European Standards Bodies to share the standard-making work with consumers, and secondly, from the European Commission’s willingness to provide the necessary funds in order to enable participation. That is why the legal basis of consumer participation is still rather weak. These deficiencies have been subject of concern for more than two decades.

The New Approach finally led in 1995 to the foundation of ANEC. However, ANEC is not given an explicit role in the New Approach, it is not formally integrated into the Memorandum of Understanding and, last but not least, none

27 CEN stands for European Committee for Standardisation, CENELEC stands for European Committee for Electrotechnical Standardisation.

28 ETSI stands for European Telecommunication Standards Institute.

29 ECJ, 13.6.1958, Case 9/56, *Moroni*, ECR 1958, 9, 43 et seq.

30 *Micklitz*, Considerations Shaping Future Consumer Participation in European Product Safety Law, in: Joerges (ed.), Workshop on Product Safety and Product Liability in the European Community, EUI-Working Paper, 1989, pp. 182-205.

31 OJ L 204, 21.7.1998, 37; see for a consolidated, however, unofficial updated version, which includes the numerous amendments, http://ec.europa.eu/enterprise/tris/consolidated/index_en.pdf.

32 General Guidelines for the Cooperation between CEN, CENELEC and ETSI and The European Commission and the European Free Trade Association, 28.3.2003 (2003/C 91/04).

of the New Approach type directives refer directly and explicitly to ANEC. In essence ANEC's role results from its status as an Associate (member) of CEN, Cooperating Partner of CENELEC and full member of ETSI. Although each of these memberships grants ANEC the right, inter alia, to nominate consumer experts to technical committees, the principal means of participation – at least in CEN/CENELEC – and the principal right to influence in the governance of the organisations, lies through and with the national standards interests.

Consumer safety has already gained ground since 1985. The European Commission was originally convinced that it would be possible to solve safety issues by way of technical standardisation as well. The “essential requirements” to be developed under New Approach type directives were regarded as a sufficient means to take consumer safety into consideration. The product liability directive 85/374/EEC³³, adopted in the same year, was regarded as a sufficient means to protect consumers against personal injuries and damage to personal goods. These essential requirements were said to lay down mandatory rules which set a binding framework for the development of safety-related technical standards. Not astonishingly, the series of New Approach type directives, mostly designed to deal with industrial products, formulated different safety requirements, as they were designed to the products in question. The so-called “machine directive”³⁴ reached beyond industrial products and addressed the consumer sphere, as certain products could be equally used in the industrial and the private environment.

After a long lasting debate, the European Community adopted in 1992 Directive 92/59/EEC on General Product Safety, which has been revised by Directive 2001/95/EC³⁵. The General Product Safety Directive (GPSD) is meant to function as a safety net, i.e. it applies only in cases where the New Approach type directives do not contain more specific safety requirements. The GPSD relies on the concept of so-called foreseeable use under which the level of safety constitutes a balance between the producer's right to market his products all over the Community and the consumer's right to health and safety. The legal formula is that both rights are only protected as far as they are legitimate³⁶. The true importance of the GPSD, however, lies in its strong impact on the establishment of an efficient post-market control management, which applies to

33 OJ L 210, 7.8.1985, 29.

34 Directive 2006/42/EC on machinery, and amending Directive 95/16/EC, OJ L 157, 9.6.2006, 24.

35 OJ L 11, 15.1.2002, 4.

36 See for more details, *Joerges/Falke/Micklitz/Brüggemeier*, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, 1988.

the New Approach type directives as well. Member States have to establish competent authorities which survey the market and take measures, from screening to recall and withdrawal, if products turn out to be unsafe.

II. EC regulation of services – sector-specific and horizontal approaches

In a way, the history of the regulation of services reflects the approach to products, however, with an important time-lag. The adoption of the Single European Act³⁷, together with the White Paper on the Completion of the Internal Market³⁸, allowed the European Commission to develop sector-specific rules on particular services. The overall idea of all these directives is to develop and establish an Internal Market for banking services, for insurances, for investment services, for public goods, for postal services, for transport services, just to name the most important fields. As the services differ, so do the regulatory techniques. However, the diverse regulatory strategies are united in the perspective that it is for the statutory authorities, at Member State level, under participation of the European Commission, to set a binding legal framework for the elaboration of the appropriate rules. However, just as in the field of technical standards for products, the European Commission had to face the challenge that the expertise available in the different sectors needed to be taken into account in the development of the sector-specific rules. This is particularly the case with financial services, where the European Commission has developed the so-called Lamfalussy procedure³⁹, the purpose of which is, just as in the

37 <http://europa.eu.int/eur-lex/en/treaties/selected/livre509.html>.

38 COM (1985) 314 final, 23.7.1985.

39 "The Lamfalussy procedure, which was originally developed for the securities sector, was born of a proposal put forward by the Committee of Wise Men chaired by Baron Lamfalussy. The aim is to simplify and speed up the complex and lengthy regular EU legislative process by means of a four-level approach. In December 2002, the European Council decided to extend the Lamfalussy procedure to the entire EU financial sector. According to the Lamfalussy procedure, the EU institutions adopt framework legislation under the auspices of the Commission (level one). The Commission prepares the detailed technical implementing measures with the help of four specialist committees (level two). These are the European Banking Committee (EBC), the European Securities Committee (ESC), the European Insurance and Occupational Pensions Committee (EIOPC) and the Financial Conglomerates Committee (FCC) for supervisory issues relating to cross-sector groups. These committees are composed of high-ranking representatives from the national finance ministries under the auspices of the Commission. They decide on implementing measures put forward by the Commission. The Commission may adopt these directly if a qualified majority of the members of the relevant specialist committees approve. In developing the implementing measures, the Commission is again advised by committees of experts at the third level of the Lamfalussy procedure. These are the Committee of European Banking Supervisors (CEBS), the Committee of European Securities Regulators (CESR) and the Committee of European Insurance and Occupational Pensions

field of technical standardisation, to share the powers in rule-making between the European Parliament, the Council, the European Commission and national regulatory agencies. The latter two provide the necessary expertise in financial services, whereas the former two organise the political process. As law making remains very much in the hands of the traditional legislators (European Parliament, Council and Commission), – despite the expertise drawn from the national agencies – there is little democratic need to integrate consumer organisations.

However, just as in the field of products, the remaining differences in the field of services could not be overcome by sector-specific harmonisation. A horizontal approach was needed to deal with the “rest” of all those services, for which no particular sector-specific rules are needed. The European Commission undertook three important steps to prepare the ground for establishing an Internal Market for services, outside sector-specific rules:

- Directive 2005/36/EC⁴⁰ lays down rules on the recognition of professional qualifications. Whilst Member States’ rules vary considerably, the Directive defines common requirements in order to ensure that services are undertaken only by those who have the necessary professional skills.
- Directive 2006/123/EC on Services⁴¹, more exactly Articles 26 and 27, pave the way for the standardisation of services in order to ensure their “quality”.
- The revision and extension of the New Approach to technical harmonisation and standards to services. This initiative, which has not even yet led to an official working document of the European Commission, must be seen in the context of the Directive on the recognition of professional services, and the Service Directive. It even

Supervisors (CEIOPS). These committees are composed of high-ranking representatives from the national supervisory authorities. The Banking Supervision Committee also includes representatives from the national central banks. Apart from advising and assisting the Commission in the development of technical implementing measures, the committees of experts also deal with the exchange of supervisory information, the consistent implementation of European legal acts and the harmonisation of supervisory practices in the European market for financial services. At the fourth level, the Commission – in close cooperation with the member states, the regulatory authorities involved in level three and the private sector – checks that Community law is applied consistently,” taken from the Committee of European Banking Supervisors, http://www.bundesbank.de/bankenaufsicht/bankenaufsicht_cebs_lamfalussy.en.php.

40 OJ L 255, 30.9.2005, 22.

41 OJ L 376, 27.12.2006, 36.

seems that the European Commission has postponed the idea of elaborating a separate policy document on standardisation of services.

It will have to be shown that the recent EC initiative suffers from the same deficiencies which have already marked the New Approach to technical standards and harmonisation. The European Commission intends to promote standardisation of services, but sets aside matters of safety of services. The analysis will demonstrate that the European Commission, *in casu* DG Internal Market and Services (hereafter DG MARKET) and DG Health and Consumer Affairs (DG SANCO),

- is not considering the extension of the GPSD to Services,
- does not even think about appropriate rules on the liability for the safety of services. The 1991 draft on the liability for the safety of services⁴² was withdrawn after strong opposition of some Member States. The Service Directive only partly compensates for these insufficiencies by way of professional liability insurance and guarantees,
- does not intend to grant consumer organisations a clear-cut legal status in the standardisation of services, although the Service Directive relies on consumers and their organisations to play an active role in “accompanying measures ... to ensure the quality of service provision”⁴³.

III. The Challenge to ANEC – the purpose of the study

The study has been commissioned to define the “core consumer elements in standardisation” and not to set out a consumer policy on standardisation of services at the EU level. The appropriate contractor for the latter project would be the European Commission, through DG MARKET or DG SANCO. Both Directorates, however, do not show much interest in (re)-discussing policy issues that have already been decided 20 years ago. Whilst ANEC⁴⁴ and BEUC⁴⁵ are doing what is possible with their limited resources, their position papers⁴⁶ only have a marginal impact on the ongoing debates.

42 OJ C 12, 18.1.1991, 8 et seq., withdrawn 23.6.1994 COM (1994) 260 final.

43 This is the wording in Article 26 para 1 of the Service Directive.

44 The European consumer voice in standardisation, www.anec.eu.

45 The European Consumer's Organisation, www.beuc.eu.

46 ANEC-SERV-2006-G-021rev; in particular ANEC-GA-2006-G-004 and BEUC/ANEC, Revision of the Toy Safety Directive, Key issues from an ANEC and BEUC perspective.

1. The pragmatic challenge – elaborating consumer requirements on standardisation of services

The study may be understood as a reaction to the *standardisation of services already in action*. The European Commission and the standardisation bodies at national, European and international level have already set precedents long before the overall policy on the role and function of standardisation in the Internal Market for services has been officially approved, be it through the adoption of the Service Directive, or through the adoption of a revised and extended “New Approach”.

In this respect the study constitutes a *reaction to ongoing activities*. Its major purpose is to sum up and systematically analyse the already existing standardisation activities in order to define the core consumer elements which should be respected whenever standardisation of services is initiated. The above mentioned Service Directive provides the necessary legitimacy for such a project.

2. The political challenge – contract law making through the back door

It is striking to see that the European Commission has strategically prepared the ground for its policy on standardisation of services with the strong support of those who are involved in the standardisation but under the exclusion of broader political attention and by setting aside contradicting voices, such as that of ANEC. This author wonders whether the European Parliamentarians are fully aware of the European Commission’s intention to approximate, harmonise or unify European contract rules on services via standardisation. This will be explained below⁴⁷.

The European Commission implicitly suggests in its policy papers that products and services can be put on an equal footing. The contrary seems true. Standardisation of products started as a device to rationalise the production process. The original idea was not to set quality standards, but to guarantee the inter-operability of products. That is why they were called “technical standards”. There is a long-standing discussion on whether these technical standards should and even must deal with the product design so as to allow producers and countries which are not yet in a position to develop a proper design to use the available technical standard as a blueprint for setting up production industries.

47 See Chapter III, I, 2, f).

The situation with regard to services is more complicated. There might be similarities between products and product-bound services, such as car repairs. The service is tied to a product. But there are services which are in no way related to products. Here, the substance of the service is defined through the rights and duties of the parties and the professional environment in which they are embedded. The quality of the product as enshrined and condensed in the rights and duties of the parties very much depends on the professional skills of the service provider. Financial services might stand for such a type of service. Technical standards on such intangible services heavily affect contract law, the making of the contract, the content of the contract, the execution of the contract and legal redress under the contract. Such standards once elaborated may even serve as a reference point for contracts that are concluded orally. All in all, standard-making necessarily involves “approximation or harmonisation or unification” of contract law. If this is correct, standardisation of services ends up in “harmonising” contracts for services through standardisation bodies⁴⁸. The parallel to standard contract terms is obvious. However, standard contract terms are usually elaborated either by a specific company and/or by the competent trade organisation for the whole business sector in question – without their being any link to a public mandate. European Standards Bodies, however, benefit from a particular legitimacy. They are integrated in a concept of shared responsibilities, where EC directives set binding essential requirements which will then have to be completed through technical standards as elaborated by private standardisation bodies. In this respect standardisation of services reaches far beyond the elaboration of standard contract terms. It might well be that the European Commission wants to use the European Standards Bodies as a substitute for the still absent European rules on contracts for services. However, not all standards are mandated by the European Commission, some of them are still business induced.

In order to avoid misunderstandings: standardisation must not necessarily *regulate* the rights and duties of contracting partners, that is standards may not grant specific rights or impose duties on the parties directly. At the very least, however, standardisation of services *affects* the rights and duties of the contracting partners, that is standards may give shape to legal rights in European and national contract law, for example, they may give shape to an already existing legal right to information. The analysis will demonstrate that the

48 See for example the French and German standards on residential homes for the elderly, Chapter V, III.

borderline between establishing rights and duties and giving shape to already existing legal rights and duties is not clear-cut.

3. Too much of a challenge for ANEC alone?

European standards on services are the gateway to the European market on services. ANEC, as the European representative of consumers in standardisation, legitimises the standards-making process. As long as standardisation of services focuses on mere technical aspects, mostly related to product-bound services, the challenge for ANEC is mainly one in terms of quantity – the workload increases – and in terms of quality, e.g. having a yardstick at hand, the so-called “core elements” of consumer needs in service standardisation.

However, the challenge is different if standardisation of services is really meant to design rights and duties of contracting parties. The analysis of the already existing standards and draft standards on services will have to show whether and to what extent the already existing projects concern contract-making. Different levels of legitimacy have to be distinguished.

- The most far reaching dimension concerns the degree to which European Standards Bodies can be entrusted with the task of silently harmonising European contract law on services and whether the participation of consumer organisations can legitimise such a transfer of powers.
- The extension to contract making could facilitate the input of consumer organisations, as consumer contract law was their major field of work for decades. Here consumer organisations may not have to face the challenge of lacking the necessary professional (legal) skills.
- The extension to contract making imposes, however, an additional burden on ANEC, which is designed to organise the technical and scientific consumer input to standardisation. The point then is whether and to what extent ANEC and BEUC have to cooperate in order to secure the most efficient input.
- It will have to be checked to what extent technical skills and legal skills may be tied together so as to increase the consumer input into standardisation, be it with regard to sector-specific vertical fields of services, or with regard to horizontal issues which touch upon all sorts of services, irrespective of sector.

IV. Design of the analysis

In taking into account the larger European background the study will have to proceed in five steps.

The *first* step is to take a deeper look into EC regulation of services (see chapter II). There is a threefold purpose behind this: (1) to demonstrate where the Service Directive together with the policy on standardisation of services must be placed; (2) to highlight the different regulatory framework which determines the role of standardisation, be it as a means to supplement an already existing body of European regulation, or to compensate for the missing European regulatory framework; (3) to provide an idea of what the European legislator understands or does not understand as belonging to the core elements of consumer protection in the regulation of services. In this respect the first step sets the tone for the ongoing analysis of the more specific rules on standardisation of services.

The *second* step is to look into the regulatory framework set out in the Service Directive, the ongoing work on the revision and extension of the New Approach and last but not least, to the already existing technical standards on services (see chapter III). Stock-taking means first and foremost to screen existing regulatory initiatives by three of the biggest National Standards Bodies (DIN⁴⁹, BSI⁵⁰ and AFNOR⁵¹), by the European Standards Bodies (CEN, CENELEC and ETSI) as well as by the international Standards Bodies (ISO⁵² and IEC⁵³), in order to find out the degree to which they have already standardised services.

The *third* step is meant to identify good and bad standardisation practices as well as difficulties in establishing clear-cut normative requirements in service standards (see chapter IV). It is here where the analysis of the already existing sector-specific rules, including consumer protection, ties in. The notion of “best practice” belongs to the common rhetoric of the European Commission. It even shows up in the relevant directives on establishing a European capital market, amongst others Directive 2004/39/EC⁵⁴ on investment services. Best practice is a concept that has been developed in American economics as a parameter to improve the efficiency of companies in comparison to their competitors. However, the European Commission has not yet tried to give shape to the idea,

49 DIN stands for Deutsches Institut für Normung.

50 BSI stands for British Standards Institution.

51 AFNOR stands for Association de la Normalisation Française.

52 ISO stands for International Organization for Standardisation.

53 IEC stands for International Electrotechnical Commission.

54 OJ L 145, 30.4.2004, 1.

either be it as a policy or legal concept. As a general “policy guiding principle” – not to say as a legal principle – in standard-making, it cannot be reduced to a mere economic efficiency orientated model. Best practice needs to integrate value driven elements. It is one of the challenges of the project to define such a common set of parameters. The elements which can be derived from the sector-specific rules might enlarge the perspective. The so identified best practice would then have to be condensed to core consumer elements. These parameters have to be rather broad so as to cover *all sorts of services*. It is self-evident that certain services require only certain parameters, not all parameters are equally relevant for all types of services. The definition of core elements must do justice to the diversity of the services and at the same time provide for criteria which are equally applicable to all sorts of services. Again, the broader regulatory framework – the standardisation of services on the one hand, and the sector-specific EC rules on the other – in the New Approach type of thinking, might help to meet the challenge.

In a *fourth* step the core consumer elements are used as a yardstick to screen the existing EC regulation of services as well as the technical standards (chapter V). In order to allow for a better comparison, EC regulation and the technical standards are grouped around six major issues: existing EC regulation of services, standardisation in tourism services, services for the elderly, furniture removal, postal services, and transport services.

The *last part* of the study places the concrete findings of the study, i.e. mainly the core consumer elements, in the broader European regulatory context (chapter VI). The results will contribute to promote a consumer-orientated policy on standardisation of services, in particular in the Service Directive in the Internal Market. The summary should tie together the different regulatory approaches of the European Community and specify where and how the core consumer elements could be integrated into a European regulatory framework. This will be done by formulating minimum or baseline requirements.

Chapter II: Existing EC Regulation of services

I. Type of services (vertical classification)

The overall purpose of the analysis of existing EC regulation of services is to demonstrate the different areas of services where the European Community has already taken action. Such a survey contributes to the envisaged study at least in a two-fold sense, it demonstrates the areas where each and every attempt to standardise services has to respect the legal framework in which standardisation has to be embedded. At the same time the survey allows at a

later stage to help identify the best practice which should be taken as a yardstick against which all standardisation projects outside regulated fields of services could be measured.

The European Commission pursues mainly a sector-specific, vertical approach. Each of the sectors has its own history. Not each sector involves a different Directorate within the European Commission, but the competence for the six sectors under scrutiny is spread over three Directorates – DG SANCO, DG TREN and DG MARKET⁵⁵. The latter being so important and so big in comparison at least to DG SANCO that the subdivisions which deal with financial services, network services and other services (the services directive) come near to a separate Directorate.

1. Consumer protective device

Consumer policy goes back to the seventies, the first and second consumer programmes⁵⁶. Two of the adopted directives, *in concreto* those on package tours⁵⁷ and time-sharing⁵⁸ are to be understood as a reaction to a growing new industry which yielded the need for a European wide solution. The Consumer Credit Directive⁵⁹ is inspired by the intention to establish a European market on consumer credit. Common standards should encourage consumers to compare prices and make better choices. The proposal currently under discussion is meant to overcome the still existing boundaries of nationally shaped consumer credit markets. The Commission project on European Contract⁶⁰ law sets a new tone in consumer contract law regulation.

The existing Regulation No. 261/2004⁶¹ on air passengers and the envisaged one on railroad passengers⁶² fit relatively well into the picture of cross-border mobility and the need for substantive protection of the economic interests of consumers and travellers. Both regulations are designed to grant passengers basic mandatory rights, just as in consumer law directives. The addressees,

55 DG SANCO (Santé et Consommation) stands for DG Health and Consumer Protection, DG MARKET stands for DG Internal Market and Services, DG TREN stands for DG Energy and Transport.

56 OJ C 92, 25.4.1975 and OJ C 133, 3.6.1981.

57 OJ L 158, 23.6.1990, 59.

58 OJ L 280, 29.10.1994, 83.

59 OJ L 42, 12.2.1987, 48.

60 See COM (2001) 398 final, 11.7.2001, OJ C 255, 13.9.2001, 1, also *Grundmann/Stuyck* (eds.), *An Academic Green Paper on European Contract Law*, 2002. The Communication has boosted publication of articles and books on European contract law.

61 OJ L 46, 17.2.2004, 1.

62 COM (2004) 143 final, 3.3.2004.

however, are not consumers in the narrow sense as defined under the consumer law directives⁶³, but passengers, a category which covers businessmen as well as private end consumers. The air passenger regulation⁶⁴ which has been revised in 2004 serves DG TREN as a blueprint for shaping the railroad passenger rights.

The true challenge in the field of transport is the relationship between EC rules and international conventions. The regulatory framework is not set by the European Community alone, but by international conventions as well. Standards will have to take into account the large regulatory environment. The Air Passengers Rights Regulation might serve as an example for the difficult relationship between EC law and international conventions. The Air Passengers Rights Regulation reaches beyond the Montreal Convention⁶⁵ which has led two business organisations to challenge the competence of the European Community to adopt conflicting European rules. The European Court of Justice, however, confirmed the validity of the Regulation⁶⁶. Otherwise the air transport industry could have escaped EC law, being bound only to less stringent international rules. It demonstrates that rule-making, be it through binding laws or through non-binding technical standards, reaches far beyond the Internal Market, at least with regard to specific sectors.

2. Financial services

Financial services might cover insurance contracts, investment contracts and banking contracts. From a consumer point of view the focus lies on consumer credit, mortgage credit, insurance and investment, with a side glance to the payment services⁶⁷. All of these initiatives do not address the consumer but the insured, the investor and/or the creditor, although the categories are largely overlapping. The EC initiatives have in common that the European Commission intends to open up markets in order to create and enhance European-wide competition between national suppliers. The insured, the investors and the creditors, notwithstanding whether they are consumers are not, will benefit from

63 See e.g. Article 2 of Directive 85/577/EEC on doorstep selling, where the notion of consumer was defined for the first time: For the purposes of this Directive: "consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession.

64 OJ L 46, 17.2.2004, 1.

65 Convention for the Unification of Certain Rules for International Carriage by Air Montreal, 28 May 1999, <http://www.icao.int/icao/en/leb/mtl199.pdf>.

66 Judgment 10.6.2006, C-344/04, *International Air Transport Association, European Low Fares Airline Association vs. Department for Transport*, ECR 2006, I-403.

67 The Directive has been adopted on the 28.3.2007, however, the final version is not yet available, see therefore COM (2005) 1.12.2005, 603 final.

increased competition. Despite these common characteristics each sector has its own historical peculiarities.

After the failure of early policy initiatives to open up the markets for insurances, the European Commission sued Germany for its rigid prior approval system of insurance contracts, as not being in line with the basic market freedoms. The European Court of Justice judgement⁶⁸, which partly supported the European Commission, triggered off a three step process, under which the European Commission managed to gradually open up the market for insurances. However, Member States rejected any attempt to define a common set of European rules on insurance contracts⁶⁹.

The spirit in the field of financial instruments is very much the same as in the insurance market, although the background is different. The two banking coordination directives⁷⁰ which allow Europe-wide activities under one single regulatory regime – the Euro-pass – are only applicable to companies which are, *inter alia*, providing investment services. The first Directive on investment services 93/22/EEC⁷¹ closed that gap. The second investment Directive 2004/39/EC⁷² pursues a two-fold aim, establishing a fully-fledged Euro-pass and improving investor protection.

3. Public services

In the aftermath of the Single European Act⁷³, the European Commission (re)discovered Article 86 of the European Treaty as a powerful means to challenge Member States natural monopolies in the telecommunication, energy and railway markets. The Commission managed to gradually open up the markets, however, being confronted with the challenge of *services publiques*, or well settled concepts that the state has to make sure that all customers have access to public goods⁷⁴.

68 ECJ, 4.12.1986, C-205/85, *Commission vs. Germany*, ECR 1986, 3755.

69 *Reich*, § 23.9, in: *Reich/Micklitz, Europäisches Verbraucherrecht*, 2003, p. 816.

70 Council Directive 77/780/EEC on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, and OJ L 322, 17.12.1977, 30; Directive 89/646/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ L 386, 31.12.1989, *Reich*, § 3.28, in: *Reich/Micklitz, Europäisches Verbraucherrecht*, 2003, p. 121.

71 OJ L 141, 11.6.1993, 1.

72 OJ L 145, 30.4.2004, 1.

73 <http://europa.eu.int/eur-lex/en/treaties/selected/livre509.html>.

74 *Cameron* (ed.), *Legal Aspects of EU Energy Regulation, Implementing the New Directive on Electricity and Gas Across Europe*, 2005.

The markets differ considerably in the degree to which the European Commission has achieved its policy. The European Community has adopted a whole series of directives all aimed at opening up the relevant market sectors with telecommunication and postal services being at the forefront of the development, energy following suit, whereas the railway market is still rather closed.

4. Service Directive

The Service Directive 2006/123/EC⁷⁵ does not really fit into a sectoral approach. It seems as if the Service Directive is meant to establish a common framework for the “harmonisation” of the remaining services *d’un seul coup*. “Harmonisation” has been put in quotation marks, because the Service Directive differs from all other vertical subject-related approaches on services in a two-fold way: first, it is not related to a particular sector – although quite a number of services are excluded from the scope of application – and second, it is not designed to harmonise services in the proper sense. Instead, the Directive should be understood as a combination of the softened country of origin principle⁷⁶ designed to establish freedom of services and freedom of establishment⁷⁷ combined with a quasi New Approach type of regulation, meant to shape the quality of services, including contractual rules. So in a way it might be misleading to classify the Service Directive as vertical strategy. The Directive has a limited scope of application by exempting, for example, labour law and health care services. However, the European Commission sticks to the idea to liberalise health care services as it was originally foreseen in the Draft Service Directive.⁷⁸ The exact scope shall be presented at a latter stage.

The following table intends to classify the different types of services, consumer, transport, financial services, network services, services that come under the scope of the Service Directive such as contracts with liberal professions and craftsmen and last but not least health care services.

75 OJ L 376, 27.12.2006, 36.

76 As defined by Wikipedia: The country of origin principle states that, where an action or service is performed in one country but received in another, the applicable law is the law of the country where the action or service is performed. The opposing principle is the *country of reception principle*. For example, if a sale of goods is made over the Internet from a website in France to a purchaser in Italy, the country of origin principle would be said to apply if French law applied to the transaction, and the country of reception principle if Italian law prevailed.

77 These are the basic freedoms guaranteed under the Treaty, the freedom to provide services all over the European Community and the freedom to establish a business site wherever in the European Community.

78 See in particular COM (2004), 2 final, 25.2.2004.

Consumer contract law on services	Transport (air and railway)	Financial services (insurance, investment, payment)	Network services for customers (electricity, gas, telecommunication, postal services)	Other services in the Internal Market (such as contracts with liberal professions and craftsmen)	Health services (separate initiative)
Credit 87/102	Air passenger rights Regulation No. 261/2004, COM (2000) 365 final ⁷⁹ , COM (2005) 46 ⁸⁰ and 47 ⁸¹ final.	Insurance 92/49 (damage), 92/96 (life insurance)	Telecommunication 2002/19-22 and 2002/58 Postal services 97/67/EC, 2002/39/EC and COM (2006) 594 final ⁸²	Service Directive 2006/123/EC ⁸³	No specific rules in secondary community law
Package tours 90/314	COM (2004) 143 final ⁸⁴ on railroad passenger rights; COM (2004) 144 final ⁸⁵ on rail freight services	Financial instruments 2004/39	Electricity 2003/54 and Gas 2003/55		Commission starts public consultation on patient mobility ⁸⁶
Time sharing 94/47		Payments services ⁸⁷	Third railway package; COM (2004) 139 final ⁸⁸		

79 21.6.2000, http://eur-lex.europa.eu/LexUriServ/site/de/com/2000/com2000_0365de01.pdf.

80 16.2.2006, http://ec.europa.eu/transport/air_portal/passenger_rights/doc/com_2005_046_en.pdf.

81 16.2.2006, http://ec.europa.eu/transport/air_portal/passenger_rights/doc/com_2005_047_en.pdf.

82 18.10.2006, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0594en01.pdf.

83 OJ L 376, 27.12.2006, 36.

84 COM (2004) 143 final, 3.3.2004, no progress since then.

85 COM (2004) 144 final, 3.3.2004 no progress since then.

86 COM (2004) 301 final, 24.4.2004, Follow-up to the High-level reflection process on patient mobility and health care developments in the European Union, see now in reaction to the failed effort under the first draft of the Service Directive to harmonise health services, the new initiative taken by the European Commission, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1267&format=HTML&aged=0&language=DE&guiLanguage=en>.

87 COM (2005) 603 final, 1.12.2005, adopted on the 28.3.2007.

88 3.3.2004.

5. Impact on Standardisation of services

The European Commission has taken a series of attempts to regulate the market in services. However, so far most of the rules cover certain sectors only, mainly because the policy behind has been and still is to open-up markets. In sector-specific rules standardisation may only fill gaps left by the legislator. In essence, the regulatory framework is set by the relevant Directives. EC law defines a minimum set of binding and non-binding rules which define the relationship between the service provider and the consumer. This policy has now been overruled by the Services Directive. The Service Directive rests on a different policy. The idea is not so much to define harmonised European legal rules, be they binding or not, which shape the relationship between the service provider and the consumer, but to use the freedom of services and the freedom of establishment as the leading concepts. Standardisation has to compensate for the absence of legal rules. In this respect standardisation within the Directive of Services has a much more prominent role to play.

II. Types of services (horizontal classification)

The European Commission did not rely on a vertical approach alone to set common European rules on contracts for services. Two kinds of strategies might be identified, both aiming at a horizontal regulation.

1. Consumer protection regulation on services

Usually, the four consumer directives, 97/7/EC⁸⁹ on distance selling, 2002/65/EC⁹⁰ on distance selling for financial services, 2000/31/EC⁹¹ on e-commerce, and 93/13/EC⁹² on unfair terms in consumer contracts, are put into the same box, the one of consumer protection. However, contrary to the directives on credit, package tours and time sharing, these four directives lay down horizontal rules on consumer contracts, both for sales contracts and contracts for services. The first three are all dealing with the modalities under which the contract is concluded, i.e. the relevant distance communication means. The doubling of the distance selling regulation turned out to be the result of hard lobbying of the financial services sector claiming special treatment due to the specific character of these services. Directive 2002/65/EC on distance selling of financial services, which was adopted five years after Directive 97/7/EC on distance selling provides for particular rules on financial

89 OJ L 144, 4.6.1997, 19.

90 OJ L 271, 9.10.2002, 16.

91 OJ L 178, 17.7.2000, 1.

92 OJ L 95, 21.4.1993, 29.

services. Ironically enough, the new Directive goes even further than its predecessor⁹³. Whilst Directive 2002/65/EC closes an important loophole, the two Directives altogether do not fully cover the type of services under scrutiny as package tour contracts and transport contracts are exempted from the scope of application. The e-commerce Directive 2000/31/EC is applicable throughout all sorts of services, independent of whether the parties to the contract are consumers or suppliers.

Directive 93/13/EEC on unfair contract terms designed to protect consumers covers all sorts of consumer services, for example credit, package tour and time sharing contracts, as well as transport, network contracts and all other types of service contracts which come under the scope of the Service Directive – provided the party to the contract is a professional *private* supplier. There has been discussion in legal doctrine on the degree to which the Directive 93/13/EEC on unfair terms, as it stands, covers public suppliers as well, that is mainly suppliers of energy and railroad transport services⁹⁴. The debate lost impetus due to the privatisation policy of the European Community in particular with regard to former natural monopolies. The following table categorises the different sets of regulatory means according the way in which they are communicated, via distant communication, via e-commerce and to the degree to which contract terms concluded in the various areas, such as credit, transport, financial services, network services, other services are subject to control of their fairness. Yes/no indicates whether the horizontal legislation applies or not to that particular service sector.

93 See *Micklitz/Schirmbacher*, *Revue européenne de droit bancaire & financier*, 2004, 457-486.

94 *Butters*, *Vertragsgerechtigkeit in der öffentlichen Versorgungswirtschaft*, 2003; *Whittaker*, *Law Quarterly Review* 116 (2000), 95.

Horizontal legislation (means of communication standard terms)	Credit, package tour, time sharing	Transport (air and railway)	Financial services (insurance, investment, payment)	Network services for customers (electricity, gas, telecommunication, postal services)	Other services in the Internal Market (such as contracts with liberal professions and craftsmen)
Distance selling 97/7	No with regard to package tours, ⁹⁵ Yes with regard to time sharing contracts ⁹⁶	No ⁹⁷	No	Yes	Yes
E-commerce 2000/31	Yes	Yes	Yes	Yes	Yes
Distance selling of financial services 2002/65			Yes, only applicable to these services		
Unfair terms 93/13	Yes	As far as undertakings are privatised	Yes	As far as undertakings are privatised	As far as undertakings are privatised

2. International Private Law (IPL)

International private law⁹⁸ remains important in those fields where EC law has not led to harmonisation. This is true for all those consumer relevant services

95 At least in principle, but see Article 3 (2) third indent.

96 Although Article 4 (1) 94/47 provides for a concluding the contract in writing, however, this can also be done by storing the contract on a durable medium, Article 5 (1) of Directive 97/7/EC on distance selling.

97 Including leasing, as decided by the European Court of Justice in *easy car*, ECJ, 10.3.2005, C-336/03, *Easy Car vs. Office of Fair Trading*, ECR 2005, 1974.

98 Wikipedia: "Conflict of laws, or private international law, or international private law is that branch of *international law* and *interstate law* that regulates all *lawsuits* involving a 'foreign' law element, where a difference in result will occur depending on which laws are applied as the *lex causae*. Firstly, it is concerned with determining whether the proposed forum has *jurisdiction* to adjudicate and is the appropriate *venue* for dealing with the dispute, and, secondly, with determining which of the competing *state's* laws are to be applied to resolve the dispute. It also deals with the *enforcement of foreign judgments*. Its three different names are generally interchangeable, although none of them is wholly accurate or properly descriptive. Within local federal systems where inter-state legal conflicts require resolution, (such as in the *United States*), the term 'Conflict of Laws' is preferred simply because such cases are not an international issue. Hence the term 'Conflict of Laws' is a more general term for a legal process for resolving similar disputes, regardless if the relevant legal systems are international or inter-state, though this term is also criticised as being misleading in that the object is the resolution of *conflicts* between competing systems rather than 'conflict' itself."

which come under the scope of application of the Services Directive. International private law is based on the idea that out of two legal orders one will have to be selected. It seems as if international private law has nothing to do with standardisation in general and service standards in particular. However, if there are European standards on the quality of services or the safety of services, these standards may indirectly affect the choice of law. Courts all over the European Community tend to refer to technical standards to decide whether a product has a merchantable quality or whether a service has been provided safely. If the supplier and the producer comply with the technical standards, the law often assumes that he has met his obligations. In this respect standards even play an important role in international private law. European standards might help to define a common level of quality and safety which is brought to bear irrespective of the applicable law.

The Rome Convention was adopted in 1980⁹⁹. It lays down common – i.e. European – rules for the applicable law in contracts for goods and services, independent of the addressee, although the Convention provides for specific rules on the protection of the consumer in Article 5. The Rome Convention is currently under review. The European Commission published a first draft on the 15th December 2005 which is now subject to a broad discussion.

So far the existing European international private law has suffered from great inconsistencies. The first generation of consumer law directives, as adopted in the late eighties did not contain rules on the applicable law, such as consumer credit and package tours. The younger generation, as adopted in the mid-nineties, however, provided for rules which deviated from the Rome Convention – both directives 97/7/EC on distance selling, and 2002/65/EC distance selling of financial services. The most recent generation of directives, however, return to the earlier approach, for example no specific rules on the applicable law are foreseen in the e-commerce directive, 2000/31/EC and the Service Directive 2006/123/EC. The first major aim of the envisaged EC-regulation¹⁰⁰, meant to revise the Rome Convention, is to overcome these inconsistencies by defining one and the same rule for consumer contracts – the law where the consumer has his or her habitual residence. This would mean that consumer directives dealing with specific types of services would no longer contain rules on the applicable law. The basic rule would have to be found in the draft regulation. However, the draft regulation as it stands now is far from being complete, as it does not cover all types of services. The second major aim of the draft

99 Publication of the consolidated version, OJ C 27, 26.1.1998, 34.

100 COM (2005), 650 final, 15.12.2005.

regulation is to put international private law rules under the jurisdiction of the European Court of Justice by way of relying on Articles 61/67 of the ET. This has not been the case under the Rome Convention which was concluded by Member States as an international convention.

However, international private law is not only important to define the applicable contract law. It might well happen that consumers come into contact with foreign law without concluding a contract, e.g. if they suffer from an accident during their holidays. International private law is therefore likewise important in deciding over the applicable law in case consumers suffer from injuries or economic loss through the non-fulfilment of extra-contractual obligations. So far there has not been any European convention concluded by Member States similar to the Rome Convention on Contract Law or a European regulation, adopted by the European Community, dealing with extra-contractual liability.

This gap will now be closed by the draft EC regulation on extra-contractual liability, the so-called Rome II Regulation¹⁰¹. The work is far advanced and the envisaged rules already take clear shape. The project does not distinguish between liability resulting from unsafe goods, or liability resulting from unsafe services. The draft regulation will apply in situations involving a conflict of laws to non-contractual obligations in civil and commercial matters, with limited exemptions for accountants and trustees. It lays down specific rules for product liability and unfair commercial practices. Directive 85/374/EEC on product liability, however, applies to products only. Electricity is regarded as a product, contrary to its supply which is regarded as a service. That is why liability claims which result from accidents deriving from the unsafe use or unsafe supply of electricity would come under the Directive. The originally intended directive on the liability for the safety of services had to be withdrawn due to the strong resistance of some Member States¹⁰². This means that there is an important gap in the existing set of European liability rules. This is all the more important as the Service Directive opens up markets for all sorts of non-sector-specific services without providing for appropriate rules that deal with the liability for the safety of services in cross border cases¹⁰³. It remains to be seen whether the European Commission is willing to pick up the issue of liability for the safety of

101 COM (2003) 427 final, 22.7.2003, as revised COM (2006) 83 final, 21.2.2006.

102 See with regard to the proposal COM (1990) 482 final, OJ C 12, 18.1.1991, 8 and the withdrawal COM (1994) 260 final.

103 See for a more detailed analysis, Chapter III, I. 2.

services again, maybe under a new regulatory device¹⁰⁴. As long as the European Commission does not take action, there is ample room for European Standards Bodies to integrate rules on the applicable law and even more so on shaping standards for the scheme of professional liabilities and guarantees as introduced by the Service Directive¹⁰⁵.

The next table identifies the impact of the Rome I and Rome II regulations on the different sector-specific directives and regulations.

IPL rules	Time sharing	Distance selling/unfair terms	Transport (air and railway)	Financial services (insurance investment payment)	Network services for customers (electricity gas, telecommunication, postal services)	Other services in the Internal Market (such as contracts with liberal professions and craftsmen)
Draft Regulation on Rome I ¹⁰⁶	Specific IPR-rules in the directives, but to be replaced by the consumers habitual residence rule in Rome I	Specific IPR-rules in the directives, but to be replaced by the consumers habitual residence rule in Rome I	EC Regulations applicable on cross border contracts only, but Rome I remains important for complementary contract terms	Excluded from Rome I, specific rules on insurances to be maintained	Covered by Rome I	Covered by Rome I
Draft Regulation on Rome II ¹⁰⁷	Yes	Yes	Yes	Yes, but potential exceptions for specific	Yes	Yes, but potential exception for

104 See *Magnus/Micklitz*, Liability for the Safety of Services, 2005, who have developed a proposal for a European rule on the liability for the safety of services, see under Chapter III, I, 3.

105 See for more details Chapter III, I, 2, d).

106 COM (2005) 650 final, 15.12.2005.

107 COM (2003) 427 final, 22.7.2003, as revised COM (2006) 83 final, 21.2.2006.

IPL rules	Time sharing	Distance selling/unfair terms	Transport (air and railway)	Financial services (insurance investment payment)	Network services for customers (electricity gas, telecommunication, postal services)	Other services in the Internal Market (such as contracts with liberal professions and craftsmen)
				financial services ¹⁰⁸		accountants ¹⁰⁹

3. Impact on standardisation of services

So far the European legislator has chosen a twofold horizontal approach, (1) the legislator harmonises specific means of communication (distance selling, e-commerce) or specific types of contract terms across all sorts of services, (2) the legislator defines rules on the applicable law be they harmonised (time sharing, distance selling, unfair terms, transport, financial services, network services or not (those coming under the Service Directive). Standardisation plays a differing role according to the approach chosen. There is an easy formula to recall: the more legal rules there are, i.e. the denser the net of legal rules, the less important is standardisation – and vice versa. That is why standardisation plays a prominent role where consumer protection rules are less developed, such as in the area of network contracts or more or less missing, as under the Service Directive.

III. Choice of instruments in public/private law

EC regulation in the field of services is first and foremost realised by using *legal measures* as appropriate means to complete the Internal Market, thereby guaranteeing a high level of consumer protection – at least this is the officially worded objective. However, it will have to be shown that the EC legislator is more and more shifting away from traditional legal measures towards less traditional ones, meaning those that do not belong to the classical set of legal instruments being developed since the Treaty of Rome entered into force. The

108 Article 1 e) for non-contractual obligations arising from relationships between settlers, trustees and beneficiaries of a trust created voluntarily and evidenced in writing.

109 Article 1 d) liability of partners, management bodies and persons responsible for carrying out the statutory audits of accounting documents of an association, a company or firm or other body corporate or incorporate, provided they are subject to specific rules of company law or other specific provisions applicable to such persons or bodies.

EC legislator is seeking *new regulatory techniques* which combine traditional “command and control” regulation with new forms of regulation through softer forms of intervention. It is here where the Service Directive paves the way for new initiatives to use standardisation as a means to increase the quality of services in the Internal Market.

1. Traditional versus less traditional instruments

However, the starting point is traditional regulation through public and private law means. This distinction is used pragmatically: public law and public regulatory instruments are mostly all measures which are taken to establish a competitive European market for the services in question, for setting up single passport regulation on the basis of home country authorisations, for privatising former natural monopolies, for guaranteeing access to universal services, for unbundling the supply of the service and the supply of the net, for creating single contact points to enhance cooperation between agencies – and for setting binding requirements on the professional training of service providers. Private law is used as an instrument to directly intervene in the contract for services and to shape the contractual obligations¹¹⁰. It is a common characteristic of all regulation on services that the EC legislator combines public and private law means, although the emphasis is put on public law means in the here defined sense – with the exemption of consumer law which nearly entirely focuses on private law.

Traditional instruments in the field of private law are legislative interventions in order to guarantee a certain level of justice in a supposedly unbalanced contractual relationship between a consumer or customer or investor and a supplier by way of mandatory contract law rules. Notwithstanding the field of services, the European legislator heavily relies on mandatory contract law rules, i.e. rules that the parties may not contract out e.g. legislative limits to the exclusion of liability, to shape its consumer policy and to supplement its liberalisation and privatisation policy. In the field of consumer law these mandatory rules laid down minimum standards, thereby leaving it for Member States to adopt more stringent rules. The European Commission is now striving for full harmonisation in consumer contract law, a policy which the Commission

110 There has been an extensive debate in Germany on whether the legal character of civil law changes when it is submitted to regulatory interventions. In particular, scholars from the University of Bremen have been involved in the debate, see *Assmann/Brügemeier/Hart/Joerges*, *Wirtschaftsrecht als Kritik des Privatrechts*, 1980.

has already achieved in other fields where it has taken measures to regulate services¹¹¹.

There is a tendency in European law on services to shift away from traditional instruments towards *less traditional* instruments¹¹². The latter category covers default rules and self-regulatory measures in consumer contract law as well as co-regulation (the combination of a binding legal framework and non-binding self-regulatory instruments)¹¹³. It encompasses contract lawmaking and contract shaping along the line of the *quasi* New Approach of the Service Directive¹¹⁴ as well as the Lamfalussy procedure in Directive 2004/39/EC on financial instruments.

At a closer look, the set of services offers a heterogeneous picture. The European Commission has undertaken numerous attempts to enhance the role and function of self-regulation in consumer law. However, the European Commission did not succeed in substantially influencing the deeply rooted cultural differences between Member States. Those Member States who are traditionally relying on self-regulatory measures could continue their way of implementing EC law, whereas those Member States that have no such tradition remain largely unaffected. Two prominent examples might help to underpin these findings: regulation on unfair commercial practices¹¹⁵ and the role and importance of voluntary dispute settlement procedures¹¹⁶. The same is more or less true with regard to co-regulation. The European Commission did not convince Member States in the Council to test new forms of lawmaking and law enforcement as discussed in various documents in the aftermath of the

111 See the Commission paper on a consumer policy strategy 2002-2006, KOM (2002) 208 endg. 7.5.2002; quite critical on this policy shift, *Reich*, Die Stellung des Verbraucherrechts im "Gemeinsamen Referenzrahmen" und im "optionellen Instrument", in: Reich/Thévenoz (eds.), *Droit de la consommation – Konsumentenrecht – Consumer Law, Liber amicorum Bernd Stauder*, 2006, pp. 357-382.

112 *Ogus*, The Regulation of Services and the Public-Private Divide, in: Caffaggi/Muir Watt (eds.), *New Modes of Governance in Private Law*, to be published in 2007.

113 *Liikanen*, Co-Regulation: a modern approach to regulation, 2000, p. 4. Le Livre blanc sur la gouvernance européenne COM (2001) 428 final and Suivi du Livre blanc sur la gouvernance européenne – Pour un usage mieux adapté des instruments, COM (2002) 278 final, 5.6.2002, Recours encadré à un mécanisme de corégulation. See for a deeper analysis *Cafaggi* (ed.), *Reframing self-regulation in European Private law*, 2006.

114 See Chapter III, I, 2, f).

115 See *Henning-Bodewig*, Unfair Competition Law: European Union and Member States, (International Competition Law) 2006; *Howells/Micklitz/Wilhelmsson*, *European Fair Trading Law – The Unfair Commercial Practices Directive*, 2006.

116 The University of Leuven is currently undertaking a research project inter alia on the law of the 25 Member States on behalf of DG SANCO which will be available soon.

White Paper on Governance¹¹⁷, with the exceptions of the New Approach to technical standards and harmonisation, and the Lamfalussy procedure. A *quasi* New Approach has been integrated into the Service Directive and into the Lamfalussy procedure which is already in action in the field of financial instruments. Both have in common that the law making process is broken down into different levels of action, where the legislator restricts itself to define a kind of broader regulatory framework, which is then completed by way of technical standardisation organisations (i.e. technical experts) or through the input of experts from national regulators (Lamfalussy procedure).

The first two levels of the Lamfalussy procedure are now completed. On the 10th August 2006 the European Commission adopted Directive 2006/73/EC implementing Directive 2004/39/EC on financial instruments¹¹⁸ which lays down detailed rules for the implementation inter alia of contract related provisions in Directive 2004/39/EC on financial instruments¹¹⁹. The consultation on the third level has already been completed¹²⁰. Legal experts and economic experts help to define what the law is. However, it should be remembered that the Lamfalussy procedure is still very much determined through legislative and executive interventions. The situation is different with regard to New Approach type directives where the legislator steps back from laying down detailed rules and leaves the forum to private law makers. This is exactly the avenue to be pursued in the Service Directive.

The following table demonstrates the effect of the public/private law divide, the distinction between traditional/less traditional instruments and between minimum and full harmonisation with regard to the different pieces of EC regulation of services. The horizontal columns indicate the type of service, the vertical ones illustrate the impact of the public/private law divide, the use of instruments and the degree of harmonisation on the different services.

117 COM (2001) 428 final, 25.7.2001;

http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf.

118 OJ L 241, 2.9.2006, 26.

119 OJ L 241, 2.9.2006, 26.

120 http://www.cesr-eu.org/index.php?page=consultation_details&id=76.

	Public law	Private law	Regulatory instruments traditional	Regulatory instruments less traditional	Minimum/full harmonisation
Consumer contract law on services	Commercial practices ¹²¹	Commercial practices, contract law, conflict solution	Comprehensive set of mandatory private law rules Limited use of country of origin principle	Few default rules, Limited impact of self-regulation	Minimum and full
Transport		Contract law and liability	Mandatory rules on transport contracts		Full
Financial services	All financial services: single passport regulation on the basis of home country authorization	Insurance: contract law rules; financial instruments services: conduct of business rules as contract law rules	Insurance: mandatory contract law on specific issues	Financial instruments: rules on conduct of business obligations to be concretised in the Lamfalussy procedure	Full
Network services for customers (electricity, gas, telecommunication, postal services)	Privatisation of public monopolies; guarantee of universal services; unbundling;		Mandatory rules on universal services (services publiques) in network contracts;	“measures” outside universal services in the energy sector ¹²² , and postal services ¹²³	Full

121 Some Member States would understand unfair commercial practices law as public law, others like Austria and Germany as private law.

122 Directive 2003/53/EC and Directive 2003/54/EC Annex A “Measures on Consumer Protection”, which means, according to Article 3 (5), respectively Article 3 (3), “at least household customers”, that is, customers purchasing electricity or gas for their own household consumption.

123 Articles 9 (3), and 19 Directive 2002/39/EC by way of regulatory means and Article 16 quality of services through technical standards.

	Public law	Private law	Regulatory instruments traditional	Regulatory instruments less traditional	Minimum/full harmonisation
Services	Standardised authorisation scheme for the creation of establishments; free access to and free exercise of a service activity; but country of destination retains control powers	Consumer contract law exempted from the scope; Pre-contractual information duties	Binding rules on information duties	Co-regulation and self regulation on the quality of services; Standardisation of services through European Standards Bodies	Full

2. Impact on standardisation of services

It seems fair to say that the Services Directive could be understood as a breakthrough in paving the way for a broader and more substantial application of new regulatory means – in particular standardisation. It might well be – if it is possible to establish standardisation under the auspices of the Services Directive – that standardisation might gain ground even in the vertically regulated sectors. This would entail new tasks for Standards Bodies in completely new areas of the law, such as financial services.

IV. Traditional and less traditional regulators

The shift from *traditional* to *less traditional* instruments¹²⁴ is mirrored in the actors who now appear on the European regulatory agenda. Consequently, they might be divided into *traditional* and *less traditional regulators*. The clear-cut world of regulation now becomes opaque. A whole series of new regulators enter the scene. Ideally speaking, these new regulators should cooperate, if necessary and feasible, in “lawmaking” outside traditional avenues.

In principle, regulation through legislative and executive measures lies in the hands of the legislator and the executive. The latter might adopt not only general rules but take individual regulatory actions. In the field here under investigation, there are two European agencies to be mentioned, the European Railway Agency and the European Aviation Safety Agency. Both deal with

124 See under Chapter II, III. Where the distinction is explained?

safety matters and interoperability of services. They are not involved in the establishment or the completion of the Internal Market. In this respect there is no European regulator in the form of a European agency which has the competence to take regulatory action in the field of services¹²⁵, not even in the form it already exists with regard to pharmaceuticals, agriculture or environmental protection. This does not mean that there is no regulation at the European level outside the EC legislator. However, it is here where the new regulators step in. Their initiatives and their regulatory interventions, in whatever form, constitute the institutional framework of European private law¹²⁶.

1. Various forms of cooperation between national regulators

The EC policy to establish an Internal Market for all sorts of services does not only touch upon national substantive law but also on the way in which the law is concretised, shaped, implemented and enforced – and under what responsibility. Most of the areas being studied here were traditionally governed by public agencies or public administrations. This is true for transport, financial services and network services. The reasons differ according to the type of service. Natural monopolies have led Member States to entrust particular departments of the government with regulatory tasks. The European Commission has been and still is fighting hard to get Member States to set up politically independent public agencies in the energy and the railway sector¹²⁷. This was less necessary in the field of financial services where Member States – even with the support of the service sector concerned – established agencies to supervise the market and eliminate rogue traders. In clearly structured vertical markets on services the European Commission could build on a stable network of national regulators.

Since the adoption of Regulation No. 2006/2004 on Consumer Protection Enforcement Cooperation, the European Commission pushes all Member States to establish a national consumer authority, in particular those Member States which do not yet have a national consumer authority¹²⁸. However,

125 See *Majone*, *Regulating Europe*, 1996.

126 See *Cafaggi*, *The Institutional Framework and the Need for European Governance in European Private Law*, in: *Cafaggi* (ed.), *The Institutional Framework of European Private Law*, 2006, p. 1; *Cafaggi*, *EUI Working Papers*, Law No. 13, 2006.

127 Each Member State has to set up a European Railways Committee (DERC). The Regulatory Body is a body independent from any infrastructure manager, charging body, allocation body or applicant. It is independent in its organisation, legal structure, funding and in its decision making. The legal basis for the creation and competence of the Regulatory Body can be found in Article 10.7 of Directive 2001/12/EC and in Articles 30 and 31 of Directive 2001/14/EC.

128 The Netherlands has established a consumer agency by the 1.1.2007.

Member States are allowed to involve business and consumer organisations in cross-border cooperation. This is stated in Article 4 (2) of the said Regulation which enables the Member States to designate bodies having a legitimate interest in the cessation or prohibition of intra-Community infringements of consumer law directives. The European Commission seems convinced that public enforcement prevails over private enforcement through business and consumer organisations. This might partly result from the fact that EC law, at least in the form of directives, can only address and bind Member States.

The way in which cooperation between national regulators is organised differs considerably. Over time, however, the Commission's strategy is relatively easy to identify. Loosely knitted networks are gradually replaced by formal legal structures in which stakeholders have no role to play anymore. This tendency can be shown in the four different forms of cooperation in the field of services:

(1) The *first* form is the *regulatory committee* which is foreseen in the Regulation 2006/2004 on Consumer Protection Enforcement Cooperation under reference to the comitology procedure¹²⁹. The committee has not yet been set up although the Regulation has entered into force by 1st January 2007¹³⁰. It will bring together only administrations and in the long run probably national consumer agencies. The committee is mostly concerned with cross border regulatory actions.

The *regulatory committee* which will have to be established under the Service Directive is shaped along the line of the comitology procedure. It is entrusted with wide-ranging competences in order to give shape to rather broad requirements which are meant to simplify administrative procedures, to further develop the information requirements, to define the details of the professional liability of service providers and last but not least to the establishment of an alert mechanism by way of a network of Member States under auspices of the European Commission.

The area of postal services follows the same patterns. Directive 97/67/EC¹³¹ has already set up a regulatory committee within the comitology procedure. However, not even the revised Directive 2002/39/EC¹³² has established a committee where the national regulatory agencies are grouped together. Contrary to most other fields of Services, the European legislator has not established a formal regulatory committee in which the European regulatory agencies are united under an EC law regime. This might be due to the existence of the European Committee for

129 See Article 19, a ruling which has been introduced under pressure in particular from Austria and Germany.

130 The EU-wide network of enforcement authorities was officially launched by Commissioner M. Kuneva on 28.2.2007 on the occasion of the first of regular meetings of EU enforcement authorities. However, the website does not provide evidence yet on whether the committee has been set up, http://ec.europa.eu/consumers/prot_rules/admin_coop/index_en.htm.

131 OJ L 15, 21.1.1998, 14.

132 OJ L 176, 5.7.2002, 21

Postal Regulation (CERP), which was set up in 1992 and which maintains close ties to the Commission, however, so far on a voluntary basis¹³³.

(2) The *second* form is well established committees in the financial sector which are set up along the lines of the *Lamfalussy* procedure. CEIOPS, the Committee on European Insurance and Occupation Pensions, performs the functions of the Level 3 Committee for the insurance and occupational pensions sectors, following the extension to those sectors of the Lamfalussy Process, as also applied by CEBS, the Committee on European Banking Supervisors, and CESR, the Committee on European Securities Regulators, in the banking and capital markets sectors respectively. This role involves advice to the European Commission on the drafting of implementation measures for framework directives and regulations on insurance and occupational pensions ("Level 2 activities"), and establishing supervisory standards, recommendations and guidelines to enhance convergent and effective application of the regulations and to facilitate cooperation between national supervisors ("Level 3 activities"). CESR has been involved in the elaboration of the first level two Directive 2006/73/EC on implementing Directive 2004/39/EC on financial instruments.

(3) The *third* form is the two *committees* set up in the energy sector. ERGEG, European Regulators Group of Electricity and Gas, is a body of independent national energy regulatory authorities, which was set up by the European Commission as an *advisory group* to the Commission on energy issues¹³⁴. It will give regulatory cooperation and coordination a more formal status, in order to facilitate the completion of the internal energy market. ERGEG is charged with advising and assisting the Commission in consolidating the internal energy market, in particular with respect to preparing draft implementing measures in the field of electricity and gas. The Decision sets a much stricter frame to cooperation between national regulators and is certainly meant to make more informal networks, such as the Florence forum, superfluous¹³⁵.

(4) The *fourth* form is initiatives outside the tight regulatory framework of EC law which bring together regulators and stakeholders. The Florence Forum has been such an initiative which forestalled the establishment of the ERGEG, thereby leaving room for an informal exchange not only between regulators. CEER, the Council of European Energy Regulators, is playing a similar role as ERGEG. CEER was created in 2000, when ten national energy regulatory authorities decided to sign a Memorandum of Understanding for the establishment of the Council of European Energy Regulators, which lead to the establishment of a not-

133 <http://www.cept-cerp.org/>.

134 European Commissions Decision of 11.11.2003 (203/796/EC) OJ L 296, 14.11.2003, 14.

135 The Florence Forum was established in 1998 by the European Commission in conjunction with the Robert Schumann Centre in Florence. The novel element, different from intergovernmental committees was to actively include third parties beyond Member States and Community representatives. The regulatory stakeholders, i.e. producers, network operators, network users and industrial consumers were brought to the table, as well as technical experts and non-EU-actors, see *Eberlein*, Regulation by Co-operation: the third way in making rules for the internal energy market, in: Cameron (ed.), Legal Aspects of EU-Energy Regulation, 2005, p. 59 et seq. under 4.19 et seq.

for-profit association. Today it has twenty six Members. The overall aim is to enhance cooperation among national energy regulators and with the EU institutions. CEER and the ERGEG share similar objectives. There are strong linkages between both bodies.

2. Business and consumer organisations

Traditionally, business and consumer organisations might have a role to play in setting up voluntary regulation, jointly or business acting alone. At the European level – as well as at national level – business organisations are organised sector by sector, being tied together by various umbrella organisations. Usually they have no direct and specialised counterpart on the consumer side. Consumer organisations therefore have to cover a broad array of consumer issues. It is an exception to the rule where consumers manage to organise their interests in a specific business sector. If any, such formations are the direct result from mass incidents and do not manage to develop a stable infrastructure¹³⁶.

Consumers are represented at the European level by BEUC which is the umbrella organisation of national consumer organisations and agencies. However, there are two exceptions to the rule and both concern enforcement matters. The International Consumer Protection Enforcement Network (ICEPEN) and the Consumer Law Enforcement Forum (CLEF) which has become the successor of the European Consumer Law Group. Whilst both forums cover consumer services (inter alia), the activities are focused on informal exchange and legal training on enforcement matters.

So far the European legislator has made only two attempts to tie business and consumer organisations more closely into its regulatory concept. The Directives on electricity and gas encourage the building of countervailing power through “small and medium-seized consumers”¹³⁷. They do not provide guidance on what sort of groups could and should be privileged here. Medium-seized consumers must probably be understood as medium-seized industrial consumers, which do not produce energy, but which need energy for their own production process. The explicit reference to “small consumers” allows for an understanding under which also *final* consumers in the sense of the consumer contract law directives are meant. This would mean that final consumers are allowed, even encouraged to group together, in order to buy energy at better prices. The Service Directive is even more concrete. Here professional bodies,

136 Such as break down of investment firms and accidents where a large number of people were injured by one single incident etc.

137 See Article 3 of Directives 2003/54/EC on electricity and 2003/55/EC on gas.

chambers of commerce and consumer organisations are enumerated¹³⁸. This will have to be elaborated on in more detail later on.

3. Standards Bodies and academic research groups

The Standards Bodies are in essence business organisations, as they serve the needs of business to develop technical standards for the sake and benefit of everybody. However, the New Approach has dramatically changed the outlook of these bodies. The General Guidelines, concluded between the European Commission, EFTA and CEN/CENELEC/ETSI established fruitful cooperation which is based on mutual rights and obligations¹³⁹. The European Commission subsidises the work of these bodies and might in return give mandates to the institutions to elaborate standards in areas where the Commission pursues specific objectives, such as consumer safety. The Standards Bodies turn into semi-public or semi private bodies which are no longer tied to industry alone, but which cooperate with the European administration. The Postal Service Directives¹⁴⁰ entrust CEN explicitly with drawing up appropriate technical standards¹⁴¹. The Service Directive mentions standardisation though in a much softer way. Member States are encouraged to promote European standardisation in cooperation with the European Commission¹⁴².

Since the adoption of the Commission's Communication on Contract Law¹⁴³, a new player has entered the scene of European regulators: *academic study groups*. Pushed into action by the European Parliament, the European Commission is striving for a Common Frame of Reference¹⁴⁴ which is to be prepared by the so-called *acquis group*¹⁴⁵ and the *study group*¹⁴⁶. The *acquis group* has, at its name indicates, the task to circumscribe and analyse the existing *acquis communautaire* in European contract law, thereby focusing on European consumer law, the Rome convention, the Brussels

138 Article 26.

139 See for a deeper analysis, *Joerges/Falke/Micklitz/Brüggemeier*, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, 1988.

140 OJ L 15, 21.1.1998, 14 and OJ L 176, 5.2.2002, 21.

141 Article 20 Directive 2002/39/EC on financial instruments.

142 Article 26 (5) of the Service Directive 2006/123/EC.

143 COM (2001) 398 final, 11.7.2001, OJ EC C 255, 13.9.2001, 1.

144 See *von Bar*, *Juridica International* 10, 2005, 17; *Reich*, *Wisconsin International Law Journal* (24) 2006, 425.

145 www.acquis-group.org.

146 www.studygroup.com, see for a recent account of the work undertaken by the two groups, *Micklitz*, *GPR* 2007, 2-15.

Convention/Regulation and product related European private law rules¹⁴⁷. It seems as if the areas here of concern, beyond consumer contract law on services, remains outside its focus of interest. The study group continues the work started 20 years ago in the Lando Commission which ended up in the adoption of the Principles of European Contract Law (PECL) I-III¹⁴⁸. The broad programme of the study group is based on comparative analysis¹⁴⁹. One of the working groups deals with services. The results of the working group on services are now published¹⁵⁰. The envisaged rules are mainly bound to a very abstract set of rules which are shaped in the tradition of codifying general rules which are applicable independent of the type of services concerned, with the exception of contracts for transport, insurance, guarantee, financial services, and particular rules which apply to certain types of services (construction, processing, storage, design, information and medical treatment). The proposed principles lay down European rules that could be integrated into the missing legal framework on contracts and liability for services¹⁵¹.

However, the two groups of researchers are more than merely academic circles where interested lawyers from all over Europe unite in order to voluntarily elaborate European Principles of Contract Law, in the hope that these rules might serve as a common legal ground for the interpretation of cross border contract making in Europe. It might be possible to regard the Commission's project as another variant of the New Approach type of law making: the Memorandum of Understanding being the contract concluded to establish the Network of Excellence, the mandatory requirements being the envisaged Common Frame of References and the technical standards elaborated by Standards Bodies being the set of rules to be elaborated in the tradition of the

147 The working programme is not publicly available. However it may be derived from a conference held in 2005 whose results are published: Europäische Rechtsakademie Trier, Special Issue European Contract Law, 2006, with contributions from *Wilhelmsson*, Pre-contractual Information Duties, p. 16; *Schulze*, Conclusion of Contract, p. 26; *Poillot*, Consumer and Contract Law, p. 36; *Howells*, Consumer Protection and European Contract Law Harmonisation, p. 45; *Ramberg*, Electronic Commerce in the Context of the European Contract Law Project, p. 48; *Pfeiffer*, Good Faith, p. 67; *Leible*, Non-Discrimination, p. 76; *Zoll*, The Future of European Contract Law from the Perspective of a Polish Scholar, p. 90.

148 *Lando/Beale*, Principles of European Contract Law, Parts I and II, 2000; *Lando/Clive/Prum/Zimmermann* (eds.), Principles of European Contract Law Part III, 2003.

149 Already published *Principles of European Law* (ed.), Commercial Agency, Franchise and Distribution Contracts, 2006, prepared by Hesselink/Rutgers/Diaz/Scotton/Feldmann and *Benevolent Intervention into Another's Affairs* (ed.), prepared by *von Bar*, 2006. All in all ten volumes are foreseen.

150 *Principles of European Law* (ed.), Service contracts, prepared by *Barendrecht/Janzen/Loos/Pinna/Cascao/van Gulijk*.

151 See under Chapter III, I, 3.

Lando-Commission by European academic researchers¹⁵². Such a link to the European Commission is missing in the European Centre on Tort and Insurance Law¹⁵³, which remains a purely academic exercise without political ties. In theory this group could provide the ground to close the gap which results from the missing EC rules on the liability for the safety of services. The table attempts to classify the different settings of cooperation and their impact on the different types of services.

	Cooperation, Committees, Networks	Academic research groups and Standards Bodies	Business organisations	Consumer organisations
Consumer contract law on services	Cooperation of national enforcement agencies (Regulation 2006/2004) ¹⁵⁴	Acquis group ¹⁵⁵ and Study group ¹⁵⁶	UNICE ¹⁵⁷	BEUC ¹⁵⁸ International Consumer Protection Enforcement Network (ICPEN) ¹⁵⁹ , Consumer Law Enforcement Forum (CLEF) ¹⁶⁰
Transport	European Aviation Safety Agency ¹⁶¹ European Railway Agency ¹⁶² Envisaged cooperation of enforcement bodies under draft Regulation COM (2004) 143 ¹⁶³ .	CEN/CENELEC	International Air Transport Association (IATA) ¹⁶⁴ , Community of European Railways and Instruction Companies (CER) ¹⁶⁵	BEUC ¹⁶⁶

152 See for further details, *Micklitz*, GPR 2007, 2.

153 www.ectil.org.

154 OJ L 364, 9.12.2004, 1.

155 www.acquis-group.org.

156 www.sgecc.net/overview.

157 UNICE stands for Union of Industrial and Employers' Confederations of Europe, www.unice.org.

158 www.beuc.eu.

159 www.icpen.org.

160 www.clef.org.

161 http://www.easa.eu.int/home/agenmeas_en.html; see Articles 13, 15, 45, 46 of Regulation 1592/2002.

	Cooperation, Committees, Networks	Academic research groups and Standards Bodies	Business organisations	Consumer organisations
Financial services	Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) ¹⁶⁷ ; Committee on European Securities Regulators (CESR) ¹⁶⁸	Insurance ECTIL ¹⁶⁹ , ISO	The European Insurance and Reinsurance Federation ¹⁷⁰ ; European Banking Federation ¹⁷¹	BEUC ¹⁷²
Network services for customers (electricity, gas, telecommunication, postal services)	Informal network of agencies in energy sector (Florence Forum on Electricity and the Madrid Forum on Gas); European Regulators		Euroelectric ¹⁷³ Promotion of <i>medium-seized</i> consumers of electricity	Florence and Madrid Forum open for consumer organisations; Promotion of <i>small</i> consumers of electricity through

162 On the basis of Regulation 881/2004, <http://www.era.europa.eu/>.

163 Article 39, in cooperation with the committee set up under Article 11 a) of 91/440/EEC.

164 <http://www.iata.org/index.htm>.

165 <http://www.cer.be/content/default.asp>.

166 www.beuc.eu.

167 <http://www.ceiops.org/> The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) was established pursuant to the European Commission Decision 2004/6/EC of 5.11.2003, OJ L 3, 7.1.2004, 30.

168 <http://www.cesr-eu.org/>.

169 European Centre on Tort and Insurance Law, www.ectil.org.

170 <http://www.cea.assur.org/>.

171 <http://www.fbe.be/Content/Default.asp>.

172 www.beuc.eu.

173 <http://www.ergeg.org/>.

174 <http://www.ceer-eu.org/>.

175 www.erg.eu.int.

176 Article 20, Directive 2002/39/EC on financial instruments.

	Cooperation, Committees, Networks	Academic research groups and Standards Bodies	Business organisations	Consumer organisations
	Group for Electricity and Gas (ERGEG) ¹⁷³ and Council of European Energy Regulators (CEER) ¹⁷⁴ ; European Regulators Group for Electronic Communication Networks (ERG) ¹⁷⁵ ; Cooperation via Standards Bodies in the postal sector ¹⁷⁶	CEN/CENELEC	through aggregation of representation ¹⁷⁸	aggregation of representation ¹⁷⁹ ANEC
Services	Cooperation and exchange of information via central contact points	CEN/CENELEC, ISO	MSts in co-op with Com shall encourage professional bodies, chambers of commerce, craft to promote the quality of services ¹⁸⁰	ANEC ¹⁸¹ MSts in co-op with Com shall encourage <i>consumer organisations</i> to promote the quality of services

4. Impact on standardisation of services

Once the new regulators enter the scene, "lawmaking" through new regulatory techniques becomes more complicated. The different actors are mostly tied to one single regulatory field of services, although there are horizontal issues which come across all sorts of services. That is why paving the way for new regulators facilitates the establishment of new regulatory techniques, but renders it more difficult at the same time. More than ever it will be important to get to know who is doing what, and under what regime, in the field of services.

177 <http://www.euroelectric.org>.

178 Article 3 (3) of Directive 2003/54/EC on electricity.

179 Article 3 (3) of Directive 2003/54/EC on electricity.

180 Article 26 (3) of the Service Directive.

181 www.anec.eu.

Such knowledge is just the first step to build on new strategies in standardisation of services. It is striking to see that the area of services which is nearest to standardisation is the postal sector. In this respect the developments in the postal field might affect all those services now harmonised by the Service Directive.

V. New instruments/new actors – and the effects on contracts for services

Most of the procedures, here analysed under the distinction between traditional and less traditional regulators,¹⁸² have just been set up and the guidelines, recommendations and other soft regulatory instruments have been published only recently. However, some tendencies are becoming clear already. They demonstrate the size of the challenge to consumer representations which result from the appearance of new actors and new regulatory techniques. The EC legislator, whilst heavily fostering the involvement of new actors and new techniques, does not, or does not take sufficiently into account that the status of consumer representations as well as their rights and duties need to be legally determined. There are two different interpretations possible: the negative interpretation would be to understand the reluctance as a means to reduce the consumer input to symbolic action; the positive would be to enhance the emergence of a European civil society which might yield the necessary institutions and structures to provide for the necessary input.

1. Differing regulatory intensities in co-regulation

Co-regulation is not a clear-cut concept. The Lamfalussy procedure is nearest to traditional regulatory intervention, in the sense that the legislator – European Parliament and Council – and later on the executive, the Commission, hold the lawmaking procedure firm in its hands. The management of the third level lies in the hands of the competent committee, CESR (Committee on European Securities Regulators dealing with financial instruments) and CEIPOS (Committee on European Insurance and Occupational Pensions sectors dealing with insurance and occupational pensions). Although the lawmaking process has not yet reached the fourth level, Directive 2004/39/EC¹⁸³ on financial instruments (first level) and Directive 2006/73/EC¹⁸⁴ implementing Directive 2004/39/EC on financial instruments (second level) might be paradigmatic for the way in which the competences are shared. Section 2 of Directive

182 See Chapter II, IV.

183 OJ L 145, 30.4.2004, 1.

184 OJ L 241, 2.9.2006, 26.

2004/39/EC dealing with “Protection to ensure investor protection” (Articles 19 et seq.) starts from a very broad concept. It lays down principles and guidelines and no, or very few, clear-cut rules. Directive 2006/73/EC, which meant to give shape to these broad principles, remains again rather broad. For example, Article 27 of Directive 2006/73/EC will shape Article 19 (2) of Directive 2004/39/EC in the following way:

(The information) shall be accurate and in particular shall not emphasise any potential benefit of an investment service ... without also giving a fair prominent indication of the relevant risk. ... It shall not disguise, diminish or obscure important items, statements or warnings.

The question remains whether such an article is really helpful in giving shape to a ruling which is adopted by the European Parliament and the Council. It is very likely that the hardcore questions may well be resolved at the third and fourth level.

The New Approach type of regulation relies much more on shared responsibilities and cooperation between public regulator and private institutions. The results obtained in the field of technical standardisation are regarded as a success story¹⁸⁵. In fact, the New Approach has boosted European standard-making through CEN and CENELEC to the detriment of National Standards Bodies such as AFNOR, BSI and DIN which have lost influence. Whether the adopted standards satisfy the needs of effective consumer protection against risks to their health and safety has never been systematically and comprehensively evaluated¹⁸⁶. The GPSD builds on the New Approach type of regulation. The work within CEN/CENELEC and also ISO, however, has already begun. It is subject to detailed analysis.

The Common Frame of Reference, which will have to be developed by the *acquis* group and the study group, will be completed in 2007. A set of Principles on European Law on Service Contracts (PELSC) has already been elaborated by the study group¹⁸⁷. However, it has not been merged with the findings of the *acquis* group and not been agreed by the European Commission. The principles as they stand today contain seven chapters dealing with general provisions, construction contracts, processing contracts (such as repair and maintenance), storage contracts, design contracts, information supply and medical treatment.

185 http://ec.europa.eu/enterprise/newapproach/index_en.htm.

186 As a scarce exemption to the rule, the study done for ANEC by *Micklitz/Schieble*, Legal Study – Exclusion Clauses in Standard Clauses under the EU Low Voltage Directive 73/22/EEC (Children and Disabled People using Electrical Appliances), 2004.

187 Available on the website of the study group.
http://www.sgecc.net/media/downloads/sgeccservices_contracts.pdf.

The PELSC might gain ground within the scope of application of the Service Directive. They do not pay specific attention to the consumer protective device. Consumer protection remains in the hands of the *acquis group*. However the Commission is now very much focusing on the revision of the existing *acquis*, which concerns only package tours and time sharing¹⁸⁸.

2. Self-regulation

Outside the field of transport services, there are no major initiatives to be reported which approach contract making in a European perspective. Standard contract terms or standard contracts are still very much subject to national markets, national regulators and national law.

3. Participation of stakeholders

In all *less traditional instruments* stakeholders are not given a formal legal status. Already the New Approach to technical standards and harmonisation has raised much discussion on the question of whether and to what extent consumer organisations should be legally included in the standardisation process¹⁸⁹. Today, ANEC has taken over the role to organise the consumer input, however, without being granted any formal legal status¹⁹⁰. The Service Directive hammers down the very same policy.

The first draft of Regulation 2006/2004 on Consumer Protection Enforcement Cooperation provided for the possibility of stakeholders to be heard before the envisaged committee which groups together national enforcement authorities¹⁹¹. However, this right did not survive the final agreements in the council¹⁹².

The Lamfalussy procedure integrates national governments and national regulators in the lawmaking process, but does not deal with the role and function of stakeholders. This task has been left to committees set up in the insurance and the investment services, CESR and ERGEG. The former has set up a *Market Participants Consultative Panel*, which has an advisory function

188 This is certainly a reaction to meeting of the EU council in London in November 2005, see EU-Council, Resolution of 28-29.11.2005.

189 Joerges/Falke/Micklitz/Brüggemeier, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, 1988 and more particularly Micklitz, Considerations Shaping Future Consumer Participation in European Product Safety Law, in: Joerges (ed.), Workshop on Product Safety and Product Liability in the European Community, EUI-Working Paper, 1989, pp. 182-205.

190 See under Chapter IV, II, 3.

191 See COM (2003) 443 final, 18.7.2003.

192 See www.european.consumerlawgroup.org, comments on the regulation on consumer protection cooperation, ECLG 134/2004.

and which comprises representatives from the various business sectors, selected and appointed by the European Commission. Private investors or their organisations are not regarded as market participants.

The ERGEG published, in as early as 2004, Public Guidelines on ERGEG's Consultation Practices. No. 4 says¹⁹³: "Regulators will, where appropriate, consult the full range of interested parties, including producers, network operators, suppliers and consumers as appropriate." However, ERGEG has not set up a formal consultative body.

4. Impact on the law of service contracts

Although the European Commission has no competence to regulate contract law *per se*¹⁹⁴, it has steadily increased the set of rules which affect directly or indirectly the law of service contracts. Most of the rules being developed within the co-regulation procedures are not legally binding, with the exception of the level 2 Directive 2006/73/EC on investment services. The vast majority of the rules are soft, in the sense that they do not constitute binding contractual rights and obligations. This will be true for the Common Frame of Reference, although it might require a quasi-legal status¹⁹⁵, as well as the principles of European contract law to be developed by the *acquis* and by the study group and to be agreed by the European Commission. For the time being these rules might certainly gain no more than the status of a formal recommendation¹⁹⁶. Such a value judgment applies equally to the set of propositions launched by the ERGEG. However, the use of European standards developed by CEN and CENELEC under the Service Directive is never formally recommended by the European Commission. The next table intends to classify the new forms of regulation, the degree to which stakeholders are participating, as well as the possible impact on contract law.

193 http://www.ergreg.org/portal/page/portal/ERGEG_HOME/ERGEG_PC/ERGEGPUBLIC-CONSULTATIONPROPOSAL_APPROVED.PDF.

194 *Weatherill*, European Private Law and the Constitutional Dimension, in: Cafaggi (ed.), *The Institutional Framework of European Private Law*, 2006, pp. 79-107.

195 If the European Commission really uses the CFR as a toolbox, as it indicated in its Communication, see in particular *von Bar*, *Juridica International* 10, 2005, 17. The annex contains a list of possible "tools".

196 There is much discussion on the way in which such a Code of Reference could be enacted, see *van Gerven*, *Needed: A Method of Convergence for Private Law*, in: Furrer (Hrsg.), *Europäisches Privatrecht im wissenschaftlichen Diskurs*, 2006, 437; *Reich*, *ZEuP* 2007, 161.

	Co-regulation	Self-regulation	Participation of stakeholders	Impact on contract law
Consumer contract law on services	Promotion of Europe-wide elaboration of standard terms and conditions through Commission ¹⁹⁷ , however, withdrawn ¹⁹⁸ , Common Frame of Reference and Principles on European Contract Law (PECL)		No guidance under the Communications of the Commission, but consultation of stakeholders on a voluntary basis	Draft Rome I allows for a reference ¹⁹⁹ ,
Transport	Airline Passenger Service Commitment ²⁰⁰ ; ACI Europe Airport voluntary commitment on airport services ²⁰¹ ; Railway passenger rights, monitoring compliance with quality commitments (envisaged) ²⁰² ,	Air passenger rights IATA Recommendation 1724;	On a voluntary basis Potentially through ANEC via standardisation process	Standard contract terms
Financial services	Lamfalussy procedure in insurances and financial instruments,		Consultation within Lamfalussy 2 level ²⁰³ ; CESR market	Directive 2006/73 (2 nd level) rules on contract related provisions in the

197 See COM (2003), 68, final part. 81-88 and then Communication from the Commission to the European Parliament and Council. European Contract Law and the revision of the *acquis*: the way forward, Brussels, 11.10.2004 COM (2004) 651 final (hereinafter ECL and the revision of the *acquis*), The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU wide use rather than just in one single legal order, p. 6. *Wilhelmsson*, *European Business Law Review*, 2006, 49 et seq., 59, fn. 37.

198 See COM (2004) 651 final.

199 Article 3 (2) of COM (2005) 650 final, 15.12.2005.

200 http://ec.europa.eu/transport/air_portal/passenger_rights/doc/commitment_airlines_en.pdf.

201 http://ec.europa.eu/transport/air_portal/passenger_rights/doc/commitment_airports_en.pdf.

202 COM (2004), 143 final, 3.3.2004.

203 http://ec.europa.eu/internal_market/securities/isd/consultation/replies_en.htm.

	Co-regulation	Self-regulation	Participation of stakeholders	Impact on contract law
			participants consultative panel ²⁰⁴ Through ANEC via potential future standardisation process	Directive (business conduct/best practice 2004/39 ²⁰⁵ , 3 rd level rules under preparation ²⁰⁶
Network customers (electricity, gas, telecommunication postal services)	Measures shall include those under Annex A ²⁰⁷ Postal services via quality of services ²⁰⁸		No specific rules foreseen at EC level; but public guidelines on ERGEG's consultation process ²⁰⁹ , Through ANEC via standardisation process	ERGEG launches 3 best practice propositions on transparency customer protection and the supplier switching process ²¹⁰ Development of a whole set of European standards ²¹¹
Services	MSts in Co-op with the Com encourage <i>providers</i> to take action on voluntary certification quality charters ²¹² ; Ibid. independent assessment of quality and		From participation to cooperation, from providing input to state governed rules to developing voluntary rules, on which Member States and the Commission might comment	Direct impact through supplementing voluntary measures, mainly through technical standards elaborated by CEN/CENELEC ; Indirect impact through

204 <http://www.cesr-eu.org/template.php?page=groups&id=24&keymore=1&BoxId=1>.

205 OJ L 241, 2.9.2006, 26.

206 http://www.cesr-eu.org/index.php?page=consultation_details&id=76.

207 Article 3 (5) 3 of Directives 2003/54/EC and Article 3 (3) 2003/55/EC.

208 See Articles 16 and 20 of Directive 2002/39/EC on financial instruments.

209 http://www.ergreg.org/portal/page/portal/ERGEG_HOME/ERGEG_PC/ERGEGPUBLIC-CONSULTATIONPROPOSAL_APPROVED.PDF.

210 http://www.ergreg.org/portal/page/portal/ERGEG_HOME/ERGEG_DOCS/ERGEG_DOCUM-ENTS_NEW/CUSTOMER_FOCUS_GROUP/PR-06-08_CFG-BestPractices.doc.

211 To be analysed in more detail below, see Chapter V, V for a full analysis of the consumer relevant technical standards.

212 Article 26 (1) of the Service Directive.

	Co-regulation	Self-regulation	Participation of stakeholders	Impact on contract law
	defects of services, in particular comparative trials or testing and communication of results, notably by consumer organisations ²¹³ Ibid. development of voluntary European standards ²¹⁴			development of "best practice" and appropriate comparative tests

5. Impact on standardisation of services

The review of existing EC regulation of services allows shedding light on the possible role and function of standardisation in the field of services, be they vertically regulated, or subject to the horizontal approach in the Service Directive. Standardisation competes with traditional regulation and traditional regulators. The more closely the service in question is regulated, the less room is left for standardisation. If the EC legislator provides leeway for standardisation, it delegates the responsibility for setting up the necessary regulatory framework to the standards and the consumer organisations. The prevailing experiences are not really promising, at least not from a consumer point of view. The Service Directive is by far the most far reaching regulatory project in the area of services, which gives standardisation a stand. However, it will have to be shown that the conceptual insufficiencies reappear in the quasi New Approach to harmonising the quality of services through standardisation.

Chapter III: The new policy on services, standardisation and protection of consumers

The sector-specific EC policy on services is well established. It is the *new* policy on services which opens up perspectives for the role and function of technical standardisation. The new EC policy on services rests on two legislative measures – the Directives on Professional Qualifications and the Service Directive, thereby largely neglecting the safety dimension, i.e. the safety of

213 Article 26 (4) of the Service Directive.

214 Article 26 (5) of the Service Directive.

services – *and* probably a revised concept of the 1985 New Approach to technical harmonisation and standards.

Parts of the new policy have already taken clear shape and have been given a legal form, the Directive on Professional Qualifications and the Service Directive. Other elements are still in the offing, the positioning of the safety of services and the revised concept of the New Approach. However, despite the lack of a clear-cut regulatory framework, the European Commission and the Standards Bodies are heavily pushing standardisation in the field of services. Stock-taking of the recent initiatives helps to set the picture and to prepare the ground for the next step – the development of best practice criteria.

I. The concept behind the new policy

1. Professional qualifications

The Directive 2005/36/EC on the Recognition of Professional Qualifications²¹⁵ does not lay down European requirements on the skills which are needed to render a specific service. Instead the Directive relies, as the title indicates on existing national rules on professional education and training. In this respect the Directive relies on the country of origin principle. Mutual recognition, however, is bound to the practical experience a service provider has made in the relevant Member State after he has completed the appropriate national education plan. The overall purpose of Directive 2005/36/EC comes clear in Article 4 (1):

The recognition of the professional qualifications by the host country allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.

The Directive might be understood as realisation of the somewhat softened country of origin principle.

a) Impact on standardisation of services

As the Directive does not harmonise professional standards it leaves ample room for standardising professional skills. Such standards might contribute to a much clearer picture of what is behind a specific service provider.

2. The Service Directive, consumer protection and standardisation

The Service Directive has already been mentioned a number of times. However, the context was different. It had to be demonstrated how and to what

215 OJ L 255, 30.9.2005, 22.

extent the Service Directive fits into the already existing EC approach on services. It could be demonstrated that the Service Directive constitutes the break even point in the EC regulation of services. It opens up new perspectives in combining traditional and less traditional regulatory measures, more particularly in giving technical standardisation and consumer involvement a small, but nevertheless important stand.

The overall purpose of the Directive is to enable cross border services and to enhance freedom of establishment. In this respect it largely codifies the already established case law of the European Court of Justice²¹⁶. The Directive does not really deal with consumer policy matters. All in all, seven different settings which affect consumers and standardisation can be distinguished in the Directive:

a) *Home country control and host country control*

Article 35 of the Directive establishes the home country control principle²¹⁷ very much along the line of the banking and insurance directives. The host country²¹⁸ may take action in exceptional circumstances, in particular with regard to the *safety of services*, as long as these have not yet been subject to Community harmonisation (Article 18 (2) (a) of the Service Directive, in following the procedure for mutual assistance laid down in Article 35 (1) and (2) of the Service Directive). This means, in essence, that the host country is in principle legally obliged to rely on the control and supervision exercised in the home country of the company concerned. However, the host country retains residual competence outside the procedure for mutual assistance in *emergency* situations (Article 35 (6)). This is especially the case if the host country discovers a risk to health and safety which requires immediate action. In such cases the measures are to be notified to the Commission and the Member State of establishment, stating the reasons for which the Member State considers that there is urgency.

aa) *Impact on standardisation of services*

216 See, *Roth*, to be published in No. 5 Verbraucher und Recht 2007.

217 Home Country Control (also Country of Origin rule) is the rule of *EU law*, specifically of *Single Market law*, that determines which laws will apply to *goods* or *services* that cross the border of Member States. EU law requires that the goods or services produced legally in one Member States should be allowed unhindered access to markets of other Member States. The latter are not allowed to apply their laws except in specific circumstances (taken from Wikipedia).

218 The country where the company offers its services.

In theory there is room for developing European standards in the field of safety, at least as long as the European Community has not taken legislative action. These European standards could then indirectly affect the Member States competence to take action in emergency situations.

b) *The two freedoms and the protection of consumers*

The case law of the European Court of Justice starts from the premise that the freedom to provide services constitute directly applicable rights for the service providers and for the recipient of the service. Articles 19 and 20 of the Service Directive sum up the legal position of the recipient of the service. Member States may not impose on a recipient requirements which restrict the use of a service in particular by an obligation to obtain an authorisation from, or to make a declaration to, their competent authorities or set discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State, or by reason of the location of the place at which the service is provided (Article 19)). The host country may not make the recipient subject to discriminatory requirements based on his nationality or place of residence (Article 20)).

However, the “true” consumer problem results from the different degree of consumer protection between Member States. It has to be recalled that there is and there has never been a particular EC policy on consumer services. There is a piecemeal sector-specific approach, but there is no horizontal policy. It is here where the famous *Cassis de Dijon*²¹⁹ formula is of importance, under which Member States are free to protect the consumer in areas where there are no harmonised European rules as long as they respect the proportionality principle²²⁰. The Service Directive, however, seems to induce an important policy change. Whereas the Directive does not affect the Member States’ competence to raise the level of consumer protection as long as he or she contracts with a supplier which is established in the consumer’s home country (Articles 15 and 4 para 8); the situation seems to be different with regard to the *freedom to provide services*. Articles 16 and 17 seem to deviate from the *Cassis de Dijon* Doctrine. Article 16, after reiterating the Member States’ obligation to

219 Case 120/78, *Rewe vs. Bundesmonopolverwaltung*, ECR 1979, 649.

220 The principle of proportionality is a political maxim which states that any layer of government should not take any action that exceeds that which is necessary to achieve the objective of government. It was initially developed in the German legal system. It is a fundamental principle of *European Union law*. According to this principle, the EU may only act to exactly the extent that is needed to achieve its objectives, and no further. This principle has underpinned the *European Union* since its inception in 1957. It is explicitly specified in the proposed new *Treaty establishing a constitution for Europe*.

respect the freedom to provide services, allows Member States to restrict that very right only for reasons of public policy, public security, public health or the protection of the environment. *Consumer protection, however, is not mentioned.*

Article 17 allows for additional derogations from the freedom to provide services, *inter alia* services of general economic interests (postal services, electricity, gas, water, treatment of waste), freedom of lawyers to provide services, judicial recovery of debts, acts requiring by law the involvement of a notary, statutory audit of annual accounts and consolidated accounts, registration of vehicles leased in another Member States, and last but not least (Para 15), provisions regarding contractual and non-contractual obligations, including the form of contracts, determined pursuant to the rules of private international law. However, there is no general disclaimer. *That is why it seems as if Articles 16 and 17 have to be read that consumer protection per se may no longer justify the restrictions of the freedom to provide services*²²¹.

To avoid misunderstandings: consumer protection here does not mean private law rules but public law standards on professional qualifications which are meant to protect the consumer. The formula in *van Binsbergen*²²², although developed with regard to lawyers that are exempted under Article 17 Para 4 anyway, provides guidance on the importance of the policy shift²²³:

“As the Court has repeatedly observed, the application of professional rules to lawyers, in particular those relating to organization, qualifications, professional ethics, supervision and liability, ensures that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience²²⁴.”

The European Court of Justice underlines the remaining competence of the Member States to take appropriate measures to ensure that the consumer is protected against unprofessional behaviour in the performance of services. This does not mean that the Member States remain entirely free. They may protect the consumer only within the limits of the proportionality principle²²⁵.

bb) Impact on standardisation of services

221 This is the reading of *Roth*, to be published in No. 5 Verbraucher und Recht, 2007.

222 Judgment 3.12.1974, C-33/74, *Van Binsbergen vs. Bedrijfsvereniging voor de Metaalnijverheid*, ECR 1974, 1299.

223 Judgment 3.12.1974, C-33/74, *Van Binsbergen vs. Bedrijfsvereniging voor de Metaalnijverheid*, ECR 1974, 1299; Judgment 12.12.1996, C-3/95, *Reisebüro Broede vs. Sandker*, ECR 1996, I-6511 at 38.

224 See to that effect, the judgments in C-292/86, *Gullung vs. Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne*, ECR 1988, 111.

225 See Judgment, 25.7.1991, Case 76/90, *Säger vs. Dennemeyer*, ECR, 1991, I-4221.

If Member States are no longer able to restrict the freedom to provide services under reference to consumer protection rules, by way of public law restrictions, there is even greater pressure to set common standards on professional qualifications so as to guarantee an adequate level of consumer protection.

c) Information requirements

Following the insurance directives, the Service Directive provides that the service provider is obliged to make information available to the recipient which refers to the *person* of the provider (name, legal status and form, where he is registered, if necessary the authorisation, membership in professional organisations – Article 22 (1)), and to the *contract* to be concluded (standard contract terms, proposed place of jurisdiction, after-sales guarantees, price, main features of the contract, professional liability insurance and guarantees (Article 23)). On request, the service recipient is entitled to additional information (Article 22 III), where the price is not pre-determined, on the price of the service or the method of calculation, for regulated professions the professional rules applicable in the particular Member State, codes of conduct, and access to and conditions of the use of non-judicial means of dispute settlement (Article 27)).

The legal quality of the information requirements differs depending on whether the service provider is established in the host Member State or is providing a cross-border service. This could best be explained by way of an example. If the service provider is settled in Member State A and he provides a cross-border services to Member State B, Member State B is not allowed to impose additional information requirements on him. In this respect the information requirements in Article 22 are exhaustive. However, if the service provider who has his main office in Member State A, establishes a subsidiary in Member State B, the latter remains free to adopt additional, more stringent, information requirements applicable to all those service providers who have settled in Member State, i.e. the host country. That is why host Member States are indirectly allowed to restrict the freedom of establishment.

cc) Impact on standardisation on services

The Service Directive severely restricts the leeway for European standardisation in developing information requirements on cross border services. As far as the service in question is covered by the scope of application of the Directive, European standards on services as elaborated by CEN/CENELEC could come into conflict with Article 22 which prohibits

information requirements beyond the level foreseen by the Directive. Strictly speaking Article 22 even bars European Standards Bodies from developing information requirements which go beyond the Article 22 requirements. The voluntary character of European standards does not set aside the consequences resulting from Article 22. Otherwise the objective, to lay down a final set of requirements which can be taken from Article 22, would be circumvented, for example if CEN is elaborating information standards which reach beyond the level provided for in Article 22.

On the other hand, European standards might help to develop a common, i.e. European framework for companies that have decided to settle on the territory of the host country. As Member States are in principle free to impose additional information requirements on companies that have settled, European Standards Bodies could contribute to avoid deviating national standards. As a starting point, European Standards Bodies could take the Article 22 requirements as a yardstick and try to make them apply to companies that are settling in the Member States.

European Standards Bodies as well as National Standards Bodies are well advised to check information requirements in technical standards on services against the content of Article 22, in order to avoid duplication and in order to contribute to a common approach on cross border services and on services that are provided by a company that has settled in the Member States.

d) Professional liability insurance and guarantees

Member States are free to require that providers whose services present a direct and particular risk to health and safety of the recipient or a third person, or the financial security of the recipient, subscribe to a professional insurance appropriate to the nature and extent of the risk, or provide a guarantee or similar which is equivalent or essentially comparable as regards its purpose (Article 23 (1)). However, Member States are obliged to recognise equivalent guarantees given by another Member State in which the provider is already established (Article 23 (2)). The Commission may establish common criteria for defining when equivalence is supposed to exist, subsequent to the comitology procedure (Article 23 (4)).

It is here where the Commission's overall policy from pre-market control through public law to post-market control through private law, becomes evident²²⁶. The non-mandatory professional liability standards will compensate the consumer

226 See Chapter I and II.

for the increasing risks which results from the open markets for services. However, not even the professional liability insurances or guarantee is obligatory. That means Member States may equally decide not to put pressure on service providers, in order not to discriminate their own national service providers against the foreign service providers which might benefit from a laxer policy.

The relationship between the national rules on the liability for the safety of services and the national rules on professional liability insurances and guarantees is even more complicated. As there are no European liability rules, the applicable law will have to be decided by the envisaged Rome II regulation²²⁷. This means, in essence, that the differences between the Member States' rules on professional liability remain in principle unaffected. The consumers' rights will entirely depend on the degree to which the applicable law protects his or her interests. It has to be recalled that the European Commission has not systematically investigated national rules on professional liability. The Service Directive pursues a policy which is in no way based on concrete knowledge. Possible consequences in differing national legal orders were of little concern in the legislative process.

However, indirectly the European Commission might affect national liability rules by way of developing common criteria for establishing equivalence. The European Commission therefore intends to catch up what it missed during the preparatory works. Formally the common criteria to be developed do not affect national rules on professional liability, as the Member States are not legally obliged to compel service providers to ensure against such professional risks, but in practice the common criteria might provide ground rules for a future European law on the liability of services. This is harmonisation of liability for the safety of services by the back door! The common criteria are not to be discussed in Parliament and in the Council, as they are not submitted to the normal law making procedure. The common criteria will be approved in the comitology procedure, where the European Commission has a key role to play.

dd) Impact on standardisation of services

There is not so much room for standardisation here. The determination of the equivalence is in the hands of the European Commission and the Member States. However, European technical standards could provide for professional liability insurance and/or directly lay down liability rules. European Standards

227 See Chapter II, II, 2.

Bodies have a word to say even in the highly legalistic area of liability rules on the safety of services.

e) Consumer contracts on services

The Directive does not touch upon consumer contracts on services, outside those which are subject to specific harmonisation measures, i.e. package tours and time sharing and those which are exempted from the Directive, i.e. financial services, health care, public goods. In this respect the national law on contract for services remains unaffected, at least through the Directive on Service. It is just another question to what extent the vertical EC regulations affect the appropriate contract law. Outside and beyond the harmonised consumer contracts for services and the services exempted from the scope of application of the Service Directive, the applicable law in cross border service contracts is to be defined by the Rome Convention which contains specific rules on the protection of the consumer²²⁸.

ee) Impact on standardisation of services

As the Directive does not deal with the harmonisation on consumer contract law, there is ample room for Standards Bodies to fill that gap. Contract related standards as elaborated by European Standards Bodies bear elements of standard contract terms, however, they benefit from a higher legitimacy.

f) Ensuring the quality of services through standardisation

Of utmost importance in the context of the study is Article 26 which under the heading of “quality of services” sets ground rules for standardising all those services which come under the scope of application. In essence it grants a mandate to the European Commission to advocate the development of voluntary standards to enhance the quality of services. This article, which reads as follows, merits closer inspection:

- (1) Member States shall, in cooperation with the Commission, take accompanying measures to encourage providers to take action on a voluntary basis in order to ensure the quality of service provision, in particular through use of one of the following methods:
 - (a) certification or assessment of their activities by independent or accredited bodies;

228 See Chapter II, II, 2.

- (b) drawing up their own quality charter or participation in the quality charter or labels drawn up by professional bodies at the Community level.
- (2) Member States shall ensure that information on the significance of certain labels and the criteria for applying labels and other quality marks relating to services can be easily assessed by providers and recipient;
- (3) Member States shall encourage, in cooperation with the Commission, take accompanying measures to encourage professional bodies, as well as chambers of commerce and craft associations and consumer associations, in their territory to cooperate at Community level in order to promote the quality of service provisions, especially by making it easier to assess the competence of a provider;
- (4) Member States shall, in cooperation with the Commission, take accompanying measures to encourage the development of independent assessments, notably by consumer organisations, in relation to the quality and defects of service provisions, and in particular, the development at Community level of comparative trials or testing and the communication of the results;
- (5) Member States, in cooperation with the Commission, shall encourage the development of voluntary standards with the aim of facilitating compatibility between services supplied by providers in different Member States, information to the recipient and the quality of the service provision.

Article 26 is the key to understand the regulatory approach on services. The starting point in contract law theory is the negotiation between two parties on the content. The Directive starts from a different premise. It understands quality of services as an undertaking that must be regulated, not by way of binding statutory, i.e. national or European legislation, but by way of soft law means elaborated by

- professional bodies,
- chambers of commerce,
- craft associations,
- consumer organisations –
- and standardisation bodies.

The regulatory means cover a broad array of instruments and tasks:

- certification,
- quality charter (which are available at the national level²²⁹),

229 See in particular the chapters on public goods in Italy and France, see the respective

- labels and quality marks,
- assessing the competence of the provider, the quality of the service,
- comparative trials or testing,
- voluntary European standards.

Strictly speaking, only Article 26 para 5 refers to standardisation. However, the last paragraph is strongly interrelated with the preceding paragraphs. This comes clear in the only recital addressing Article 26, which explains its overall function:

(102) In order to increase transparency and to promote assessments on comparable criteria with regard to the quality of the services offered and supplied by the recipients, it is important that information on the meaning of quality labels and other distinctive marks relating to these services can be easily accessible. That obligation of transparency is particularly important in areas such as tourism, especially in the hotel business, in which the use of a system of classification is widespread. Moreover it is appropriate to examine the extent to which European standardisation could facilitate the compatibility and quality of services. European standards are drawn up by the European standards-setting bodies, the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI). Where appropriate the European Commission may, in accordance with the procedure laid down in Directive 98/34/EC of the European Parliament and the Council of 22nd June 1998²³⁰ laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information society services, issue a mandate for the drawing up of specific European standards.

The idea of the EC legislator is to use the available infrastructure on technical standardisation, in order to give shape to Article 26. The work will go on as before, within the existing interplay of European Commission, CEN/CENELEC/ETSI and ANEC. Strictly speaking the work has already started – long before the Directive began to make its way in the legislative procedure. The EC initiative to draft a Service Directive and the first steps in the Standards Bodies to elaborate service standards started more or less simultaneously.

ff) Impact on standardisation of services

country reports, in *Micklitz/Keßler*, unter Mitarbeit von *Mareen Basler/Holger Beuchler/Romina Bonome-Dells*, Kundenschutz auf den liberalisierten Märkten für Telekommunikation, Energie und Verkehr 2006, http://www.bmelv.de/cln_045/nn_760478/SharedDocs/downloads/02-Verbraucherschutz/Telekommunikation/StudieKundenschutz.html__nnn=true.
230 OJ L 2004, 21.7.1998, 37. Directive as last amended by the 2003 Act of Accession.

Article 26 is the key to understanding what is going on in the field of services. It provides the legitimacy to foster standardisation, first and foremost without the European Commission. Standardisation is recognised as an appropriate means to close the gap which results from the missing rules on the quality of services. On the other hand, Article 26 grants the European Commission a mandate under Directive 98/43/EC to initiate standard-making within the comitology procedure, and enables consumer organisations to develop a tool kit for testing whether and to what extent the adopted standards guarantee the necessary level of quality in services. This is the gateway to the best practice approach.

g) Settlement of disputes

The European Commission has a long standing policy in inviting Member States to initiate action within professional bodies on the development of appropriate dispute settlement mechanisms. It is therefore a prominent field of self-regulation. However, the rules on dispute settlement in the Directive remain rather scarce. There is no reference to dispute settlement in the recitals and only one modest one in Article 27 in the text, which runs as follows:

- (1) Member States shall take the general measures necessary to ensure that providers supply contact details, in particular a postal address, fax number or e-mail address and telephone number to which all recipients, including those residents in another Member State, can send a complaint or a request for information about the service provided. Providers shall supply their legal address if this is not their usual address for correspondence.

Member States shall take general measures necessary to ensure that providers respond to the complaint referred to in the first subparagraph in the shortest possible time and make their best efforts to find a satisfactory solution.

- (2) Member States shall take the general measures necessary to ensure that providers are obliged to demonstrate compliance with the obligations laid down in this Directive as to the provision of information and to demonstrate that the information is accurate.
- (3) Where a financial guarantee is required for compliance with a judicial decision, Member States shall recognise equivalent guarantees lodged with a credit institutions or insurer established in another Member State. (...).
- (4) Member States shall take the general measures necessary to ensure that providers who are the subject to a code of conduct, or are members of a trade association or professional body, which provides recourse to a non-judicial means of dispute settlement inform the recipient thereof and mention that fact in any document which presents their services in detail, specifying how to access detailed information on the characteristics of and conditions for, the use of such a mechanism.

The recent Eurobarometer, published in October 2006, has shown that consumers all over the European Community are very much concerned about the enforceability of their rights outside their home country²³¹. The Service Directive neither mentions these concerns, nor refers to already established Europe-wide dispute settlement mechanisms, such as the EEJ-net, nor underlines the importance of the relevant Recommendations 98/257/EC and 2001/310/EC which lay down minimum requirements for out-of-court dispute settlement procedures²³².

The reason might be that the approach chosen in the Service Directive²³³ is extremely narrow. Contrary to Article 26, Article 27 addresses Member States only, it does not define the role of the European Commission and it deals only with *in-house* dispute settlement through the service provider himself and not through dispute settlement bodies as established by professional bodies. These service providers will use *best efforts* – the importance of which will be explained later²³⁴. It is true the European competence on enforcement matters is indeed shaky. However, the European Commission has quite successfully combined the regulation of the substance of the matter, such as services, with introducing appropriate enforcement mechanisms. It seems as if the intended “high level of protection of the general interests, especially the consumer protection”, as spelt out in recital 7, is no more than paying lip service to the Treaty without taking measures to give shape to that policy.

gg) Impact on standardisation of services

The silence of the legislator does not preclude action of Standards Bodies. They are invited to give shape to the complaint management of service providers. Article 27 contains one notable consumer friendly message. Providers have to make a telephone number available to the consumer, which might often be a hotline or helpline. There is a strong link to the work ongoing in CEN BT TF 182 on Customer Contact Centres²³⁵. Here clear-cut rules are certainly needed to protect the consumer against misuse. Outside and beyond, there is room for advocating existing out-of-court dispute settlement mechanisms or for the development of new and even better ones. Dispute settlement could therefore become a prominent field of standardisation.

231 http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf.

232 OJ L 115, 17.4.1998, 31, OJ L 109, 19.4.2001, 56; see *Micklitz*, § 32, in: Reich/Micklitz, *Europäisches Verbraucherrecht*, 2003.

233 OJ L 376, 27.12.2006, 36.

234 See Chapter IV.

235 See Chapter IV, II, 3.

3. The missing link – safety of services

European consumer policy on the safety of services is – to say the least – underdeveloped. In theory it should be built on three premises, firstly by public law means i.e. to ensure that the service providers have the necessary professional skills, the right equipment and hygienic premises, secondly that only safe services in the above mentioned meaning are placed on the market and unsafe services are withdrawn from the market; thirdly by private law means that consumers who suffer injuries from unsafe services may be adequately compensated.

a) Public law means – requirements on professional skills

Directive 2005/36/EC on professional qualifications takes precautionary measures to ensure that the consumer is adequately protected against unprofessional behaviour that might affect his or her health and safety. Recitals 6 and 8 of the Directive 2005/36/EC on professional qualifications make clear that the facilitation of service provision is ensured in the context of strict respect for public health, safety and consumer protection. Whilst service providers from outside the host Member State are in principle exempted from the requirements which the host Member State places on professionals established in its territory (Article 6 (a)) of Directive 2005/36/EC on professional qualifications, the latter remains competent to check the professional qualifications of the service provider as long as he does not benefit from automatic recognition under Title III Chapter III (Article 7 (4)), i.e. doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, pharmacists and architects (Article 21).

Where there is a substantial difference between the professional qualifications of the service provider and the training required in the host Member State, to the extent that that difference is such as to be harmful to public health or safety, the host Member State will give the service provider the opportunity to show, in particular by means of an aptitude test that he has acquired the knowledge or competence hitherto lacking.

aa) Impact on standardisation of services

There is ample room for standardisation in particular with regard to shaping safety related skills in those professions which do not benefit from automatic recognition. A new CEN Task Force has been established, CEN BT TF 192, which in essence means to identify existing EU directives, national legislations,

*CEN and ISO standards on qualification of professions, in order to get to know possible ways and means for a more coherent approach*²³⁶.

b) Public law means – pre- and post market control

The French Act on consumer safety²³⁷ provided a blue print for the development of Directive 92/59/EEC on product safety²³⁸. The French Act covers products and services. Safety on services was high on the agenda when the GPSD had been under revision. Article 20 of the GPSD called upon the European Commission to identify the needs, possibilities and priorities for Community action on the safety of services and to submit to the European Parliament and the Council a report, accompanied by proposals on the subject as appropriate. The result was the Commission's report adopted in June 2003 on the safety of services to consumers²³⁹. The report highlighted gaps in the availability of data on service safety, suggested improving the knowledge base, but did not call for regulatory action, i.e. for the extension of Directive 2001/95/EC to safety of services. The report led to Council Resolution 2003/C 299/01, which was adopted on the 1st December 2003²⁴⁰. The Council Resolution confirmed the need to improve the knowledge base on safety of services. However, it contains two remarkable references which deserve attention:

13. The Council of the European Union calls upon the Commission to

13.4. reflect on how European standards could contribute to a common high level of safety for services,

13.5. examine on the basis of the results of the activities mentioned above (improving the knowledge base and considering standardisation; H.-W.M.) the need for concrete Community initiatives and activities in this field, with might include inter alia the development of a legislative framework with particular attention to the identified priority areas (see Para 7. tourism, sports and leisure).

The message is not entirely clear. But it is evident that the European Council considers standardisation as a possible appropriate means to deal with matters of safety. This comes even clearer in No. 11 of the same resolution. The European Council considers that European standards on the safety of certain

236 The work is still in progress.

237 Article L 221 de la Loi n° 93-949 du 26 Juillet 1993 relative au Code de la consommation, see <http://www.securiteconso.org/article168.html>.

238 *Micklitz*, Produktsicherheitsrecht in Frankreich, in: Joerges/Falke/Micklitz/Brüggemeier, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, 1988, pp. 62 et seq.

239 COM (2003) 313 final, 6.6.2003, http://ec.europa.eu/consumers/cons_safe/serv_safe/reports/safety_serv_rep_en.pdf.

240 OJ C 299, 10.12.2003, 1.

services, established following mandates given by the Commission to European standardisation bodies, can support or supplement the relevant policies pursued by Member States, provided that evidence indicates a need for such initiatives. This means that in December 2003, the way had already been paved for what later became Article 26 of the Service Directive. However, Para 13 (5) seems to indicate that sector-specific binding law might still be an option. The European Commission was invited to present to the Council by 31 December 2004 some sort of a follow-up report – this has not happened so far.

However, the European Commission understood its mandate as commissioning research studies in particular with regard to the so-called priority areas. Concrete measures undertaken within the framework of consumer safety for services concern:

- Council Recommendation 86/666/EEC²⁴¹ defines minimum standards on fire safety in hotels and serves as a basis for common safety rules throughout the EU. In 2001 the European Commission published a report on its application²⁴². The report presents the broad lines of further EU initiatives and activity on the issue, and in particular the need to make more precise provision for alternative solutions where the recommended technical guidelines in the Recommendation cannot be implemented; improve supervision and monitoring; update and improve technical guidelines for future activities; identify and disseminate best practice in fire safety management and monitoring²⁴³.
- In 2003 the Dutch Consumer Safety Institute conducted a study on behalf of the European Commission on “Risks of certain sports and recreational activities in the EU”²⁴⁴. It gives details of the available information on the risks involved in certain potentially dangerous sports and leisure activities (skiing, diving, fairgrounds, etc.) and an analysis of related accident data, together with an overview of the services related to these activities. The report was funded by the European Commission. Therefore the information contained does not necessarily reflect the opinion or the position of the European Commission. An estimated 480,000 cases treated each year in casualty departments in the EU are related to certain dangerous sports and leisure services.

241 OJ L 385, 31.12.1986, 60.

242 COM (2001) 348 final, 27.6.2001.

243 See in more detail, Consultation on the Commission Report on Fire Safety in Hotels and revision of technical guidelines attached to the Recommendation.

244 http://ec.europa.eu/consumers/cons_safe/news/rep_risk_sport_en.pdf.

- In 2005 the European Commission published a report on consumer safety in amusement parks²⁴⁵. The report, which was elaborated with the support of the Risk and Policy Analysts Limited, identifies and describes the existing regulatory and non-regulatory measures aiming at consumer safety in fairgrounds and amusement parks and presents different options for improvement. It estimates that there are about 19000 injuries per year associated with fairgrounds and amusement parks throughout the EU.
- In 2005 the European Commission published a report which shall help to improve data collection²⁴⁶. This is in line with the conclusions drawn from consultations with stakeholders on the issue of safety of consumer services that took place in 2003. The purpose of the study was to assist the European Commission in identifying and examining options for an improved systematic collection of data in relation to the safety of leisure services. The present report investigates existing schemes at international, national and local levels that monitor accidents related to tourist and leisure services and makes recommendations for a future EU-wide system.

The Service Directive has paved the way for officially providing Standards Bodies with a mandate to undertake a feasibility study on the degree to which safety of services can be standardised²⁴⁷.

bb) Impact on standardisation of services

It seems as if the European Commission is willing to put safety matters into the hands of Standards Bodies. In this respect there is increased pressure on consumer organisations to adequately manage safety issues in ongoing standardisation projects. Legally speaking, there are severe doubts whether it is possible to delegate product safety matters away from the responsibility of statutory entities to private organisations without providing for a system under which the outcome can be adequately evaluated, assessed and confirmed. The protection of health and safety belongs to the core tasks of modern nation states. If the nation states decide to delegate safety issues to private institutions

245 http://ec.europa.eu/consumers/cons_safe/serv_safe/reports/final_032005_en.pdf.

246 http://ec.europa.eu/consumers/cons_safe/serv_safe/reports/final_en.pdf.

247 See Chapter III, III, 2 a).

such as Standards Bodies they are legally obliged to control and supervise the activities of these private entities²⁴⁸.

c) *Private law means – liability for the safety of services*

The very same Council Resolution notes

4. that the Commission report does not cover the issue of liability of service providers, which is considered separately in the context of ongoing analysis of the functioning of liability of the national liability systems; further notes that the Commission's commitment to follow-up any development of this issue and to report to the Council at the appropriate stage.

After having been obliged to withdraw its 1991 proposal on the liability for services²⁴⁹, the European Commission seems rather cautious in taking up the issue again. Liability issues are part of the overall EC project on the codification of European contract law. This seems to be the background to the somewhat cryptic allusion in para 4 of the Council Resolution. However, the European Commission has launched in 2003 a study on the "Comparative analysis of national liability systems for remedying damage caused by defective consumer services" which focused on tourism, sports and leisure, medical malpractice and public goods. The study has been conducted by VIEW²⁵⁰. A revised and supplemented version of the study has been published in 2006²⁵¹.

No follow-up, however, seems to be envisaged. The Service Directive with its non-mandatory rules on professional insurance liabilities and guarantees are obviously regarded as an efficient and sufficient means to protect the consumers Europe-wide against possible risks resulting from unsafe services. Outside and beyond the envisaged Rome II regulation on extra-contractual liabilities, this is to be understood as an appropriate and sufficient means to deal with cross border consumer complaints²⁵².

cc) *Impact on standardisation of Services*

248 This is the basic finding of a study we have undertaken as early as 1988, see *Joerges/Falke/Micklitz/Brüggemeier*, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft.

249 OJ C 12, 18.1.1991, pp. 8 et seq, withdrawn 23.6.1994 COM (1994) 260 final; *Brüggemeier/Joerges*, Europäisierung des Vertragsrechts und Haftungsrechts, in: Müller-Graff (Hrsg.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 1999, p. 301.

250 http://ec.europa.eu/consumers/cons_safe/keydocs/index_en.htm, see under various reports.

251 *Magnus/Micklitz*, *Liability for the Safety of Services*, 2005.

252 Chapter II, II, 2.

The inactivity of the European Commission does not preclude European Standards Bodies from taking the initiative. The draft proposal for an EC directive on the liability for unsafe services, as set out by Magnus/Micklitz²⁵³, provides a set of rules which might serve as a guideline for action. This draft proposal goes back to a study commissioned by DG SANCO which was aimed at analysing and comparing national case law in four selected areas: home and leisure, medial malpractices, tourism services and services of general interest. The draft proposal, however, remained purely academic and did not entail political consequences. It seems as if the European Commission is not willing to get to grips with liability for the safety of services. The green paper on the review of the consumer acquis deliberately excludes the issue from the agenda²⁵⁴.

II. The new EC policy on technical standards

1. DG ENTR/DG MARKET and CEN – development of a strategy

In June 2006 the European Commission via DG Enterprise and Industry (DG ENTR) presented a background summary which allows for the re-construction of the timing of the new initiative. History demonstrates that the European Commission has systematically prepared the ground for standardising services as a supplement to the Service Directive, thereby overruling possible rejections against privatisation of safety matters. The documents enlisted below show the strong interaction between the two DGs, ENTR and MARKET, with CEN on how to proceed in standardisation of services.

- In October 2003 DG ENTR issued Mandate M/340 which requests a programme of standardisation from CEN, CENELEC and ETSI to support the Internal Market in services²⁵⁵. Mandate M/340 must be placed in the context of the development of the Service Directive. It explicitly refers to the overall EC policy on services and to the Council Resolution on the Safety of Services. The major purpose of the Mandate is to invite the European Standards Bodies to present a working programme which will serve as a basis for further standardisation mandates.
- In December 2003 the Commission Communication on the competitiveness of business-related services stresses the role of standardisation in the field of services²⁵⁶. The idea here is to increase

253 Liability for the Safety of Services, 2006.

254 COM (2006) 744 final, 8.2.2007.

255 <http://www.cenorm.be/cenorm/businessdomains/businessdomains/services/m340.pdf>.

256 COM (2003) 747 final, 4.12.2003 under 3.1.

market transparency on products and prices via voluntary standardisation in the sector of services.

- In October 2004 the Commission Communication on the role of European Standardisation in the framework of European policies and legislation emphasises the potential of standardisation for the Internal Market in services, which recognises that the availability of voluntary standards in the area of services lags considerably behind the economic importance and potential of this area. European standards are acknowledged as one of the measures able to enhance intra-EU trade on services and to foster competitiveness²⁵⁷.
- In February 2005 DG ENTR receives CEN's final report to Mandate M/340 setting out its strategy on services²⁵⁸. This paper starts with a valuable description and analysis of the already existing activities in CEN itself and in the Member States standardisation organisations on services. Whenever national bodies take the lead the question emerges whether a European initiative is better suited. CEN argues in favour of a more focused approach in already existing fields (tourism (including on request of ANEC safety of services in winter sports), cleaning, logistic, healthcare, consultancy-management-marketing), and proposes after consultation of its member organisations to set up new working groups on the following subjects: contact centres, business support services to SMEs, real estate agents – engineering services, film cataloguing – provided the European Commission makes the necessary resources available. This required also organisational steps. A specific working group on “service standardisation” was established, CEN Technical Board Working Group 163. As will be seen, CEN's report seems to have heavily affected the policy of the European Commission.
- In February 2005 DG ENTR issues standardisation mandate M/370 to CEN and CENELEC for a normative document on the quality of business support services. In this respect the Commission followed one of CEN's proposals.
- In July 2005 DGs ENTR and MARKT requested a second period of programming in support of CEN'S strategy through mandate M/371. Through this mandate the European Commission asked CEN to follow on from its proposed strategy and submit projects, whether sectoral or

257 COM (2004) 674 final, 18.10.2004.

258 <http://www.cenorm.be/cenorm/businessdomains/businessdomains/services/freport.pdf>.

horizontal that looks in depth at specific service areas, industries or processes. Nine key requirements were set for the individual projects: clarity of scope, focus on the European level, depth of planned work, identification of potential barriers, identification of issues relating to misunderstanding the nature of standardisation, involvement of all relevant stakeholders, possibility to give rise to standardisation work at European level, an assessment of the economic impact of the resulting standards, in particular for SMEs. It seems as if the European Commission would like to speed up the development of standards.

- In January 2006 DGs ENTR and MARKET issued standardisation mandate M/378²⁵⁹ to CEN in relation to customer contact centres. In this respect the Commission accepted a further proposal of CEN presented in its 2005 final report to M/340. The goal of the standard is to provide quality of service requirements for customer contact centres, common to all centres, which exist independent of service provider, service sector or technical approach to the provision of the service. The mandate lays down requirements on contract management and service and performance management.
- In June 2006 DG ENTR received CEN's project bid for programming mandate M/371. It is in this bid where CEN's working programme takes a much clearer shape. The programme distinguishes between bottom up (incremental development of standards as initiated by the member organisations) and top-down (mandates from the Commission), between horizontal (beyond sectors) and vertical (sector-specific) and between business and consumer services.
- Two recent initiatives emerged out of the programmes which document the need for more consistency in the standardisation on services. The first is the establishment of a CEN Technical Board Working Group 192 examining a horizontal approach on the qualification on personnel (October 2006), the second is the BSI project under mandate M/371 on a feasibility study on cross-sectoral services standardisation.

The rough description of the interplay between the European Commission and CEN demonstrates that progress is painstaking. Despite more than 20 years of close cooperation, the European Commission remains dependent on CEN's organisational structure which is built on national standardisation organisations. This is best reflected in the distinction between bottom-up and top-down

259 <http://www.cenorm.be/cenorm/businessdomains/businessdomains/services/m3781.pdf>.

approach. The national organisations will insist on their independence to develop standards, if they feel that there is a need. This might lead to duplication of work which needs to be avoided at European level. Coordination is a smooth word here for delegating standard-making away from the national organisations to the European organisation – CEN. It is much easier for the European Commission to cooperate with CEN via the system of mandates. However, the number of mandates is dependent on the available resources. Mandates quite necessarily require an economic engagement of the European Commission. CEN constantly reiterates its plea that progress in standard-making depends on available resources.

There is not very much consumer rhetoric in the analysed documents. In early 2006, consumer services appear for the first time as a separate category in CEN's working programme. If any, consumers are seen as the beneficiaries of standards, but not as direct addressees. There is one notable exception in CEN's final report to Mandate M/340, ANEC's quest for standards in the field of winter sports. However, there is no consumer policy, despite the Council Resolution on consumer safety and despite the consumer protection rhetoric which governs the area of standardisation of services. If any, consumer issues emerge on an ad hoc basis. The four proposed consumer services related projects have been proposed by AFNOR and NEN, three of them concern the elderly, and one is attributed to tourism and transport. This does not mean that ANEC is not consulted or not involved in the policy-making. Indeed ANEC has been entitled to propose topics for standardisation. ANEC may propose new standards topics either directly to CEN or via lobbying for a mandate from the Commission to CEN (both have been successfully done in the ANEC Child Safety field in the past). Also, ANEC is entitled to use the same appeals procedure as other CEN associates and full members. The problem is that if no organisation of the new Working Group or Technical Committee is found from amongst the CEN members, the proposals may fail for lack of financing/organisation. Understandably, ANEC does not have the resources to take on the organisation of a Technical Committee itself.

a) *Impact on standardisation of services*

Seen from a consumer policy point of view, the true problem of standardisation of services seems to be that ANEC has no status which would allow it to claim the development of a certain policy or certain standards in various fields and – if the request is not met – to set a mechanism into motion which allows to fully consider the arguments brought forward by consumer organisations in an independent forum.

2. The broader perspective – the envisaged revision on the New Approach to technical harmonisation and standards

On 7th May 2003 the European Commission published a communication from the Commission to the Council and the European Parliament “Enhancing the Implementation of the New Approach type directives”²⁶⁰. The overall message of the communication was to overcome certain deficiencies, to test its application in other areas, *amongst others services*, and to develop a more coherent legal framework on conformity assessment, accreditation and market surveillance. On 14th February 2007 the European Commission published a proposal for a Decision on a common framework for the marketing of products²⁶¹. However, this document no longer deals with services. That is why the envisaged revision is of limited importance for the questions under scrutiny, with one exception that the European Commission seems to reformulate its policy on consumer safety.

By now the basis for discussion constitutes a paper called “A Horizontal Legislative Approach to the Harmonisation of Legislation on Industrial Products”, from 6th September 2006²⁶², which was forestalled by a working document “Elements for a horizontal legislative approach to technical harmonisation” from 23rd February 2006²⁶³. The two documents intend to further develop the European policy with regard to technical standards and health, safety and environment, meaning they cover the original New Approach, the adopted New Approach-type directives and the GPSD.

3. Consumer policy in the intended revision of the New Approach

Consumer policy, consumer interests, consumer critique of the New Approach is not given much space in the two documents. This is particularly astonishing with regard to CE-marking, as a recent Commission paper reflected and described the problems consumers have encountered²⁶⁴. For some while it seemed as if there was a chance to revise the CE-marking in order to improve the protection of consumers against being confused by unclear messages resulting from the CE-marking²⁶⁵. The working documents are disappointing in that they do not even mention the major critique already raised against the

260 COM (2003) 240 final, 7.5.2003.

261 COM (2007) 53 final, 14.2.2007.

262 The paper explicitly states that it is not a Commission proposal, it bears the number N560-1 EN.

263 European Commission, DG Enterprise, Certif doc 2005-16 Rev. 2.

264 Draft Certif 2005-11: The role and significance of the CE marking, 30.8.2005.

265 See ANEC comment on the role and significance of the CE-marking, prepared in response to the Draft Certif. Doc 2005-11 of 308.2005.

legitimacy of the New Approach. In this respect the EC initiative equally impacts standardisation of services. The most critical points were and still are²⁶⁶:

- The still unclear status of consumer participation in standardisation – privatisation of lawmaking or even of quasi lawmaking requires democratic legitimacy which can be drawn only from stakeholders, amongst others consumer organisations. ANEC's existence depends on the good will of two parties, CEN/CENELEC in granting access to the work and the European Commission in providing the necessary resources.
- The missing consumer committee on product safety – it has to be recalled that DG SANCO had already discussed the establishment of such a committee in the nineties but did not receive the necessary support within the European Commission. DG SANCO's website mentions the Consumer Safety Working Party of which ANEC is a member, which unites public officials from the Member States and the EFTA countries on a voluntary basis²⁶⁷. However, no information is publicly available of what the working party is doing. The main topics are mentioned on the website in passing only.
- The missing European forum that enshrines the participation of consumer organisations to discuss policy issues in the field of technical standards. This deficiency is not compensated for by the fact that European Consumer Consultative Group (ECCG) which unites consumer organisations all over Europe amongst others ANEC²⁶⁸, and might therefore deal inter alia with standards issues. ISO/CPOLOCO could be taken as a possible model.
- The open question of whether consumer organisations should have standing with regard to product safety matters – they should be entitled to go to court in order to oblige producers and/or dealers to withdraw products from the market, and even more far reaching to file an action

266 See already, *Joerges/Falke/Micklitz/Brüggemeier*, Die Sicherheit von Konsumgütern und die Entwicklung der Europäischen Gemeinschaft, 1988; *Micklitz*, Produktsicherheit und technische Normung in der Europäischen Gemeinschaft – zu den Leistungsmöglichkeiten und Grenzen des Selbstregulierungsmodells als Mittel des Verbraucherschutzes, in: Paetow/Tonner (Hrsg.), Staatliche Wirtschaftsregulierung in der Krise, 1986, pp. 109-127; *same author*, Considerations Shaping Future Consumer Participation in European Product Safety Law, in: Joerges (Hrsg.), Workshop on Product Safety and Product Liability in the European Community, 1989, p. 182-205.

267 http://ec.europa.eu/consumers/cons_safe/serv_safe/committees_workinggroups_en.htm.

268 http://ec.europa.eu/consumers/cons_org/associations/committ/index_en.htm.

against technical standards, if the European Commission has published standards in the Official Journal despite solid arguments that they do not meet consumer requirements²⁶⁹.

ANEC has reiterated the critique and introduced the formula of *balanced representation* in consumer relevant working committees²⁷⁰. There is not much hope that the European Commission in its official version will go beyond the working documents. However, the problem remains that the GSPD provides for a safety net to consumers' products only. If the European Commission intends to leave safety issues in the hands of private Standards Bodies – and this seems to be the intention of the two documents – without setting a binding legal framework, not even within a revised New Approach that puts more emphasis on what could and should be meant by “essential requirements”, the European Commission might run into serious problems. The protection of health and safety of consumers belongs to the core of statutory tasks. The European Commission has no power and no legitimacy to delegate safety matters away from the Member States to private organisations²⁷¹.

a) *Impact on standardisation of services*

The revised New Approach suffers from two major deficiencies: the first is the missing link between standardisation and both existing and pending consumer safety legislation; the second is the positioning of consumer organisations in standardisation. It seems as if ANEC will have to struggle within the existing regulatory framework. The European Commission seems in no way prepared to upgrade the status of consumer organisations, neither in relation to consumer safety nor in relation to technical standardisation.

III. Stocktaking – the existing and envisaged standards on consumer services

Stocktaking aims at getting a full overview of the relevant initiatives undertaken at the national and European level, be it via Standards Bodies or via public agencies. The idea is to classify and to enlist the relevant activities which then serve as a starting point for the analysis of its content under the best practice formula.

269 See the list of published European standards, OJ C 100, 24.4.2004, 20 and ANEC's critical comments ANEC2005/CHILD/077, November 2005.

270 ANEC-GA-2006-G-036, <http://www.anec.org/attachments/ANEC-GA-2006-G-004.pdf>.

271 See already under Chapter III 3. a). The issue cannot be fully developed here.

1. Guidelines and recommendations by Finnish Consumer Agency

The notable exemption here to be mentioned derives from the Finnish Consumer Agency. The Finnish Consumer Protection Act covers products and services. The guidelines are seen as a means to enforce the law. They can be broken down into general guidelines for the promotion of safety in program services (such as sports, adventure activities) and sector-specific guidelines. These initiatives have contributed to ANEC's intervention in the shaping of CEN's working programme.

- Finnish Consumer Agency & Ombudsman – Guidelines for the Promotion of Safety in Program Services, publication series 11/2003;
- Finnish Consumer Agency & Ombudsman – Guidelines for the Promotion of Safety of Ski Slopes, publication series 2/2002;
- Finnish Consumer Agency & Ombudsman – Guidelines for the Promotion of Safety at Swimming Pools and Family Spas, publication series 2/2003;
- Finnish Consumer Agency & Ombudsman – Guidelines for Furthering the Safety of Karting, publication series 6/2003;

a) *Impact on standardisation of services*

The Finnish Product Safety Legislation covers services. The consumer agency has been given powers to survey the market and to take appropriate actions. The guidelines are meant to apply and enforce the safety legislation. The general guidelines on the promotion of safety in package services lay down requirements on the professional skills of the service provider and on the need to ensure himself and his personnel against compensation claims resulting from accidents²⁷². Because of the lack of European requirements on the safety of services, Member States' policies will have to close that gap. The Finnish requirements might be taken into account whenever technical standards on services affect safety matters.

2. Consumer service standards by National Standards Bodies

Major activities may be reported from AFNOR, BSI, DIN and NEN²⁷³. Some of the projects are part of CEN's programme bid under the Second Programme

²⁷² See, 11/2003, under points 8 and 17.

²⁷³ NEN stands for Nederlands Normalisatie Instituut.

Mandate M/371. The stocktaking below does not take those national standards into account which merely transpose European standards.

a) *AFNOR*

- 'Accessibility services: opportunity and feasibility of a standardisation work in the area of transport and tourism', project No. 2 approved within CEN's bid for programming mandate M/371 in cooperation with NEN,
- 'Feasibility and opportunity to develop standardisation in the field of residential homes for elderly people', project No. 4 approved within CEN's bid for programming mandate M/371,
- 'Feasibility and opportunity to develop standardisation in the field of services for resident people', project No. 5 proposed within CEN's bid for programming mandate M/371,
- NF X 50-056 'Services aux personnes à domicile',
- NF X 50-058 'Etablissement d'hébergement pour personnes âgées',
- NF X 50-575 'Prestations d'accueil externalistes',
- NF X 50-700 'Service quality, approach for improving service quality, reference and service commitments',
- NF X 50-720 'Quality of services, recommendations for conceiving and improving welcome'. There is a certain link here to the CEN project on customer contact centres²⁷⁴,
- NF X 50-722 'Quality of services, measurement and monitoring for improving service quality',
- NF X 50-767 'Qualité des services',
- AC X 35-501 'Label Tourisme & Handicap'.

b) *BSI*

- Cross-sectoral service standardisation feasibility study, project approved within CEN's bid for programming mandate M/371 in cooperation with AENOR, DIN, DS, EVS and NEN²⁷⁵. The activities to be undertaken will be organised around seven separate modules (1) guidance in the preparation of service standards (AENOR); (2) glossary of terms and

²⁷⁴ Chapter III, III, 3 c).

²⁷⁵ AENOR stands for Asociación Española de Normalización y Certificación; DS stands for Danish Standards, EVS for Estonian Standards.

definitions relevant to service standardisation (BSI); (3) safety in the delivery of services (DIN); (4) good practices in the assessment of consumer satisfaction (BSI); (5) recommendation for complaints and redress systems (BSI); (6) billing and innovative metering systems (BSI) and (7) specifications, sourcing, delivery and quality of business-related services. This project reflects the desire voiced within CEN to get a better idea of the conditions under which standardisation in the field of services is feasible and useful. Although the project does not focus on consumer services, it very well affects consumers,

- BS 8463:2005 'Specification for customer billing practice',
- BS 8477:2007 'Code of practice for customer service'.

c) *DIN*

- DIN 77800 'Qualitätsanforderungen an Anbieter der Wohnform "Betreutes Wohnen für ältere Menschen" ' – Quality requirements for providers of "Assisted living for the elderly"²⁷⁶,
- DIN 77700 'Dienstleistungen der Lohnsteuerhilfvereine – services of associations providing tax law advice to citizens'²⁷⁷,
- DIN ISO 2222 'Private Finanzplanung, Anforderungen an private Finanzplaner' – private financial planning, requirements on private providers²⁷⁸,
- PAS 1055 'Anforderungen an die Gestaltung der jährlichen Mitteilung an Versicherungsnehmer über den Stand der Überschussbeteiligung bei Kapitallebensversicherungen' – requirements on shaping of annual communications to insured on the allocation of surplus to capital insurance policyholders²⁷⁹,
- DIN 77600 'Kosmetik-Dienstleistungen in Parfümerien' – cosmetic services in perfume shops²⁸⁰.

276 Reprinted in DIN (Hrsg.), DIN-Taschenbuch 397, Normen und Standards für Dienstleistungen, 2006, p. 583.

277 DIN-Taschenbuch 397, p. 503.

278 DIN-Taschenbuch 397, p. 517.

279 DIN-Taschenbuch 397, p. 551.

280 DIN-Taschenbuch 397, p. 571.

d) *NEN in cooperation with SN*

- ‘Smart house services for elderly and disabled people’, project No. 14 approved within CEN’s bid for programming mandate M/371 in cooperation with SN²⁸¹,

e) *Impact on standardisation of services*

These national standards will form the basis of analysing the degree to which standardisation of services takes core consumer elements into consideration.

3. European Standards Bodies (CEN and CENELEC)

For the sake of consistency all consumer-relevant initiatives CEN has undertaken in the last years in the field of standardisation of services have been taken into account. A first attempt to classify the different initiatives might be to distinguish between guidelines, bottom-up and bottom-down approaches. Whilst the guidelines set out factors to be considered in standard-making, the distinction between the bottom-up and bottom-down approaches is more far-reaching. It is suggested that standards elaborated on the basis of EC mandates (bottom-down) are supposed to be more comprehensive and more consumer-policy orientated.

a) *Guidelines*

- CEN/CENELEC Guide 6 Guidelines for standards developers to address the needs of older persons and persons with disabilities.

b) *Bottom-up (from the National Standards Bodies)*

Furniture removal

- Final draft EN 12522-1 and EN 12522-2 Furniture removal activities – furniture removal for private individuals, Part 1 Service specifications and Part 2: Provision of service.
- EN 14873-1 and EN 14873-2 Furniture removal activities – storage of furniture and personal effects for private individuals – Part 1: Specifications for the storage facility and related storage provision and Part 2: Provision of the service.

Language study tour

- EN 14804 Language study tour providers – Requirements.

281 SN stands for Standard Norge, meaning “Standards Norway”.

Services of Real Estate Agents

- Requirements for the services of real estate agents, CEN BT TF 180 is the group currently drafting this standard.

Recreational diving services

- EN 14153-1 EN 14153-2 and EN 14153-3 Recreational diving services – Safety related minimum requirements for the training of recreation scuba divers – Part 1 Level 1 Supervised Diver, Part 2 Level 2 Autonomous Leader; Part 3 Level 3 – Dive Leader.
- EN 14413-1 and EN 14413-2 Recreational diving services – Safety related minimum requirements for the training of scuba instructors Part 1: Level 1 and Part 2: Level 2.
- EN 14467 February 2004 Recreational diving services – Requirements for recreational scuba diving service providers.

Tourism

- EN 13809 March 2003 Tourism services – travel agencies and tour operators – Terminology.
- EN ISO 18513 October 2003 Tourism services. Hotels and other types of tourism accommodation.

Transport

- EN 13816 April 2002 Transport – Logistics and services – *Public* passenger transport – Service quality definition, targeting and measurement.
- EN 13876 December 2002 Transport – Logistics and services – Goods transport chains – Code of practice for the provision of cargo transport services.
- EN 15140 April 2006 *Public* passenger transport – Basic requirements and recommendations for systems that measure delivered service quality.
- CEN TC 320 Business Plan 'Transport – Logistics and services'.

c) *Top-down (mandates from the European Commission)*

Postal services

The set of very comprehensive standards have been prepared on the basis of two Mandates from the European Commission²⁸². A third mandate is under way. The standards of major interests for consumers are the following:

- EN 13724, November 2002, Postal services – Requirements and test methods.
- EN 13850, May 2002, Postal services – Quality of services – measurement of the transit time of end-to-end services for single piece priority mail and first class mail. Must be read together with CEN TR²⁸³ 14709 Postal services – quality of service – Guide for the implementation of EN 13850.
- EN 14012, March 2003, Postal services – Quality of service – Measurement of complaints and redress procedures.
- EN 14137, September 2003, Postal services – Quality of service – Measurement of loss of registered mail and other types of postal services using a track and trace system.
- EN 14508, May 2003, Postal services – Quality of services – Measurement of the transit time of end-to-end services for single piece non-priority mail and second class mail.

Customer contact centres

- Mandate M/378, January 2006, states that “customer contact centres have developed over recent years to be a business sector of global importance, with significant outsourcing both in Europe and in third countries. A European standard would offer the possibility to set a quality level for the provision of the service and for purchasers of the service to make informed choices in their contracting”.
- CEN BT TF 182, July 2006, the Draft business plan gives concrete shape to what the European Commission expects CEN to do. It reiterates the distinction between contract management and performance management, thereby enlisting a whole set of issues, and sets out procedural rules for its elaboration (project team, member contributions, time schedule).
- The first working draft of the envisaged CEN standard on Customer contact centres will be discussed in April 2007.

282 <http://www.cenorm.be/cenorm/businessdomains/businessdomains/services/freport.pdf>, at page 18.

283 Technical report.

d) *Impact on standardisation of services*

These (draft) European standards and other documents will form the basis of analysing the degree to which standardisation of services takes core consumer elements into consideration.

4. International Standards Bodies (ISO/IEC)

IEC/ISO have drafted a set of policy standards which do not deal with particular services, but which focus on specific consumer concerns. COPOLCO is a political committee of ISO (not a standards committee) and suggests standards projects to ISO (such as the ISO 10001, 10002 and 10003 see below) and also produces standards development guides, policy statements and informational publications on issues of importance to consumers. ANEC is an observer in ISO/COPOLCO, whereas Consumers International has liaison status.

- Draft ISO DIS 10001 'Quality management – customer satisfaction – guidelines for codes of conduct for organisations'. This document is meant to serve as a tool kit for developing codes of conduct, however, not in the field of services alone. The approach is very broad and comprehensive. The draft could be seen as a wish list of what consumers would like to see in a technical standard. That is why the draft helps to define what might be understood by best practice.
- ISO 10002 'Quality Management – Customer satisfaction – Guidelines for complaints handling in organisations'. This document fits very well into Article 27 of the Service Directive which does not deal with dispute settlement but with complaints handling alone²⁸⁴.
- Draft ISO DIS 10003 'Quality management – customer satisfaction – guidelines for dispute resolution external to organisations'. This document is envisaged as a tool kit for developing appropriate out of court settlement procedures. The draft does not reflect the two EC Recommendations 98/257/EC and 2001/310/EC²⁸⁵.
- ISO/IEC Draft Guide 76 'Development of service standards – recommendations for addressing consumer issues'. This document is not an ISO standard. It could be understood as a wish list meant to serve as a yardstick in the elaboration of standards. The broad approach chosen is helpful in that it covers environmental protection, personal training and

284 See already under Chapter III, I, 2, g).

285 See already under Chapter III, I, 2, g). Legally speaking there are no barriers why an international standard should not refer or mention to an EC recommendation.

emergency measures, but it might produce problems in that it redefines well established EC concepts, such as choice and quality.

a) *Impact on standardisation of services*

These international standards and guidelines will form the basis of analysing the degree to which standardisation of services takes core consumer elements into consideration.

5. A first attempt at systematisation

The stock taking indicates that so far consumer services have not been at the forefront of this development. There are very few initiatives taken so far, mostly in the relevant business circles.

a) *Original consumer services*

Strictly speaking there is only a limited set of projects which bear a strong consumer focus

- At the national level, the guidelines on the safety of services developed by the Finnish consumer agency, and
- At the international level, the ISO/IEC Draft Guide 76 on Development of service standards – Recommendations for addressing consumer issues, as well as the (envisaged) series of ISO 10001 to 10003 on consumer satisfaction – though not particularly designed for consumer services.
- At the European level, the BSI project on a “cross sectoral standardisation feasibility study”,
- and the AFNOR project ‘Accessibility services: opportunity and feasibility of a standardisation work in the area of transport and tourism’, ‘Feasibility and opportunity to develop standardisation in the field of residential homes for elderly people’, ‘Feasibility and opportunity to develop standardisation in the field of services for resident people’, as well as the NEN project ‘Smart house services for elderly and disabled people’.

This means that the only piece available so far that might provide guidance on the standardisation of services results from ISO/COPOLCO. The situation might change once the BSI feasibility study has been completed. This finding seems astonishing in particular as the European Community played and is playing a highly important role in standardisation ever since 1985, which has even

triggered action at the GATT²⁸⁶ level²⁸⁷. ANEC and Consumers International are participating in ISO and IEC. At the EC level, ANEC ensures timely consumer input into standardisation and related policy debates. The current study commissioned by ANEC complements ISO/IEC Draft Guide 76. Whilst the latter is addressed to practitioners, the ANEC study may be regarded as more of an academic exercise.

b) Business induced consumer services

Once this gap is closed, the point remains that standardisation of services is very much determined by business interests. At first sight the interests of business can be easily identified. Broadly speaking they could be grouped around three areas:

- Tourism; tour operators and travel agents, recreational activities such as diving, language tours,
- Elderly people, housing and care,
- Transport and furniture removal.

Tourism is big business today. Standardising definitions, providing ground rules for tour operators, travel agents and language tour operators and securing the safety of, for example, diving activities through appropriate education fit very well into a consumer society in which travelling combined with leisure activities have gained such an importance that standards increase the economies of scale in this business sector.

Europeans are getting older and have less children. Society is under change. More and more people retire at an age where they are still in a position to organise their lives themselves. At the same time, they intend to take precautionary measures which allow them to feel safe even if they need more and more help in the daily organisation of their households. It is here where the projects on standardising services tie in. They all deal in some form or the other with the elderly as market citizens who request services, to be paid out of their pensions or assets. The relevant initiatives, however, are taken at the national level, not at the European level. The reason could be that the pension systems are still national and that the majority of the elderly return home when they need support and care. However, the number of Europeans who do not want to stay in their home country and who seek to spend the third age in the warmer part of Europe is steadily increasing. European law has substantially contributed to this

286 GATT – General Agreement on Tariffs and Trade, see <http://www.gatt.org/>.

287 See *Micklitz*, Internationales Produktsicherheitsrecht, 1995, pp. 257 et seq.

development by way of granting European citizens the right to settle anywhere in the European Community, at least as long as they are financially independent.

From a consumer perspective transport issues and removal of furniture fit into such a scheme, although tourists do not require the services of furniture removal companies and the number of the elderly who move to southern Europe may not suffice to create such a demand. The much bigger market seems to be those citizens in the European Community who change their workplace and need support in transporting their household from one Member State to the next. In this respect consumers benefit from initiatives undertaken at the national level, however, they are not leading the process of standardisation.²⁸⁸

c) European Commission induced consumer services

The European Commission has not yet taken a clear stand. The standardisation of postal services accomplishes the initiative in the service sector. The mandate to elaborate the above-mentioned set of technical standards results from the European policy to liberalise, to privatise and to “Europeanise” postal services all over Europe²⁸⁹. The vast majority of the standards on postal services are the direct result of sending more letters around Europe and ensure that they arrive safely and on time. However, consumer-to-consumer mail is decreasing but business-to-business and business-to-consumer mail is increasing.

The first mandate that affects consumers directly is M/378 on customer contact centres. In a world where consumers order products even Europe-wide via the internet, after-sales services are changing. The consumer can no longer go to the shop where he or she bought the product. He is bound to contact the service provider via distant telecommunications means. The service provider, however, tends to outsource after-sales services, be it in the form of mere advice on how to handle the product, or be it on how to solve possible consumer complaints. In this respect a new type of service has emerged that produces a lot of difficulties to consumers and maybe also to business.

288 See with regard to the need for genuine consumer led standardisation work, Chapter VII, III.

289 See for the very same development in the network industries, telecommunications, gas, electricity and transport, Chapter II, I, 3.

d) *Impact on standardisation of services*

The survey makes clear that although the standardisation of services is gaining pace, not much has happened yet in the field of consumer services. For the purpose of this study this finding is advantageous and disadvantageous. Advantageous insofar as the core elements might be helpful for the future ongoing work, disadvantageous in that there is little material which could serve as a basis for defining “best practice”.

Chapter IV: Identification of best practice and core consumer elements

In order to give shape to “best practice”, the study will draw together the existing theoretical, legal and practical debate. These will serve to then define the core consumer elements.

I. Best practice – what does it mean?

For some years “best practice” has appeared in EC directives, such as in Directive 2004/39/EC on financial instruments and now in the Service Directive. It governs more and more the overall policy rhetoric of the European Commission, also with regard to product safety. The recent study on product safety of amusement parks is entirely based on the idea to identify “best practice”. For the purpose of this study, it is necessary to look behind the curtain, in order to better understand what is or what could be meant.

1. “Best practice” as a business concept

Best practice has nothing to do with standardisation or lawmaking. It is a business concept as old as industrialisation. In Wikipedia we can find the following definition²⁹⁰:

Best Practice is a *management idea* which asserts that there is a *technique*, method, process, activity, incentive or reward that is more effective at delivering a specific outcome than any other technique, method, process, etc. The idea is that with proper processes, checks, and testing, a project can be rolled out and completed with fewer problems and unforeseen complications ...

The notion of “best practice” does not commit people or companies to one inflexible, unchanging practice. Instead, Best practice is a philosophical approach based around continuous learning and continual improvement.

Whilst the reference to the so-called “Taylorismus” may appear frightening, the overall direction of ‘best practice’ comes clear. As a business concept it looks for more and increased efficiency in analysing the internal processes, thereby

290 http://en.wikipedia.org/wiki/Best_practice.

looking for more and better ways to save costs and increase the quality. As a philosophical concept, best practice enshrines the idea of an open-ended constant learning process.

a) *Impact on standardisation of services*

Best practice combines two elements: the definition of a content and the open learning process. That is why best practice cannot and should not just be confined to “the best possible content or result” but to establish a procedural framework which enables constant improvement.

2. Best practice in investment directives

The concept of best practice seems to appear for the first time in the regulation on investment services. This is not at all the surprising, taking into account the business origin of the concept. The notion has to be concretised at its sources so to say before it is possible to give it shape in the field of standardisation.

Whilst the European Commission has not laid down and clarified generally, i.e. notwithstanding the circumstances, what it means, best practice is constantly used, reiterated and shaped within the Lamfalussy procedure.

In Directive 2004/39/EC on financial instruments²⁹¹ best practice appears in the recitals, in the articles, all in all twelve times. Directive 2006/73/EC²⁹² implementing Directive 2004/39/EC on financial instruments mentions best interests, best possible result, best execution obligation, best deal, best handling, all in all 41 times.

Directive 2004/39/EC only formulates programmatic targets, such as investment in the best interests, achieving best results, taking best execution obligation. At that level the content remains rather vague. However, the concept takes shape at the second level of the Lamfalussy procedure within Directive 2006/73/EC. Best practice is defined as a set of mandatory obligations to be imposed via the Member States on the investment firms. They set out a regulatory framework in which the investment activities are embedded. There is less attention in the two Directives on how to organise the open learning process.

a) *Impact on standardisation of services*

So far financial services is the only area where the EC legislator explicitly refers to the notion of best practice in various contexts. This might be regarded as a

291 OJ L 145, 30.4.2004, 1.

292 OJ L 241, 2.9.2006, 26.

precedent in a two-fold sense: first the EC legislator might have used financial services just as a starter to be followed in other areas of the law, and secondly, the context of best practice reveals its strong economic efficiency bias.

3. Best practice in the network industries

The two Directives on electricity and gas, 2003/54/EC and 2003/55/EC, do not yet contain the best practice rhetoric. Best practice, however, appears most recently, i.e. in July 2006, in three recommendations²⁹³ meant to improve the position of the end customer. The three recommendations on

- Customer Protection – Best Practice Proposition,
- Transparency of Prices – Best Practice Proposition,
- Supplier Switching Process – Best Practice Proposition,

will concretise Annex A of the two Directives, which lays down the basic customer protection rules. The three recommendations constantly reiterate that the three recommendations are to be regarded as best practice. However, there is no help in defining what is meant by best practice and in what way the practices are “best”.

a) Impact on standardisation of services

The EC policy behind is quite different from the financial services sector. The two directives 2003/54/EC and 2003/55/EC do not contain much guidance on what the relationship between the consumer and the service provider should look like. This is largely left to the Member States. However, the relevant European institutions, which might be understood as a counterpart to the European Standards Bodies, have tried to develop non-binding rules in order to fill this gap. Here the notion of best practice crops up a number of times, again without explaining what is meant.

4. Best practice in the new policy on services

The different pieces of legislative measures which could be referred to, e.g. the Service Directive, the intended revision of the New Approach and the lack of a Commission policy on safety of services indicates that the development with regard to standardisation lags far behind those of investment services.

293 http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_DOCS/ERGEG_DOCUM-ENTS_NEW/CUSTOMER_FOCUS_GROUP/PR-06-08_CFG-BestPractices.doc.

The Service Directive mentions “best efforts” in relation to Article 27 on dispute settlement:

Member States shall take general measures necessary to ensure that providers respond to the complaint referred to in the first subparagraph in the shortest possible time and make their best efforts to find a satisfactory solution.

But the Directive does not indicate what it means.

The EC policy on the safety of services is somewhat more specific. Whilst the notion of best practice is still missing in the application, it appears in the research projects DG SANCO has initiated to meet the mandate of the Council Resolution. One study is entitled “Assessment of Best Practice in Fairgrounds and Amusement Parks in Relation to the Safety of Consumers”²⁹⁴. The outline of the study to be undertaken, as formulated by the European Commission, reiterates the notion of best practice without defining it²⁹⁵. The authors of the study seem to understand best practice as the one which undertakes the most comprehensive and deepest research on these specific risks and which is regarded by experts as simply being the best available standard in that field.

In the working document on the intended revision of the New Approach on standards²⁹⁶ there is one reference to best practice in “market surveillance”:

Member States, it is suggested, shall have recourse to best practice and sound management of resources. They must, in particular be able to detect serious cases of non-conformity. Priority shall be given to the fields in which the probability of risk is the highest or to cases which are of individual interests (complaints, accidents).

The working document contains as Annex 1 a set of definitions. However, best practice is not defined. All in all the notion of best practice is slowly gaining pace, but no one has ever made an attempt to define it, at least not with regard to standardisation.

a) *Impact on standardisation of services*

The integration of best practice into Service Directive 2006/123/EC can easily be understood as a prolongation of a policy which the European Commission began in the field of financial services. What the Commission has really done is to transform best practice into a general principle that gains pace outside financial service and turns into a common device for shaping the Internal Market. At the same time, however, the strong economic efficiency bias is

294 http://ec.europa.eu/consumers/cons_safe/serv_safe/reports/final_032005_en.pdf.

295 The outline is reprinted in the report.

296 European Commission, DG Enterprise, Certif doc 2005-16 Rev. 2, under 8.1.f) p. 21.

weakened. Once best practice shows up in the overall regulation of safety of services, the notion becomes a political device as well. This opening helps to decouple the concept from its economic efficiency origins and to introduce moral and value loaded ideas to it.

5. Best practice in BSI Code of practice for customer services

The recently adopted BS 8477:2007 'BSI Code of practice for customer services' is not particularly aiming at protecting consumer interests in standardisation. However, it is the first attempt so far to law down horizontal rules for customer services. The standard sets out essential principles for establishing and maintaining effective customer service and provides recommendations on applying these principles.

The Code contains four chapters:

- (1) Customer service principles
 - commitment,
 - credibility,
 - customer service culture,
 - responsibility, resources,
 - identification of customer service issues,
 - customer service quality feed back systems,
 - continual improvement,
 - internal communication,
- (2) Implementation at a structural level
 - obligations of top management,
 - obligations of customer service management,
 - obligations of employees
- (3) Operational recommendations
 - provision of information to customers (general requirements, pre-purchase and purchase and delivery),
 - customer interaction (accessibility, counter service, telephone service, web-based service, customer appointment service),
 - after sales (repairs),
 - Customer service documentation (registering, billing, service delivery record system, correction and corrective action).
- (4) Maintenance of customer services principles
 - Feedback systems (customer/employee feedback, audits, benchmarking and complaints)

The Code of Practice sets out quite a number of innovative requirements which heavily affect consumer issues, e.g. with regard to education and training and with regard to the pre-contractual as well as the post-contractual stage. It relies

on national standards alone and does not build links to European and/or international standards that affect the subject matter.

Although the Code affects legal rights and duties, the Code contains a disclaimer that it does not take into account the relevant contractual and legal considerations. Whilst the Code may guide standard making, it may not guide business practice. Here hard information on the legal environment is needed.

a) *Impact on standardisation of services*

The Code of Practice provides for useful input on the education and training as well as on the pre-contractual and the post contractual stage. In so far the Code might help to shape the consumer input into standardisation.

6. Best practice in ISO/IEC Draft Guide 76 on development of service standards – Recommendations for addressing consumer issues

So far the ISO/IEC Draft Guide 76 is the only document that formulates recommendations on how standards in the area of consumer services could and should be developed. In this respect the ISO/IEC Draft Guide 76 could be understood as “*best practice per se*”. The Guide contains 9 chapters²⁹⁷:

- (1) scope, meant for the use of standardising services, be they formal or informal, be they services to be paid for or not (i.e. also for charities), be they tied to a contract or not (such as education, health and care provision),
- (2) normative reference – ISO 9000 Quality management systems,
- (3) terms and definitions,
- (4) key consumer principles,
 - General,
 - Information – in the selection, provision and effective use of services,
 - Access and fairness – is availability to all consumers regardless of location, social and economic consideration, physical or mental impairment,
 - Choice, – a standard should not favour a specific supplier,
 - Safety and security – health, safety, financial security, privacy,
 - Quality – the extent to which the characteristics of a service fulfil the requirement,
 - Redress – delivery and appropriate provisions to handle claims,

297 The information is based on the draft copy received at ISO COPOLCO meeting, May 2006, Kuala Lumpur, Malaysia.

- Environmental issues,
 - Representation – of consumers in the standard-making, as fall back position consultation,
 - Compliance with laws and regulations.
- (5) Using the Code – reference to ISO 10001 – 10003 on consumer satisfaction, as well as ISO Guide 71 on the needs of the elderly, as well as ISO Guide 51 on consumer safety, and ISO Guide 50 on child safety,
- (6) Developing standards – taking into account the consumer interest – guidance on how to proceed in ensuring respect of key consumer issues,
- (7) Key consumer questions – check list on key questions consumers might ask,
- (8) Detailed consideration of service elements and related topic areas – transforms the key consumer questions (7) into a more detailed list of requirements which must be met
- Service provider (quality, environmental, occupational health and safety management, solvency and other financial aspects, integrity (through codes), capacity (size and resources), social responsibility (i.e. care of workers, child labour – an international standard is under consideration), human resources,
 - Suppliers – which also includes organisations,
 - Personnel knowledge (language), skills and competences, attitude, training,
 - Customers (he who purchases the services, depending on his capacities),
 - Contract (clarity and transparency, objectivity and fairness (fair contract terms, cancellation rights, complete costings, data protection), format (layout)),
 - Billing (information related to payment, mode of payment, conditions),
 - Delivery (trustworthiness, privacy, safety, health and hygiene, environmental aspects, code of conduct, security),
 - Service outcome (satisfaction, continual improvement (ISO quality standards 9004),
 - Service environment (health and safety, accessibility),
 - Equipment (quality and safety, accessibility),
 - Safeguards (emergency, liability, guarantee, redress),
 - Communication between service provider and customer (method, content, frequency, approachability, attitude policy, code of conduct, customer satisfaction measurement),
 - Communication within service organisation (method, frequency, shared information),

(9) Checklist – the criteria set out in clause 8 are transformed into a checklist.

Whilst the ISO/IEC Draft Guide 76 as it stands today substantially contributes to the development of “best practice”, it seems rather complex and incomplete which regard to consumer issues.

Complexity: The key consumer principles (4) and the detailed consideration of service areas (8) might be merged into one single category. This would allow to restructure the ISO Guide in the following way:

- Data collection: evaluating the consumer interests in the relevant field (bottom-up approach)
- Guides, guidelines and standards to consider;
- Core consumer elements on the substance of standard-making, ((4) and (8) merged);
- Checklist (whether standard-making complies with the above criteria).

Completeness: The two (draft) ISO standards 10001 and 10003 as well as ISO 10002 on consumer satisfaction establish comprehensive rules on code-making, complaint handling and out of court settlement, but they do not replace the need to lay down in a Guide on how to develop key principles on inspection and monitoring. This means that the ISO/IEC Draft Guide 76 could contain a separate category:

- Core consumer elements on the enforcement of consumer complaints (handling, dispute settlement);
- Rules on the inspection and the monitoring of the standard (substance and enforceability).

a) *Impact on standardisation of services*

The envisaged ISO guide contains a whole series of important ideas and elements which will have to be taken into account when drafting the core consumer elements and the minimum or basic requirements. The comprehensive approach allows to condense a series of factors into leading principles. In this respect the draft is a very useful tool for completing the purposes of this study.

7. Elements of best practice as defined by ANEC in the outline to the study

In the outline to the study ANEC has set out “core consumer elements” which cover, inter alia:

Information provisions:

- Availability, quality, correctness, completeness and comparability of information concerning the service provision;
- Information about the applicable legislation and avenues of redress in the case of dispute.

Quotation/contract/billing:

- Quotation (such as basis of calculation, commercial terms);
- Minimum requirements for contractual agreements (such as written form);
- Billing.

Service quality requirements:

- Definition of quality criteria and/or processes;
- Quality management/internal and independent control;
- Accessibility.

Personnel:

- Training, qualification, and competence of personnel.

Customer satisfaction:

- Collection and method of measuring of customer satisfactions evaluations;
- Publication of customer satisfaction and complaint statistics;
- Complaint-handling and redress.

ANEC's core elements are composed of three parts, firstly detailed substantive requirements on information, quotation, content of the contract and billing, secondly requirements on professional skills and thirdly on inspection and monitoring by using consumer satisfaction as a yardstick.

II. Shaping and sharpening the concept of best practice

The survey and analysis of already existing efforts to give shape to best practice has revealed uncertainty of what could and should be meant by best practice in general and in the specific field of standardisation. This does not mean that the review process turned out to be useless. The idea now is to condense the available criteria into a proper concept which should then serve as a blueprint of analysis.

In the light of the foregoing analysis, the elements of best practice may be broken down into leading principles, core consumer elements and minimum or baseline requirements. The relationship between the three can be demonstrated by a pyramid that is put upside down. On top of the pyramid are the leading principles. They represent the broad ideas and concepts which govern best practice. These leading principles may be concretised into core consumer elements. These give shape to the leading principles and represent a yardstick against which existing standards or standards under work can be measured. The minimum or baseline requirements may be deduced from the core elements. They are a slim version of the core consumer elements. Minimum or baseline requirements might help to evaluate existing standards or standards under work and defend the bottom line interests of consumers in standard-making.

1. Leading principles

- *Completeness* – substantive standards and procedural rules on how to organise the constant learning process. It does not suffice to determine substantive standards, how comprehensive they might be (rights, remedies, enforceability), it is equally indispensable to make sure through appropriate procedural requirements that a constant improvement of the existing level of standardisation can be achieved. This seems to be the most important lesson to be learnt from the economic background of best practice.
- *Innovation* – when there is no practice at all, each and every effort to give shape to the elaboration of standards on consumer service could be regarded as the existing best practice. Innovation is particularly important in those fields of services where there are no legal requirements at the national and European level, which may provide already guidance.
- *Expertise* – best practice implies a value judgment on what is considered to be best. As long as standardisation of services involves technical matters, the expertise must come from engineers or natural science researchers. If standardisation of services interferes into contract making, legal expertise might equally be needed.
- *Legal language* – it is plain that technical standards are not binding per se. They gain a specific legal status only if the producers or service providers voluntarily decide to subscribe to them. Outside contractual commitments, technical standards may gain importance in product liability matters. However, these limited effects depend entirely on the

language used in the technical standards. Widely drafted general declarations or the reiteration of common sense or truisms cannot produce any legal effect, not even if the service provider explicitly refers to such standards. That is why clear-cut language with concrete messages constitutes a basic element for identifying best practice.

- *Democratic accountability* – although technical standards are not legally binding and although those who subscribe to them are not legally bound to their commitment, technical standards bear a quasi-legal character. Compliance with technical standards grants access to the Internal Market and releases the producer from liability issues, in the absence of safe proof to the contrary²⁹⁸. In this respect it is fair to test whether the standard-making process meets basic democratic requirements, such as openness, transparency, accessibility, fair participation of all relevant stakeholders, i.e. not only a formalistic right to be heard, but a fair chance to influence the standard-making process.

2. The substantive core consumer elements

The core consumer elements are derived from the foregoing analysis of EC regulation of services, and so-called best practice in the examined EC regulations and technical standards, as well as the guides and codes.

- Education and skills – the quality of the service depends to a large extent on the personnel qualifications of those individuals who provide the service to the consumer. In this respect professional skills and professional training hold a prominent position. Because of the lack of harmonised standards on professional skills and professional training in the EU – Directive 2005/36/EC relies in essence on mutual recognition of national educational requirements, at least outside health and safety related professions - technical standards on services should lay down requirements on the skills the service provider needs to meet.
- Equipment and premises – services, at least tangible services, can only be executed by the service provider or reasonably be used by the consumer with the aid of the necessary equipment, such as tools or any other devices. The equipment must not only meet quality standards but also and in particular, safety requirements. The same applies *grosso*

²⁹⁸ Compliance with technical standards is regarded either as *prima facie* evidence or as a presumption of compliance, see for details *Magnus/Micklitz, Liability for the Safety of Services*, 2006.

modo to business premises. Depending on the service, premises must be hygienic and safe.

- Contract for services – standardisation of consumer contracts for services covers the whole range of consumer concerns, from cradle to grave, from the *pre-contractual stage* (advertising and information), over *contract conclusion* (formal requirements, written form, role of internet), up to the *content of the contract* (price and quality (safety), rights and duties of the parties, what rights and what remedies for what parties), and *the post-contractual stage* (guarantees, after-sales services, complaint handling, dispute settlement, redress, protection against insolvency).
- Inspection and monitoring – self-regulatory means, such as technical standards require a mechanism to ensure the constant learning process is enshrined in the concept of best practice. Without a feedback mechanism, in which consumer satisfaction plays a prominent role, the constant learning process cannot be organised. Therefore any technical standard which does not provide for inspection and monitoring in order to constantly improve the standard necessarily fails the best practice test.

These core consumer elements may be broken down into six different levels of analysis which will be used as a common yardstick for reviewing the already existing EC rules on services, as well as technical standards:

- (1) education and skills,
- (2) equipment and premises,
- (3) pre-contractual stage and contract conclusion,
- (4) content of contract,
- (5) post-contractual stage,
- (6) monitoring and inspection.

3. The procedural core consumer elements – democratic accountability of standardisation

Democratic accountability may be discussed at two levels: at the more general level regardless of the type of products and services in question, as well as in more detail with regard to the already existing technical standards or those

where work is in progress. ANEC is an associate of CEN²⁹⁹ a cooperating partner of CENELC, and a full fee-paying member of ETSI. ANEC's status in CEN, CENELEC and ETSI gives it the right to attend e.g. the Technical Board (BT) meetings and General Assembly. In CEN and CENELEC ANEC has no voting rights and is informed of new standards initiatives along with other members. It may participate in all working groups where it wishes to be present. For the time being ANEC is present in the following working groups here of interest:

- CEN BT TF 180 on Real Estate Services,
- CEN BT TF 182 on Customer Contact Centres,
- CEN TC 331 on Postal services,
- CEN BT Working Group on Services Standardisation (advisory group to the CEN Technical Board),
- European Commission EFOSIM (European Forum on Services in the Internal Market) WG "Service Standards",
- CERP Project Team "Relations with Customers",
- Consumer Safety Working Party of the Commission.

The latter three are not related to CEN:

However, national consumer representatives might provide input to standardisation as well. In the elaboration of standards for services, national representatives from the consumer side within National Standards Bodies participated, inter alia,³⁰⁰:

- in Furniture removal CEN TC 320, Working Group 4 (consumer representative from DIN Consumer Council),
- in Language study tour providers, CEN TC 329 (consumer representatives from DIN, Stiftung Warentest, and the consumer advice centres, as well as consumer representatives from ON Consumer Council and BSI Consumer Policy Unit),
- in Recreational diving services, CEN TC 329 (consumer representative from BSI Consumer Policy Unit),

299 The rights and duties of CEN associates are laid down in the CEN Associates Guidelines and information package, March 2004.

300 Information from the Secretariats to the respective Technical Committees in their personal capacity.

- in Transport, CEN TC 320 (consumer representative from BSI Consumer Policy Unit).

The short survey demonstrates that the consumer representatives raised their voice in the large majority of all standards here to be analysed in more detail. So the true question is not one of getting access to standardisation, but to what extent the consumer voice is heard and listened to in the relevant committees. CEN is much more relevant here than CENELEC. Formally speaking, the CEN's Technical Committees are in no way bound to take ANEC's view into consideration. A simple rejection might be counterproductive for the consent-oriented approach on standard-making and might even yield political reactions, at least in the long run. In current practice, however, it depends to a large extent on ANEC's arguments alone whether or not it can bring its particular position through. That is why the concrete impact of ANEC in standard-making could only be evaluated by reconstructing the process of elaborating a specific standard. This has been done in the area of toy safety, where ANEC commissioned a study on the degree to which the then prevailing proposals neglect the specific safety needs of smaller children³⁰¹. In the areas here to be investigated in the following chapters, a more general assessment of ANEC's impact might be enough to give shape to the idea that standard-making may only gain democratic accountability if all stakeholders are given the opportunity to make their views known and to influence the outcome of voluntary standard-making. As a last resort ANEC may contradict the publication of those CEN standards which have to be published in the Official Journal of the European Union. However, ANEC has no rights and no remedies to stop the European Commission. It can only address the press and raise public awareness. This is exactly what happened when ANEC criticised the publication of certain European toy standards³⁰².

III. The next step: Reviewing the existing EC rules and technical standards against the core consumer elements

The analysis of existing best practice allowed me to draft leading principles and to deduce from them the core consumer elements of best practice. These core consumer elements will now be used as a yardstick against which are measured

301 <http://www.anec.org/attachments/R&T006-04rev.pdf>.

302 See Comment from ANEC on Draft list of standards for consideration in view of publication of references in the OJEU, ANEC2005/CHILD/077, November 2005.

- (1) the already existing EC rules on services – sector-specific rules on consumer services, on transport, financial and network services (telecommunications, postal services, gas, energy) as well as the services coming under the Service Directive – and
- (2) the existing, as well as drafted, technical standards on services. In order to allow for a more consistent analysis of the already existing technical standards, including those where work is in progress, these are grouped around five major topics: tourism services (II), services for the elderly (III), furniture removal (IV), postal services (V) and transport services (VI).

Such an approach allows for a more consistent analysis. At the same time it has to be clearly said that the analysis is in no way comprehensive. It covers the CEN standards and AFNOR, BSI and DIN standards on services insofar as they fall under the five categories. However, national standards which transpose CEN standards, are not taken into account.

The review process will allow to identify strengths and weaknesses of the standardisation in the field of services, under the assumption that the above defined core consumer elements present a valuable and useful tool for such exercise.

The review process does not include whether and to what extent ANEC and/or the national consumer representatives have managed to influence standard-making to the benefit of consumers. This aspect is included in the comparative analysis of all screened set of standards³⁰³.

Chapter V: Reviewing existing EC regulation and technical standards against the core consumer elements

The review process is broken down into existing EC regulation (I), i.e. those areas where the EC legislator has intervened and has defined requirements, and into areas where European and National Standards Bodies have already elaborated standards or where there is work in progress. These standards are grouped together in order to facilitate review. Five different areas may be distinguished: tourism services (II), services for the elderly (III), furniture removal (IV), postal services (V) and transport services (VI).

303 See under Chapter V, VII.

I. Current practices in the already existing EC regulation of services

The already existing EC rules on services, that is, the sector-specific rules on consumer contracts and services, transport, financial services, network services and the Service Directive provide a fertile ground for giving shape to the notion of “best practice”. The crucial problem in already adopted EC rules on services results from the sheer number of European rules launched, issued and adopted by the various regulators. It requires detective skills and stubbornness to dig all the various rules out of the web. The success is worth the effort. The web reveals more and more rules. In this respect the situation differs considerably from the existing rules laid down in technical standards. The various European regulations, directives, codes, recommendations, programmes etc. will now have to be contrasted against the six parameters which reflect the core criteria developed above.

1. Education and skills

In principle, the existing EC law on services, mainly in specific sectors, does not contain rules on professional skills, on training and education. The regulatory technique is shaped to open up markets in realising the freedom of establishment and the freedom to provide services. This is done by harmonising the requirements under which suppliers might settle in the host country or might provide the service from the home country. If any, these harmonised requirements are bound to the performance of specific activities on the market. Therefore suppliers must meet certain minimum requirements. However, EC law does not lay down rules on how the relevant service providers need to be trained, or what sort of education they must have if they intend to widen their activities beyond national borders.

That is why it is not at all surprising that the set of rules which have been adopted to regulate certain services do not contain rules on professional skills. This is true for Directives 2003/54/EC and 2003/55/EC on electricity and gas, Directive 2004/39/EC on financial instruments and the Service Directive. The situation is slightly different in banking services and for insurance companies. However, all directives put more and more emphasis on the correct definition of the different service providers acting on the market. These definitions, however, are not bound to professional skills. They are merely technical, or maybe even more accurately, functional, i.e. they are defined for the purpose of the role they have to play in the market. They do not help in deriving professional skills.

2. Equipment and premises

Just as education and skill, equipment and premises are of no primary concern for a regulatory approach which is meant to open up markets for tangible and intangible services.

Any quality and safety requirements on equipment and premises show up mainly in relation to tangible services. There are some rules here and there, but there is no systematic approach to equipment and premises. Although the new approach type directives might lay down requirements on equipment and premises these are not referred to in the standards. Health and safety issues may be found for obvious reasons in transport and tourism services. That is why standards tend to deal with health and safety matters. Whilst security plays an important part in the area of financial services, such as protection against misuse of data, data protection and data safety, the rules in question may not be found in the sector-specific directives.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
equipment		Operating ban on unsafe carriers ³⁰⁴ ; Railway Safety: comprehensive requirements on safe equipment ³⁰⁵	Security of data transfer (protection against misuse and data protection) ³⁰⁶	Energy: protection of health and safety (safe installation, distribution system directly connected to consumer equipment) ³⁰⁷	Rules on the safety of equipment to be used at work are explicitly excluded ³⁰⁸

304 Regulation 2111/2005 of 14 December 2005.

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_344/l_34420051227en00150022.pdf

305 Article 4 para 4, Directive 2004/49/EC, OJ L 164, 30.04.2004, 44.

306 Articles 41 et seq., Proposal for a Directive on payment services in the Internal Market, COM (2005) 603 final, 1.12.2005, thereto *Burgard*, WM 2006, 2065.

307 Articles 5, 6 and 24 of Directive 2003/54/EC on electricity, Articles 3 (2), 6, 26 of Directive 2003/55/EC on gas.

308 Directive 89/654/EEC, OJ L 393, 30.12.1989, 1; see Article 16 para f.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
premises	Leisure (package tours, time sharing): minimum standards on fire safety in hotels ³⁰⁹	Ban must be made available in the business premises ³¹⁰	Security of such as cash machines	Postal services rules on the availability of access points (such as letterboxes) ³¹¹ , but no rules on their safety or security	Rules on the hygiene of equipment to be used at work are explicitly excluded ³¹²

3. Pre-contractual stage and conclusion of contract

The traditional concept of contract law is *caveat emptor*. That means the buyer – that is, the consumer – is responsible for obtaining information in order to be able to take an informed decision on whether to engage in a contract or not. It is one of the major characteristics of (European) consumer law that the burden to furnish information is put to a large degree on the supplier. This is likewise true for the existing sector-specific EC rules on services. The service providers are coming under a legal obligation to meet the consumer’s information needs and to provide adequate advice even in the pre-contractual stage. Pre-contractual duties are governing the transparency principle. This means that all information must be provided in a clear and comprehensible way. European contract law rules are said to strengthen the rights of consumers, customers and the insured, to receive as much information as possible in the pre-contractual stage so as to be able to compare prices and quality in order to make not only an informed, but the best-informed, decision. European law is near to an obligation of the supplier to disclose material information³¹³.

309 Council Recommendation 86/666/EEC on fire safety, OJ L 385, 31.12.1986, 60.

310 Article 3 para 3 Regulation 2111/2005 of 14 December 2005.

311 See Directive 2002/39/EC, however, the Directive does not lay down standards on how letterboxes should look like or on the safety (security of letterboxes).

312 Recitals 14 and 86.

313 *Wilhelmsson*, Private Law Remedies against the Breach of Information Requirements of EC Law, in: Schulze, et al., Informationspflichten und Vertragsschluss im Acquis

However, information obligations and advice will not always suffice to overcome barriers to conclude a contract. Sometimes consumers might face difficulties to get access to the service. This is especially the case for public utilities, such as energy or water. There is a long-standing policy in the EC Member States to guarantee citizens access to certain public utilities even in case the consumer is no longer in a position to pay for the service. However, in today's time access to consumer credit³¹⁴, access to a bank account, access to telephone and telecommunication means has become essential for consumers in organising their daily life.

Usually EC law does not contain rules on the conclusion of the contract. This is left to the Member States. The reason is that the European Community has no competence in the field of private law as such. However, the lack of competence does not prevent the EC legislator from adopting rules on the form in which the contract is concluded.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Accessibility of the service	Access to consumer credit No EC rules	Particular rules on access to travel information systems, envisaged ³¹⁵ ;	Access to bank account No EC rules	Access to energy supply and public phone under the universal service doctrine; Access to postal services ³¹⁶	
Freedom to contract		Through establishment		Energy: Through	Improved choice by

Communautaire, 2003, p. 245 and now Article 7 of Directive 2005/29 puts a verdict on misleading omissions, see *Howells/Micklitz/Wilhelmsson*, European Fair Trading Law – The Unfair Commercial Practices Directive, 2006, p. 147 et seq.

314 Access to consumer credit means that each consumer must have a fair chance to get a credit provided he can bring the requested securities. There is an ongoing debate in Europe whether and to what extent banks should be allowed to differentiate the interest rate according to the creditworthiness of the consumer. The point cannot be deepened here.

315 COM (2004), 143 final, 3.3.2004 on access to travel information.

316 Article 3 Directive 2002/39/EC on financial services.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
(choice)		of competition and unbundling		establishment of competition and unbundling; Change of supplier free of charge ³¹⁷ , Postal services through deregulation	way of cross border services ³¹⁸
Transparency	Contract specific information on price and quality of service	Envisaged: air carrier right to transparency in real time ³¹⁹ ; Envisaged: railway ticket as prima facie evidence for contract	Insurance (no specific rules, but mediator); Financial instruments are directed to the <i>potential</i> customer	Energy: Contract specific information on price and quality of service ³²⁰ ; Postal services: tariffs must be transparent and non-discriminatory ³²¹	Information must be made available in a clear and unambiguous manner ³²² ; Information through consumer organisations ³²³ , in a clear and unambiguous manner ³²⁴

317 See the ERGEG proposition on switching process, fn. 210.

318 Articles 20 and 21 of the Service Directive.

319 COM (2005) 46 final on air carrier rights, 16.2.2006 at (47).

320 See the ERGEG proposition on price transparency process, fn. 210.

321 See Article 12 last indent Directive 2002/39/EC on financial instruments.

322 Article 22 (4) of the Service Directive.

323 Article 21 (1) c) of the Service Directive.

324 Article 22 (4) of the Service Directive.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Information obligations of the supplier	Medium related and contract related set of information duties	In particular: right to know the identity of the air carrier ³²⁵ ; Envisaged: detailed set for railroad passengers ³²⁶	Damage: basic information; Life insurance: detailed set of information duties Investment services: detailed set of information duties ³²⁷	Energy: contract related set of information duties, inter alia transparent information on prices and tariffs ³²⁸ , EREG Transparency of Prices, Best practice Proposition	Comprehensive set of information, inter alia the price of the service ³²⁹ , but method for calculating on request only ³³⁰ , Specifications within the comitology procedure possible ³³¹

325 Regulation 261/2004, ruling that entered into force on the 16.7.2006, see press release of DG TREN from 18.7.2006.

326 COM (2004) 143 final, 3.3.2004, Article 3 with Annex on railroad passenger rights.

327 In Articles 19-24 of Directive 2004/39/EC on financial services (1 level) and Articles 27 et seq. of Directive 2006/73/EC (2 level) implementing Directive 2004/39/EC on financial instruments.

328 Directive 2003/54/EC on electricity and 2003/55/EC on gas, Annex A c).

329 Article 22 (1) and (2) of the Service Directive.

330 Article 22 (1) (i) and (3) (a) of the Service Directive.

331 Article 22 (6) of the Service Directive.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Information available on request only					Detailed set of information on request ³³² , inter alia on the price calculation method; Specifications within the comitology procedure possible
Advice	Responsible lending ³³³		Insurance no rules (but mediator) Financial instruments: Know your product, know your customer, agreement in writing ³³⁴		
Availability of contract terms prior to the conclusion of the contract	In commercial communications prior to the conclusion of the contract ³³⁵			To be provided prior to the conclusion of the contract ³³⁶	General contract conditions and clauses before the conclusion of the contract ³³⁷

332 Article 22 (3) of the Service Directive.

333 Modified proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers repealing Council Directive 87/102/EEC and amending Council Directive 93/13/EEC, Interinstitutional File, 2002/0222 (COD). 2.10.2006.

334 Article 19 (7) of Directive 2004/39/EC in combination with the working document and Articles 35 et seq. of Directive 2006/73/EC (2 level).

335 Article 10 (3) of Directive 2000/31/EC on e-commerce.

336 Annex A a) of Directives 2003/54/EC on electricity and 2003/55/EC on gas.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Information on the applicable law				In distance selling of financial services ³³⁸	Applicable law to the contract and/or competent court ³³⁹
Form of contract conclusion				Written basic agreement, in paper or another durable medium ³⁴⁰	No written contract necessary ³⁴¹

4. Content of the contract

Each and every consumer needs to have access to public utilities. But access depends on affordability. In this respect access and affordability are interlinked. Affordability means that even the poor consumer is in a position to use electricity, water, transport means, as well as telecommunication devices and bank services. Affordability is particularly important in the area of universal services.

The by far most important and widely spread means to protect consumers is the availability of information. However, quite often the set of information requirements can only be met if the information provider integrates them into the contract. In this respect it might be fair to say that information requirements help to shape a set of minimum contract obligations. Sometimes the EC legislator goes even further and obliges the Member States to lay down rules on the content of the contractual agreements, such as in the case of investment services and network contracts.

Most of the EC rules revolve around quality and safety of the services. Safety seems to be relevant primarily in transport contracts and in energy supply. The

337 Article 22 (1) (f) and Article 22 (4) of the Service Directive.

338 Article 3 (1) m) of Directive 2002/65/EC on distance selling of financial services.

339 Article 22 (1) g) of the Service Directive.

340 Article 39 of Directive 2006/73/EC implementing Directive 2004/39/EC on financial instruments, Article 19 (7) of Directive 2004/39/EC on financial instruments.

341 Article 22 (4) of the Service Directive.

big issue is the regulation of *quality of the service* which constitutes the major subject of co- and self-regulation. This comes down to regulating the content of the contract, as the quality of the service largely depends on the rights and duties of the parties.

Payment modalities gain more and more importance. Consumers might be interested to choose between different payment options. However, the regulation of payment modalities also covers the question to what extent advance payments will be possible or prohibited. There is a clear tendency in service contracts to make the consumer pay in advance, more and more via credit card (such as package tours, dry cleaning, hotel reservation and air fares). The regulation on payment services³⁴² will lay down ground rules. However, the regulation is not designed to protect consumers only.

The most developed rules exist in the field of financial services. The four-level mechanism in the Lamfalussy procedure leads to sophisticated rules and to duplications. The ERGEG is now intensifying its efforts to make propositions on how to define the quality of the service by way of best practice. The work under the Service Directive has already started. All of these efforts are legally guided by broadly termed requirements such as fairness, honesty, professional behaviour, transparency, best practice.

It remains to be seen whether the results of co-regulation and enhanced self-regulation meet these broadly termed *mandatory* requirements. The question remains whether the non-binding rules which are meant to *fully* harmonise the law on the service in question may gain supremacy over binding European and national consumer law rules, such as those laid down in Directive 93/13/EEC³⁴³.

342 The Directive has been adopted on the 28.3.2007, however, the final version is not yet available, see therefore COM (2005) 1.12.2005, 603 final.

343 I would like to thank Norbert Reich for putting emphasis on the relationship between vertical and horizontal rules in European law, with particular regard to consumer protection.

a) *Affordability, minimum content, safety, quality, payment*

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Affordability	Consumer credit ^{344?}			Energy prices, telephone tariffs ³⁴⁵ ; Postal services prices must be affordable ³⁴⁶	
Minimum content through contract terms	Mandatory information requirements are often directly linked to the content of the contract		Mandatory minimum standards for non-professional clients ³⁴⁷	Mandatory information requirements as part of contract ³⁴⁸	Mandatory information requirements are often directly linked to the content of the contract

344 The principle is enshrined in the second proposal of the European Commission which aims at amending the consumer credit directive, COM (2005) 483 final, the question relates to the possible effects of scoring under which the poor pay more, see in this context the European Coalition for Responsible Lending, <http://www.responsible-credit.net/>.

345 See on the existence of such a principle *Rott*, European Review of Contract Law, 2005, 323.

346 Article 12 first indent Directive 2002/39/EC on financial instruments.

347 Article 19 (7) of Directive 2004/39/EC on financial instruments.

348 Directive 2003/54/EC on electricity and 2003/55/EC on gas, Annex A a), although b) to g) are also linked to the content of the contract.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Quality		Air carrier rules on passengers with reduced mobility ³⁴⁹ ; Envisaged transferability of airline tickets ³⁵⁰ and integrated ticketing ³⁵¹ ; Railway passenger, similar rules envisaged ³⁵² ; Service quality standards envisaged ³⁵³	Financial instruments: best practice and client order handling rules ³⁵⁴	Energy: Security of supply ³⁵⁵ ; Service to be provided without interruption, EREGG launched proposition on best practice (customer protection, price transparency, switching) ³⁵⁶ ; Postal services: quality standards on routing time (specific rules for cross border services), regularity and reliability ³⁵⁷	Procedural rules on the elaboration of quality standards for services ³⁵⁸ ; Substance of the quality charter: making it easier to assess the competence of the provider, encourage independent assessment mechanisms

349 Proposed in COM (2005) 47 final, 16.2.2005, adopted on the 6.6.2006.

350 Proposed in COM (2000) 365 final, 21.6.2000, but not integrated in the "Airline Passenger Service Commitment".

351 COM (2005) 46 final, 16.2.2005 (48).

352 COM (2004) 143 final, 3.3.2004, Article 4 and 46 (reduced mobility).

353 COM (2004) 143 final, 3.3.2004, Article 33.

354 Articles 21 and 22 of Directive 2004/39/EC on financial instruments, respectively Article 46 et seq. Directive 2006/73 /EC implementing Directive 2004/39/EC on financial instruments (2 level).

355 Article 3 (3) and (7), Article 4 of Directive 2003/54/EC on electricity and in various other references; Article 3 (2) and (4), 5, 22 and 27 of Directive 2003/55/EC on gas.

356 http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_DOCS/ERGEG_DOCUMENTS_NEW/CUSTOMER_FOCUS_GROUP/PR-06-08_CFG-BestPractices.doc.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Safety		Operating ban on unsafe carriers ³⁵⁹ Railway Safety ³⁶⁰		Protection of health and safety ³⁶¹	
Billing				Detailed rules in ERGEG Transparency of prices, best practice proposition ³⁶²	
Payment modalities	Prohibition of advanced payment in time share contracts ³⁶³			Wide choice of payment modalities ³⁶⁴	

b) Rights and remedies (withdrawal, compensation and liability)

European law puts much emphasis on rights and remedies. The rationale for this can be found in the early days of the European Community, when the European Court of Justice turned the Treaty of Rome into a genuine legal order, granting rights to suppliers and later consumers, which prevail over national law which conflicts with the basic freedoms³⁶⁵. The European legislator and the European Court of Justice have extended the concept of rights and remedies to

357 Article 16 Directive 2002/39/EC, together with Annex A quality standards for intra-community cross-border mail.

358 Article 26 of the Service Directive.

359 Regulation 2111/2005 of 14. December 2005.
http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_344/l_34420051227en00150022.pdf.

360 Directive 2004/49/EC, OJ L 164, 30.04.2004, 44.

361 Articles 5, 6 and 24 of Directive 2003/54/EC on electricity, Articles 3 (2), 6, 26 of Directive 2003/55/EC on gas.

362 Under the heading of "Transparency of price elements in the bill", no. 36-40.

363 Article 6 of Directive 94/47 on time sharing.

364 Annex A d) of Directives 2003/54/EC on electricity and 2003/55/EC on gas.

365 *Stein*, *The American Journal of International Law* 75, 1981, 1.

secondary EC legislation. This is especially the case in the law on service contracts. There are rights at all stages: the right of withdrawal from a contract or at least to cancel the contract in case of improper performance belongs to the core of EC regulation. And there is a whole series of compensation rights in the field of services which overarch by far the existing state of EC law with regard to products. However, European law does not sanction violations of the obligation to supply and/or to disclose information, at least not by contract law remedies³⁶⁶.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Right to withdrawal and cancellation rights	Consumer credit and time sharing (withdrawal); Cancellation (package tour, time sharing)	24 hour cooling-off period for telephone reservations under the "Airline Passenger Service Commitment" ³⁶⁷	Right to withdrawal in life insurance contracts ³⁶⁸ ;	Cancellation right in case of price increase ³⁶⁹	

366 *Schwintowski*, Informationspflichten und effet utile – Auf der Suche nach einem effektiven und effizienten europäischen Sanktionssystem, in: Schulze et al., Informationspflichten und Vertragsschluss im Acquis communautaire, 2003, p. 267.

367 Article 6,
http://ec.europa.eu/transport/air_portal/passenger_rights/doc/commitment_airlines_en.pdf.

368 Article 30 of Directive 92/96/EEC.

369 Annex A b) Directives 2003/54/EC on electricity and 2003/55/EC on gas.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Compensation for improper information supply					
Compensation for incomplete/in sufficient performance	For non-performance and pain and suffering (package tours) ³⁷⁰	Air carrier: in case of delay and cancellation ³⁷¹ , Railway undertaking envisaged for delays ³⁷²	Liability of investment firms for tied agents ³⁷³	Energy: information on compensation rights; Postal services where warranted (routing times, regularity, reliability), system of reimbursement and /or compensation ³⁷⁴	

370 Article 5 of Directive 90/314/EEC on package tours and ECJ, 12.3.2002, C-168/00, *Simone Leitner*, ECR 2000, I-2631.

371 Article 7 of Regulation 261/2004.

372 COM (2004) 143 final, Article 15.

373 Article 23 of Directive 2004/39/EC on financial instruments.

374 Article 19 Directive 2002/39/EC, although the Directive does not impose an obligation of compensation, but presupposes its existence.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Joint/subsidiary liability in trilateral contracts	Rules on combined contracts (sale and credit) credit; package tour (liability of operator); financed time sharing contracts		Triangle credit card issuer, contracting company and credit card user		
Liability for personal injury and belongings		Air carrier liability in the case of accidents ³⁷⁵ ; Railway undertakings; envisaged liability in case of accidents (also hand luggage) along the line of the Montreal convention ³⁷⁶ ;		Postal services: particularly in case of loss, theft or damage ³⁷⁷	Professional liability insurance and guarantees ³⁷⁸

5. Post-contractual stage – after-sales services, complaint handling, dispute settling, collective redress, protection against insolvency

The contractual obligations do not end with the performance of the original obligations. Quite often service providers offer maintenance and after-sales services; these are provided mostly on a voluntary basis.

375 Regulation 2027/97 as amended by Regulation 889/2002.

376 COM (2004), 143 final, 3.3.2004.

377 Article 19 Directive 2002/39/EC. Strictly speaking the Directive presupposes that such rules exist under national law.

378 Article 23 of the Service Directive.

It is one characteristic of EC contract law that it does not respect the divide between substantive and procedural law. The different regulations, directives and soft law instruments contain mostly rules on in-house complaint handling and out-of-court settlement. This policy of the European Commission fits in very well into the advocacy of less traditional instruments. The law is soft, and so is the enforcement. Collective remedies are scarce. The amazing rule in Article 53 of Directive 2004/39/EC on financial instruments, which introduces some sort of collective redress, has not yet found the attention it deserves. However, even soft enforcement fails if the service provider has gone bankrupt. There are more and more rules to be found in EC law which protect the consumer and/or customer against the insolvency of the service provider.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
After-sales services				Maintenance services if offered ³⁷⁹ ,	Information on the existence of after-sales services ³⁸⁰
Insolvency	Protection against insolvency of tour operator ³⁸¹	Envisaged, in the event of bankruptcy of the air carrier ³⁸²	Investor compensation schemes ³⁸³		
In-house complaint handling		Complaint handling procedure foreseen in draft ³⁸⁴		Postal services, availability of transparent, simple and inexpensive procedures ³⁸⁵	Detailed rules on rules on in-house complaint handling ³⁸⁶ ,

379 Annex A a) third indent.

380 Article 22 (1) (h) of the Service Directive.

381 Article 7 of Directive 90/314/EEC on package tours.

382 COM (2005) 46 final 16.2.2005 at (49).

383 Directive 97/9/EC, OJ L 84 of 26.3.1997.

384 COM (2004) 143 final, 3.3.2004, Article 34.

385 Article 19 Directive 2002/39/EC, no reference to Recommendation 98/257/EC.

386 Article 27 (1) to (3) of the Service Directive.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Out of court dispute settlement procedures		Air carrier dispute settlement on a voluntary basis	Financial instruments: promotion of dispute settlement procedures ³⁸⁷	Energy: dispute settlement under reference to 98/257 ³⁸⁸ ; Postal services, bring complaint before competent national authorities ³⁸⁹	Information on dispute settlement procedures, if available ³⁹⁰ ,
Collective redress			Financial instruments: in the interests of consumers before courts and administrations by public bodies, and/or consumer and/or business organisations ³⁹¹	Postal services individual complaint to competent national authority may be presented jointly with representative consumer organisations ³⁹²	

387 Article 53 of Directive 2004/39/EC on financial instruments.

388 Directive 2003/54/EC on electricity Annex A f).

389 Article 19 Directive 2002/39/EC, such opportunity must exist without prejudice to other possibilities of appeal under national and Community legislation.

390 Article 27 (4) of the Service Directive.

391 Article 52 para 2 of the Directive 2004/39/EC on financial instruments leaves Member States the choice between the three potential bodies acting on behalf consumers.

392 Article 19 para 3 Directive 2002/39/EC.

6. Monitoring and inspection

In the here chosen perspective, the service provider must be regarded as the addressee of the monitoring and inspection duty. That is why monitoring and inspection duties imposed on the Member States and/or on the European Commission by way of reporting duties might be set aside.

The directives and regulations which define the ground rules for the vertical markets do not deal with monitoring and inspection duties. In theory the European legislator may define a legal framework for codes and guidelines to be elaborated by business and/or business organisations. So far, however, the European legislator has, if any, obliged Member States to promote the elaboration of codes or has invited the European Commission and the Member States to foster the elaboration of standards under the Service Directive.

That is why monitoring and inspection duties could only be found in less traditional measures where public agencies and/or business organisations together, or business organisations alone, operate in a legislative vacuum. All in all, however, the development seems to be in an early stage. There are only a few indications in the area of network services and the services coming under the Service Directive. The “best execution obligations” which could be transposed into a learning mechanism have not been given shape in the Lamfalussy procedure³⁹³. In this respect the European legislator leaves it for all less traditional regulators to give shape to best execution obligations.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
Monitoring and inspection in binding law			Best execution obligations ³⁹⁴	Postal services - Member States shall publish information on the number of complaints	Assessment by independent bodies, Assessing the competence of a provider,

393 See fn. 11.

394 Directive 2004/39/EC recital 44.

	Consumer contract law on services	Transport	Financial services	Network services for customers (electricity, gas, telecommunication, postal services)	Services such as contracts with liberal professions and craftsmen
				and the manner in which they have been handled ³⁹⁵	Communication of results ³⁹⁶
Monitoring and inspection in co-regulation and self-regulation				Monitoring duties in the best practice propositions ³⁹⁷	

7. Impact on standardisation of services

The review of the existing EC rules on services clearly demonstrates that the EC legislator starts from a piecemeal approach. The directives and regulations are covering those issues which seemed to be of concern for the European Commission. However, there is no concept behind to look more systematically into the regulation of services. This is a first lesson to learn for standardisers. The EC rules on services leave a number of loopholes which could easily be filled through standardisation:

- (1) rules on education and skills are not regarded as being part of service regulation, they are to be found in separate pieces of EC law. Equipment and premises appear to a limited extent only, although service providers should be given guidance in how safe the equipment should be;
- (2) in the pre-contractual stage rules are missing on advice, on the availability of standard terms, and on the form in which the contract is concluded;

395 Article 19 para 4 Directive 2002/39/EC.

396 Article 22 (1) a), (3) and (4) of the Service Directive.

397 Supplier Switching Process, under "Ensure customer confidence and sound market monitoring", under no. 30: Customer protection, under "To ensure reliable and continuous supply of good quality" and "To help the customer effectively redress the conflict with the service provider", no. 29 to 41.

- (3) with regard to the content of the contract, rules on the minimum content could be specified. Safety requirements remain underdeveloped, just as billing rules which are of utmost importance in the field of consumer services;
- (4) in terms of rights and remedies most of the EC directives and regulations contain only very basic or no rules. They define comprehensive information obligations which should be met by the provider, but do not foresee any sanctions³⁹⁸. The same is true with regard to standards of care. Compliance could be secured by a strong liability regime. This is missing in most of the directives;
- (5) in the post-contractual stage, the directives and regulations remain certainly underdeveloped. There are no consistent rules on after-sales services, limited rules on insolvency, some and very inconsistent rules on in-house complaint handling and out of court dispute settlement procedures. Rules on collective redress are more or less lacking at all;
- (6) last but not least, monitoring and compliance rules do not appear in EC law relating to services.

The second lesson to learn – if there is something to learn – is the different language the EC legislator is using. Not only binding law, but also most of the non-binding recommendations and guidelines, contain relatively clear messages which could ideally guide the service provider and in case, there is need, the courts, in assessing whether the provider complied with the self set standard. However, all EC rules are missing a link between the hard law, i.e. the directives and regulations and the soft law, i.e. the codes, guidelines and recommendations. There is no such rule saying that if the service provider subscribes to the voluntary rules, he may be held liable exactly under these standards. There is a first hint in the Principles of European Law on Services Contracts which have been elaborated by the study group³⁹⁹. Article 1:107 (3) General Standard of Care for Services runs as follows:

If the service provider is, or purports to be, a member of a group of professional service providers for which standards exist that have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in these standards.

398 In its Green Paper on the review of the consumer acquis, COM (2007) 744 final, 8.2.2007, the European Commission raises the question of whether additional tools are needed, p. 22 under 4.7.

399 *Principles of European Law* (ed.), Service contracts, prepared by Barendrecht/Jansen/Loos/Pinna/Cascao/van Gulijk, in the context of Chapter II, IV, 3.

The proposed ruling does not cover technical standards; however, the idea behind the rule could easily be extended to all those service providers who claim to have performed their services in compliance with various technical standards. It has to be recalled, however, that such a reference makes sense only if the technical standards lay down clear-cut rules and do not contain only cloudy wording.

II. Current practices in standardisation of tourism services

The same set of core consumer elements are now used to review the already existing technical standards in the field of tourism services.

1. Scope, education and skills

The standards under analysis here are quite heterogeneous.

EN ISO 13809 on travel agencies and tour operators provides for definitions of tourism services. This has to be understood in the proper sense. The standard does not lay down requirements on what a traveller might be entitled to expect if he books a package tour, sales promotion tour, city break or boat trip. The standard does not even contain a pattern for different services. It is just a list of definitions, which is not fully compatible with the relevant EC law, that is Directive 90/314/EEC⁴⁰⁰, or which reiterates the very narrow definition of the EC legislator.

AFNOR AC X 35-501 requirements on package tourism & the disabled lays down much more detailed standards on the equipment and services to be provided but does not deal with contract making at any stage.

EN 14804 on language study tours covers more or less the whole spectrum of issues being studied here. The comprehensive set of EN standards on recreational diving services have to be divided into EN 14467 on recreational diving services, which constitutes some sort of “umbrella” standard, and the respective EN 14413-1-2⁴⁰¹ and 14153-1-2-3⁴⁰² which lay down a detailed set of rules on the particular requirements imposed on the staff and the equipment according to the sort of diving.

400 OJ L 158, 23.6.1990, 59.

401 EN 14413-1 Recreational diving services – Safety related minimum requirements of the training of scuba instructors – Part 1: level 1, 14413-2 Part 2 Level 2.

402 EN 144153-1 Recreation diving services – safety related minimum requirements for the training and of recreational scuba divers – Part 1: Level 1 – Supervised divers and EN 1453-2 Part 2 Level 2 – Autonomous Diver.

The AFNOR project on “accessibility services: opportunities and feasibility of standardisation work in the area of transport and tourism”, under the Second Programming Mandate M/371, has been approved. The project is meant to define accessibility criteria for tourist services, such as tourist transport and tourist sites for people with physical, sensory or cognitive disabilities. There is a strong link to EN 13816 ‘Transport, logistics and services, public passenger transport, and draft EN 15140 ‘Public passenger transport – basic requirements and recommendations for systems that measure delivered service quality’. The objective is to develop common criteria, to provide reliable information, to promote accessibility and to increase public awareness.

	Travel agencies and tour operators EN 13809	AFNOR AC X 35-501 Accord on package tourism and disability	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14467	Language study tour EN 14804
Scope/purpose	Set of definitions, designed to facilitate the understanding between the users and the providers of tourism services, Assisting consumers to make an informed choice.	Purpose is to create a label which guarantees quality standards in the equipment and the services	defines terms used in the tourism industry in relation to the various types of tourism accommodation and other related services	Training and education, Organised and guided diving for certified divers, Rental of diving equipment	Requirements for language study tour providers, including schools, tour operators and agents,
Management and staff		1.2. Training of personal			4.6. requirement on group leaders

	Travel agencies and tour operators EN 13809	AFNOR AC X 35-501 Accord on package tourism and disability	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14467	Language study tour EN 14804
Scope/purpose	Set of definitions, designed to facilitate the understanding between the users and the providers of tourism services, Assisting consumers to make an informed choice.	Purpose is to create a label which guarantees quality standards in the equipment and the services	defines terms used in the tourism industry in relation to the various types of tourism accommodation and other related services	Training and education, Organised and guided diving for certified divers, Rental of diving equipment	Requirements for language study tour providers, including schools, tour operators and agents,
Service provider		1.2. Training of personnel with regard to reception and support of client		5.3. detailed rules for training of recreational scuba instructors EN 14153-1-2-3, EN 14413-1-2 6. specific rules on organised and guided diving for certified divers EN 14153-1-2	4.2.4. requirements on teaching staff (home country, TOEFL, university qualification)

2. Equipment and premises

Although requirements on the equipment and the premises are often laid down in New Approach type directives, the standards do not contain references and do not indicate where additional criteria are needed. The five technical standards being studied here do not provide much guidance, with the exception of recreational diving services at the EC level, and the French normative document AC X 35-501 on package tourism and the disabled. This is self-explanatory, as diving requires the use of the necessary technical equipment.

	Travel agencies and tour operators EN 13809	AFNOR AC X 35-501 Accord on package tourism and the disabled	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14467	Language study tour EN 14804
equipment		Detailed rules on equipment, 1.8. on installations,	2.3. type of room (single, double, suite etc), 3. services (food and beverages) 4. facilities for guests, 4.2. body care	4.4. emergency equipment procedures, 4.5. diving equipment (only definitions) 7.1 and 7.2. equipment shall conform to European standards (EN 14153-2, or 14153-1 or 14413-2)	
premises		Detailed rules on premises, 3. where leisure activities are taken place, 4. restauration, 5. accommodation,	2.12. accommodation: rating system		3.2.5 accommodation (basic information on type), 4.2.3 classrooms (appropriate shape etc) and common areas (communal areas, access to toilets and water/beverages)

3. Pre-contractual stage and conclusion of contract

The first two columns below could be set aside as they contain definitions only, although the type of service regulated implies the need to deal with the pre-contractual stage and the conclusion of a contract. However, even the two other standards on recreational diving services and language study tours remain largely behind the requirements laid down in Directive 90/314/EEC on package

tours⁴⁰³. The level would have been substantially raised if the standard makers would have taken the Directive into consideration – or if they did not want to do so – to refer to the Directive by stating that the requirements of the package tour Directive apply if the services are part of a package tour as defined by the Directive and given shape by the European Court of Justice⁴⁰⁴. Seen against such a background the two European standards do not contain much useful information for consumers.

	Travel agencies and tour operators EN 13809	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14153-1-2-3, EN 14413-1-2-EN 14467	Language study tour EN 14804
Accessibility of the service				
Freedom to contract (choice)				
Transparency		2.4. type of tariff (room only, bed and breakfast)		3.1. clear, transparent, true, legible, readable
Information obligations of the supplier			EN 14467 4.2.1. Information prior to provision of service; 4.2.2. Information during service provision	3.2. pre-booking information (general, care of minors, documentation, declaration of special requirements, accommodation, course details) 3.3. pre-departure information 3.4. on arrival information
Information available on request only				3.2. g) on which language is spoken
Advice			EN 14467 7.1. clients shall be advised on	

403 OJ L 158, 23.6.1990, 59.

404 ECJ, 30.4.2002, Case C-400/00 *Club Tour* ECR 2002, I-4051.

	Travel agencies and tour operators EN 13809	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14153-1-2-3, EN 14413-1-2-EN 14467	Language study tour EN 14804
			choosing the proper diving equipment; Individual clients need certificate, EN 14153-1-2-3, or 14413-2	
Availability of contract terms prior to the conclusion of the contract			EN 14467 4.2.1. first indent, contractual issues including conditions bearing on signature, delivery, termination of contract	3.3. b) terms and conditions of booking
Information on the applicable law				
Form of contract conclusion				3.1. pre-booking in written form

4. Content of the contract

Giving shape to the content of the contract could, in theory, be a subject matter for standardisation. However, in practice, there is little evidence that Standard Bodies are prepared to tackle the issue.

a) *Affordability, minimum content, safety, quality, payment*

There are no rules on the content of the contract at all in the six standards examined. Directive 90/314/EEC on package tours, however, relies heavily on the idea of guaranteeing the consumer, in this case the traveller, who could be a consumer but also a businessman, if the package comes under the scope of the Directive, that the contract covers a set of basic elements (see Annex lit a) to k) to the Directive 90/314/EC). No such rules exist for billing. Again this loophole could be filled by standards.

	Travel agencies and tour operators EN 13809	Hotel and other type of tourism accommodation EN ISO 18513	Recreational Diving services EN 14467	Language study tour EN 14804
Affordability				
Minimum content through contract terms				
Quality				4. Service provision (management) and staff, tuition (teaching, premises, teaching staff), accommodation, leisure, welfare
Safety			4.3. Risk Assessment 4.4. Emergency equipment and procedures	3.2.4. declaration of special requirements (dietary, allergies, mental and physical disabilities) 4.5. emergency management
Billing				3.2.1. d) contract price, 3.2.1. h) percentage to be paid as deposit
Payment modalities				

b) Rights and remedies (withdrawal, compensation and liability)

The European standard on language tours EN 14804 contains some scarce information on rights and remedies. If one measures the standards against the rules provided for in Directive 90/314/EEC on package tours, the result is rather disappointing. There are only some basic rules on the potential liability in providing the contractual services.

	Travel agencies and tour operators EN 13809	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14467	Language study tour EN 14804
Right to withdrawal and cancellation rights				3.2.1. i) in case, charges and/or conditions governing refund and payment
Compensation for improper information supply				
Compensation for incomplete/insufficient performance				
Joint/subsidiary liability in trilateral contracts				
Liability for personal injury and belongings				
Liability insurance				4.8. potential liability in providing the contractual services

5. Post-contractual stage – after-sales services, complaint handling, dispute settling, collective redress, protection against insolvency

The European standard on recreational diving service does not contain rules on the post-contractual stage. Only the European standard on language study tours contains at least some rules on insolvency and complaint handling.

	Travel agencies and tour operators EN 13809	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14467	Language study tour EN 14804
After-sales services				
Insolvency				3.2.3. b) information whether

	Travel agencies and tour operators EN 13809	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14467	Language study tour EN 14804
				insolvency is covered
In-house complaint handling				4.7.4. monitoring of client and/or participant satisfaction 4.7.5 management of complaints – response within one month
Out of court dispute settlement procedures				
Collective redress				

6. Monitoring and inspection

Monitoring and inspection rules are rather seldom laid down in law. Both areas are a prominent field of self-regulation, be it through codes of practice, guidelines or the like. Standards have not yet really entered the field, although the European standard on language study tours contains some very basic rules on the evaluation of consumer satisfaction.

	Travel agencies and tour operators EN 13809	Hotel and other type of tourism accommodation EN ISO 18513	Recreational diving services EN 14467	Language study tour EN 14804
Monitoring and inspection in binding law				
Monitoring and inspection in co-regulation and self-regulation				4.7.4. processing of questionnaires in order to analyse the level of satisfaction and take appropriate action after verification

7. Impact on standardisation of services

Measured against the six core consumer elements, a review of the available European standards in the field of tourism services shows poor results. Not even a single core consumer element has been addressed. The first two, education and skills, as well as equipment and premises, have at least been taken into consideration. Some positive incentives have been set with regard to the third core consumer element, the pre-contractual stage. For the remainder there is not much to report. Most of the categories have been neglected.

III. Current practices in standardisation of services for the elderly

The CEN/CENELEC Guide 6 for standard developers to address the needs of older persons and persons with disabilities does not really deal with the services the elderly and the disabled need in residential homes or with accommodation provided for elderly and disabled. The major purpose of Guide 6 is to provide assistance for standard developers if they design products – and to some extent services, which are to be used by the elderly and the disabled. In this respect a major part of Guide 6 is meant to weigh and classify the different abilities and to transpose them into a set of factors that might help standardisers in drafting information, labelling, instructions and warnings (table 1 of Guide 6), packaging: opening, closing, use and disposal (table 2 of Guide 6), materials (table 3 of Guide 6), installation (table 4 of Guide 6), user interface, handling, control and feedback (table 5 of Guide 6), maintenance, storage and disposal (table 6 of Guide 6), built environments (buildings, table 7 of Guide 6).

The DIN 77800 on ‘Quality requirements for providers of “assisted living for the elderly”’ can only be understood against the economic background of the project. Elderly people, who do not yet need care but have enough resources to spend their lives in a relatively wealthy environment under the auspices of private companies who manage their daily life and offer help if it is needed, constitute an important market. The DIN project is legitimated by the lack of binding rules on assisted living and absence of institutions which survey the market. The DIN project will close that gap by setting out quality standards for that particular age group. It lays down very detailed rules on the service to be provided as well as on the contractual relationship itself.

Beyond the national level, two feasibility studies are under way which might lead to a European set of standards in this field. The AFNOR project No. 4 deals with services provided to resident people. The origins of the project can be found in NF X 50-056 on ‘*Services aux personnes à domicile*’. However, there is a strong component of providing care to people who need it at home.

The two other projects, NEN/SN on smart house services, and AFNOR on residential homes, are more directly concerned with all sorts of services the elderly need once they are living in residential homes.

AFNOR's involvement in a European project is certainly influenced by the existence of a French standard NF X 50-058 in this field '*Etablissement d'hébergement pour personnes âgées*'. This standard can be regarded as a counterpart to DIN 77800. The existence of two different approaches in two Member States allows for a more detailed comparison of the degree to which the six core consumer elements are taken into account.

1. Scope, education and skills

In the field of services provided to the elderly be it at home (i.e. services for resident people), or be it services provided at residential homes for those who are no longer able to manage their own lives or at residential homes for those who need some support in organising their lives but are in principle still autonomous, the professional skills of the service providers are of utmost importance. This is true for management of the services and performance of the services towards clients. Seen against this background, the diverse national and European standards and guidelines are not very telling. The requirements laid down in the AFNOR and DIN standards are relatively vague and do not provide much guidance on what sort of skills are really needed. All standards refrain from asking for specific certificates or professional qualifications that require professional education.

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Scope/purpose	1) NEN/SN Identify the possibilities for standardisation in Europe, Scope: <i>social alarming</i>	AFNOR (project) 1) services with a domestic dominant (cleaning,	0.4. this guide is intended to be part of the overall framework that standard-setting bodies use in	1. applicable to assisted living for the elderly only, independent of the legal quality of the operator

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
	<p>(telecare means to provide a means of signalling a local need),</p> <p><i>Medical monitoring</i> (telemedicine means healthcare using telecommunication means,</p> <p>2) AFNOR (project) services include, welcoming and registering, environment of life, restoration (nutrition), social activities, medical care, temporary stay and leaving the establishment,</p> <p>3) AFNOR X 50-056 ethical framework and service commitments</p>	<p>ironing),</p> <p>2) services with a relational dominant such as helping isolated fragile persons (nursing care, accompaniment),</p> <p>AFNOR NF X 50-56, services for resident people (<i>activité prestataire, activité mandataire, prêt de main d'œuvre</i>)</p>	<p>their efforts to support the need for more accessible products and services,</p> <p>Supplementing ISO/IEC Policy Statement 2000 – Addressing the Needs of Older Persons and People with Disabilities in Standardisation,</p> <p>1.2. this guide applies to products and services,</p> <p>1.5. this guide contains considerably more guidance on products than on services</p>	<p>and the shaping of the relationship between the operator and the elderly (buying or renting the apartment)</p>
Management and staff	<p>AFNOR X 50-058</p> <p>6.2.2.1. general requirements</p>			

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Service provider	AFNOR NF X 50-058 6.2.2.4 special requirements on providing care, but no formal professional qualifications	AFNOR NF X 50-056 3.4.2.2. execution must respect the specific professional standards, 5. competences linked to functions (need for educative formation), long list of capacities, but no concrete professional standards		4.2.1.6.1. requirements on the skills the person who provides the care must have, basic legal and medical knowledge, soft skills (communication), Education in care of the elderly, nursing care, does not free from providing evidence of basic legal and medicinal knowledge

2. Equipment and premises

For obvious reasons the CEN/CENELEC Guide 6 as well as DIN 77800 lay down requirements on equipment and premises. These references are missing in the AFNOR X 50-058 as the services are provided at the consumer's home. DIN 77800 makes a cross reference to two further DIN standards on the equipment and the premises. The CEN/CENELEC Guide 6 defines rather general criteria.

	Smart house services for elderly and disabled people NEN/SN (project) Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
equipment		AFNOR NF X 50-056 3.2. rules on the equipment to be used (range, telephone, documentation etc).	8.4. lighting levels and glare (appropriate lightning), 8.12. ease of handling (how easy it is to lift, hold or carry) 8.12.7. elements in building and the built environment, 8.23 fire safety of materials,	4.3.1. place and living environment have to meet DIN 18025-01
premises	AFNOR X 50-058 5.2.4.1. environment of building, 5.2.7. requirements on hygiene		8.3.2. design of buildings (people should feel more confident) 8.16. accessible routes	4.3.2. equipment of apartments means DIN 18025-2

3. Pre-contractual stage and conclusion of contract

All standards here to be analysed contain comprehensive rules in particular on the pre-contractual stage of contract making. This might easily be explained by the fact that those persons who enter into negotiations with the service provider give up their autonomy both de facto and de jure, partly or even completely. Therefore contract making is a relatively delicate issue which requires skills in which one should be trained and a number of precaution measures in order to respect human dignity.

The comparison of the French and the German standard, AFNOR project NF X-50-056 services for resident people and DIN 77800 Assisted living for the elderly demonstrates a relatively different approach on how to manage the pre-contractual stage. The French standard contains a lot of human rights rhetoric, meant to maintain and to respect the autonomy of the person. The “legal” expression of this rhetoric is the explicit guarantee of freedom of contract. The German approach is much more technical and, in a way, legalistic. The standard resembles a legal text. However despite the national cultural differences in approaching the issue, both standards have much in common. Somewhat simplistically one might argue that they avoid presenting the message at the pre-contractual stage in a clear legal format. From a legal point of view, the standards would have to clearly distinguish between advertising, pre-contractual information, content of the contract and the like. These different steps should be presented in clear-cut headings. The contrary is true. The messages which bear a legal character, are shaped along the lines of what standardisers believe to be the psychology of the client.

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Accessibility of the service				
Freedom to contract (choice)	AFNOR NF X 50-058 5.2.7.1. respect decision to leave the residential home			

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Transparency	AFNOR NF X 50-058 5.1. detailed set of requirements on reception and admission		8.3. location and layout of information, 8.7. clear language in written or spoken information 8.10. slow pace of information presentation	4.1.1.1. purpose of information supply, comparability, 4.1.3. assessment criteria of transparency

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Information obligations of the supplier	<p>AFNOR NF X 50-058</p> <p>Annex A list of documents on 1) the home 2) on equipment and premises, 3) on type of car, 4) on nutrition 4) on leisure, 5) on prices to be made available prior to the conclusion of contract</p>	<p>AFNOR NF X 50-056</p> <p>3.2. a) making an offer and clearly indicating the scope and limits,</p> <p>b) public opening hours,</p> <p>c) face to face reception or via telephone</p> <p>3.3.2.1. b) estimate of costs, detailed set of parameters,</p>	<p>7. Tables of factors to consider during the standards development process, (1) labelling, instruction and warnings, (2) packaging, (3) materials, (4) installation, (5) user interface, (6) maintenance, storage and disposal, (7) built environment with regard to the respective human abilities (sensory, physical, cognitive, allergy),</p> <p>8. and 9. define and specify the factors to consider under 7.</p>	<p>4.1.1.1-4.1.1.6 (building environment, apartment, services, services on request, price) detailed set of information prior to conclusion of contract</p> <p>4.1.1.2.-4.1.1.7 (see above and additional written information on payment modalities, treatment of complaints, contractual rules, advice prior to conclusion of contract) detailed set of information prior to conclusion at the last during the first advice</p>
Information available on request only				

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Advice	AFNOR NF X 50-058 5.1.2.3. explain documents of admission, 5.1.3.1. explain details of contract and price	AFNOR NF X 50-056 3.3.b) evaluation of adequacy of service in the light of the client's needs 3.3. b) personal visit at client's home		4.1.2. oral advice besides written information, Prior to conclusion of contract, Cost free Subject matter of advice (concept of care, limits of services, on the apartment, on costs and financing
Availability of contract terms prior to the conclusion of the contract				4.1.1.7. information on contractual relationship must be made available prior to the conclusion of the contract
Information on the applicable law				4.1.2.2. on the non-applicability of the German Heimgesetz (Act on Home Care)

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Form of contract conclusion	AFNOR NF X 50-058 5.1.3.2. Register inscription in a formalised document without payment, 5.1.4.4. no signing on behalf of resident by family members		8.7.1. information should be made available in text format whenever possible, however, due respect to personal disabilities	4.1.1.1. detailed list to be made available in written form

4. Content of the contract

All in all it might fairly be concluded that the standards put much emphasis on the pre-contractual stage, including the process of contract conclusion. They even define a certain minimum content of the contract but they remain less outspoken on the rights and remedies of the clients.

a) *Affordability, minimum content, safety, quality, payment*

The French approach is remarkable in that AFNOR NF X 50-056 explicitly refers to the minimum requirements written down in the French Code de la Consommation. However, the standard does not discuss whether the rules in the French Code de la Consommation cover the particularities of a contract between an elderly person and a residential home. The approach remains formalistic in that the law is taken as a benchmark. It is plain that such a contract requires more careful information on all sorts of issues, in particular on the type of services, on the price for the services and on the total price if the client needs accommodation, nutrition and care. It is a well-known problem in

Germany that the prices for all three services are broken down into three parts, which renders price comparisons between different residential homes difficult.⁴⁰⁵ So price transparency prior to contract making, and price transparency in the billing is crucial. The two standards are of little help to consumers. On the other hand it should be highlighted that the standards lay down quality and safety standards. The latter are particularly important in all sorts of emergency situations.

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Affordability				
Minimum content through contract terms	AFNOR NF X 50-58 5.1.4.1. detailed set of information to be made available at the admission, document of reception, contract, internal statutes, quality charter (if there is one), price, information on financial subsidies	AFNOR NF X 50-056 3.3.2. offer of service, detailed rules on the content of the offer (prices, advantages and compulsions of services, payment modalities, competence of service provider, replacement, continuity over weekend, modes of evaluation, indication to Article L 121 - 21 Code de la Consommation (seven days of		4.4. shaping of contractual relationship Separation of the two contracts, care and renting 4.4.2. requirements on the care contract Price increase Definition of services included in the contract and services available on request only

405 Micklitz, VuR 1998, 291.

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
		<p>withdrawal in case the price differs from the offer made at the personal visit);</p> <p>3.3.2.1. b) contract covers the information in the estimate (in addition duration of contract, one year in general, reference to Code de la Consommation on protection against abuse of weakness, 3.3.2.1. c))</p>		
Quality	<p>AFNOR NF X 50-058</p> <p>5.2.5.1.1. size of room,</p> <p>5.2.6. collective rooms,</p> <p>5.3.4. rules on personal care,</p> <p>5.4. rules on nutrition,</p> <p>5.5. rules on social life</p>	<p>AFNOR 50-056</p> <p>3.4. 1.1. preparation of execution and 3.4.2.1. performance</p>		<p>4.2. services</p> <p>Technical housing service,</p> <p>Emergency services,</p> <p>Personal care</p> <p>Information on all sorts of services provided outside the building, including legal advice on social security law</p>

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Safety	AFNOR NF X 50-058 5.3.2. safety and security, 5.3.2.1. Individual freedom, 5.3.2.2. emergency management, 5.3.2.3. protection of property,		8.16.9. emergency routes in buildings, 8.21. fail-safe, when incorrectly used product will fail a safe manner 8.23 fire safety of materials	Emergency call
Billing				
Payment modalities	AFNOR NF X 50-058 5.7.4.1. specific management rules in case of payment difficulties (contact to family, possible financial aids)			4.1.1.7. direct debit authorisation

b) Rights and remedies (withdrawal, compensation and liability)

The standards under review do not contain rules on rights and remedies, with one exception: the French standard codifies the test period, which seems to be the rule in residential homes anyway.

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Right to withdrawal and cancellation rights	AFNOR NF X 50-058 5.1.4.6. one month of a test period without financial sanctions	AFNOR NF X 50-056 3.3.2.1. modalities of cancellation, enlisted in detail, in correspondence to the type of contract		
Compensation for improper information supply				
Compensation for incomplete/insufficient performance				
Joint/subsidiary liability in trilateral contracts				
Liability for personal injury and belongings				

5. Post-contractual stage – after-sales services, complaint handling, dispute settling, collective redress, protection against insolvency

As the clients may stay for years in the same institutions, conflicts over the quality of the service are not really surprising. However, the standards under review contain few precautionary measures on the complaint handling and dispute resolution. From a client's point of view professional complaint handling, not only in-house resolution, but also mediators or conciliators is a crucial point.

Despite the obvious need for such sorts of conflict resolution, the standards remain rather vague. Mere in-house complaint handling certainly does not suffice to adequately manage the issues which arise.

	Smart house services for elderly and disabled people NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
After-sales services				
Insolvency				
In-house complaint handling	AFNOR NF X 50-058 7.1. procedures on complaint handling through <i>conseil de vie sociale</i> and other instances of mediation,	AFNOR NF X 50-056 4.1. complaint handling in 15 days,		4.5.2. complaint management
Out of court dispute settlement procedures				
Collective redress				

6. Monitoring and inspection

All standards provide for rules to evaluate consumer satisfaction and for means to take corrective action. The strong and stable relationship between the clients and the residential home requires an atmosphere of mutual trust. The relevant rules on consumer satisfaction must therefore be carefully monitored by the service providers.

	Smart house services for elderly and disabled NEN/SN (project), Residential homes for elderly people AFNOR (project) and AFNOR NF X 50-058	Services for resident people AFNOR (project) and AFNOR NF X 50-056	CEN/CENELEC Guide 6 Guidelines for standard developers to address the needs of older persons and persons with disabilities	Assisted living for the elderly DIN 77800
Monitoring and inspection in binding law				
Monitoring and inspection in co-regulation and self-regulation	AFNOR NF X 50-058 7.2. evaluation of quality, 7.2.2. consumer satisfaction, 7.2.3. establishing corrective and preventive actions	AFNOR NF X 50-056 3.4.2.1. monitoring the client's situation, once a year, 3.4.2.2. regular evaluation, 4.2. evaluation of consumer satisfaction, 4.3. corrective and preventive action		4.5. detailed rules on survey of customer satisfaction (including confidential treatment) and Follow-up measures to improve the quality of the service

7. Impact on standardisation of services

The standardisation of services provided to the elderly if they are residents or living in a residential home is certainly some sort of an acid test for standardisation. It is a huge and even growing market which attracts attention from all service providers. On the other hand, it is a market which requires a sensitive management of the relationship to the client. As most national private legal orders do not deal with contracts for residential homes, there is ample room for standards to fill that gap. In particular, the two German and French standards constitute a promising start. They deal with at least four parameters quite intensively: education and skills, equipment and premises, pre-contractual information and monitoring and inspection. However the hard core issues, the content of the contract in specific sensitive areas, such as pricing and billing of services, and rights and remedies, are relatively underdeveloped. Standardisers could take the freedom to also consider how rights and remedies can be executed, in particular if the parties to the contract are not, or are only partly, in

a position to defend their rights. In this respect the two standards appear as a starter – which needs to be developed beyond the boundaries of existing legal rules.

IV. Current practices in standardisation of furniture removal

The four European standards here to be analysed may be broken down into furniture removal and furniture storage. Amongst these activities the European standards clearly distinguish between service specification on the one hand and service provision on the other. All standards are designed for those activities which relate to the mobility of private individuals where the standard is applied by an individual or by an employer or relocation agent when the former requires the moving of personal property, generally consisting of non-commercial property and/or property which is in current use. The regulatory technique is innovative in that the definition of the service and its content are separated from the quality management of that service.

1. Scope, education and skills

It goes without saying that furniture removal requires educational training and appropriate skills. Furniture removal does not only require physical force but specific skills and training which guarantees the customer that his belongings are dealt with safely and prudently. That is why technical standards under scrutiny put much emphasis on the professional requirements which are needed to engage in that business. Furniture removal is not the type of business that occupies people who have undergone an educational training that requires a certificate or even statutory approval. Service providers are therefore under pressure to make sure that the employees are professionals in that they have the necessary experience and skills.

	Furniture removal service specification EN 12522-1 Final Draft	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
Scope/purpose	Service: all the services agreed upon between the service provider and the customer within the framework of the contract: includes characteristics	Provision of service: all the means engaged by the service provider which include the personnel, the equipment, the organisation and the budget with	1. minimum requirements for the provision of storage facilities and related services, for furniture and personal effects belonging to private	1. specifies service activities designed to ensure a customer orientated service for the storage of furniture and personal effects

	Furniture removal service specification EN 12522-1 Final Draft	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
	which allow this said service to be assessed	a view to carrying out the service	individuals, applicable to all sort of such storage whatever the means of containment employed	for private individuals
Management and staff				
Service provider/personnel	4.1.1. professionalism EN 12522-2 Punctuality, courtesy, good presentation and honesty	3.3.1. human resources – 50% must have followed a professional training or one year practical experience, 4.8. training programme and record of the training undergone by each employee		3.2.4. human resources (specifically trained/designated people) 3.2.5. technical skills 6.6. service provider

2. Equipment and premises

Furniture removal requires the existence of the appropriate equipment, this being mainly packaging material to protect the customer's belonging against damages. Whilst the technical standards put down "basic requirements" it is likewise fair to say that these are rather vaguely worded. There is more needed than just suitability of the packaging material. Rules on premises are only needed if the furniture has to be stored. This gap is closed by European standard 14873-1 on specifications for storage during furniture removal.

	Furniture removal service specification EN 12522-1 Final Draft	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
equipment	4.1.2. suitability of the transport equipment,	3.3.2. technical means (packaging)		

	Furniture removal service specification EN 12522-1 Final Draft	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
	4.1.3. suitability of packing material	materials) 4.3.4 equipment (not packaging material) means renewal, replacement, maintenance		
Premises			Whole standard contains detailed rules safe storage, 5. container storage, 6. loose storage, 7. self storage	

3. Pre-contractual stage and conclusion of contract

Pre-contractual negotiations precede the conclusion of the contract. The service provider can only make an offer if he has checked the furniture he has to remove. This requires the service provider to visit the customer's home or office. The set of standards under scrutiny are largely based on the idea that the customer needs to receive a set of pre-contractual information in order to decide whether he wants to conclude a contract or not. The standards contain information obligations as well as mandatory advice to the customer. Contract terms should be made available before the conclusion of the contract. Furniture removal is cross border business. That is why the standards provide for the need to inform the customer on the applicable law. This is foreseen, however, in a way, which might supersede the capacities of the service provider. The standards presuppose that the service provider knows the different national as well as the relevant European rules. The determination of the applicable law is often quite complicated, in particular if the parties have not explicitly agreed on the legal order to be applied. In this respect the technical standards seem to be rather challenging.

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
Accessibility of the service				
Freedom to contract (choice)				
Transparency				
Information obligations of the supplier	4.2. initial contact and preliminary information on the structure of the service (4.3. and 4.4.)			3.2. information prior to commencement of service, broken down into 3.2.1. preliminary information, 3.2.2. further information, 3.2.3. elements of the agreement
Information available on request only				
Advice	4.2. initial contact by way of a preliminary physical survey	3.2.1. initial contact to be made by a delegated employee of the service provider		
Availability of contract terms prior to the conclusion of the contract	5.2. the enlisted terms must be made available before the contract is entered into			3.2.2. minimum elements for offer of services, 3.2.3. minimum elements of the agreement
Information on the applicable law	6.7. liability rules should comply with the national regulations and, if need be, with those of the EU	3.3.1. national or European regulation relevant to handling, packaging and transport operations should be taken into account		3.3.4.3. the service provider should select only those items of equipment which are designed and manufactured in accordance with relevant

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
				legislation.
Form of contract conclusion				3.2.2. offer of service shall be in written form, 3.2.3. agreement must be in writing

4. Content of the contract

The relatively well developed set of informational duties facilitates the definition of the rights and duties concluded under the contract.

a) *Affordability, minimum content, safety, quality and payment*

These technical standards lay down minimum requirements on the content of the contract. They equally contain a whole set of quality standards and to a lesser extent safety standards. Specific rules are only foreseen for the storage of furniture. Billing is not dealt with and payment modalities to a limited extent only.

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
Affordability				
Minimum content through contract terms	5.2. a) to o) lists the minimum content of the furniture removal contract		4. the storage facility (minimum provision) 10 items	3.2.3. lays down minimum content of the agreement

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
Quality	4.3. specifications of the minimum furniture removal service 4.4. Recommendation for additional optional services	4. organisation and implementation rules of the furniture removal quality approach (communication, responsibilities, quality manual, personnel, equipment, incidents/accidents, quality control, control of quality related documents, assessment of subcontractors, elimination of non standard service, corrective action)	5. container storage, 6. loose storage 7. self-storage units	3.3. receipt and release of stored items (minimum provisions), 4. formal quality policy, 5. conducting, controlling and reviewing quality policy responsibilities, 6. Quality manual
Safety			4. 7 th to 9 th indent, intruder alarm system, fire detection, local fire control	
Billing				
Payment modalities	5.2. m) precise indication of terms of payment 6.5. Terms of payment to be specified after negotiation			3.2.3. 12 th indent invoicing frequency and the terms and method of payment

b) Rights and remedies (withdrawal, compensation and liability)

The set of standards is relatively well developed with regard to rights and remedies. This is not at all surprising as damages and compensation claims of customers belong to the daily business. In particular European Standard 12522-

1 on furniture removal specification covers a broad range of rights and remedies. The regulatory technique is not to impose liability obligations on the service provider, but to inform the customer on liability rules under the relevant law. The standard is more specific on insurance rules. In this respect the standard underlines the need of the service provider to secure the furniture against possible damages. Similar or comparable rules are missing with regard to storage of furniture.

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
Right to withdrawal and cancellation rights	6.6. unless otherwise stipulated, any and all sums paid in advance shall be a deposit. The deposit is not reimbursed if the customer cancels the contract, if it is the company, the customer receives twice the deposit			
Compensation for improper information supply	6.7. liability, The contract shall indicate the contractual as well as the legal liability			
Compensation for incomplete/insufficient performance	6.7. liability, The contract shall indicate the contractual as well as the legal liability			
Joint/subsidiary liability in trilateral contracts				

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
Liability for personal injury and belongings				3.2.3. 5 th indent, final agreement of the extent of liability in the event of loss and damage
Insurance	Service provider's liability shall be covered by one or several reputable insurance companies			3.2.3. 6 th indent terms and conditions relating to any offer of insurance

5. Post-contractual stage – after-sales services, complaint handling, dispute settling, collective redress, protection against insolvency

Post-contractual disputes are part of the business. The technical standards therefore contain rules on complaint handling and dispute resolution. However, these requirements are not really developed. There is no reference to the way in which out-of-court dispute resolution should be handled. It is only said that amicable dispute settlement should be available. This is a rather low standard in comparison to the existing EC recommendations on dispute resolution, such as 98/257/EC⁴⁰⁶.

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
After-sales services	4.4. last indent After-sales service to ensure that the customer's reasonable expectations for amicable settlement of			4.3. after-sales services (here being understood as management of customer satisfaction)

406 OJ L 115, 17.4.1998, 31.

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
	any dispute can be met			
Insolvency				
In-house complaint handling	5.2. j) information on the procedure for dealing with complaints or complains			3.4.2. complaints handling
Out of court dispute settlement procedures	4.4. last indent 2 nd sentence. Amicable settlement should include identification of the possibility for involvement of any professional organisation of which the service provider may be a member and of any consumer organisation nominated by the customer			3.4.3. resolution of dispute Amicable settlement should include identification of the possibility for involvement of any professional organisation of which the service provider may be a member and of any consumer organisation nominated by the customer
Collective redress				

6. Monitoring and inspection

Those who request furniture removal services may be repeat players, i.e. they do not use the service once in their lives, but several times. In this respect customer satisfaction is eminent. Only two of the standards contain basic requirements on monitoring and inspection.

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2

	Furniture removal service specification EN 12522-1	Furniture removal provision of services EN 12522-2	Furniture removal Specification for storage EN 14873-1	Furniture removal provision of services EN 14873-2
Monitoring and inspection in binding law				
Monitoring and inspection in co-regulation and self-regulation		3.4. monitoring of customer satisfaction, evaluation of consumer complaints and dispute settlement 4.7. corrective action after collection and analysis of customer complaints		3.4. monitoring of customer satisfaction via complaints and dispute settlement management, 6.5. corrective action after evaluation of complaints and disputes

7. Impact on standardisation of services

The technical standards on furniture removal show a heterogeneous picture. Although they do not cover the full array of the six core consumer elements, the standards are relatively comprehensive, even in the field of rights and remedies. The problem seems to be that the overall picture is relatively positive, however, the degree to which the individual standards meet the six parameters differ widely. In theory the four standards read together should more or less meet the same ceiling in terms of removal and storage. In practice furniture removal and furniture storage are submitted to different rules. This is clearly demonstrated by comparing the requirements throughout the six parameters.

V. Current practices in standardisation of postal services

The set of standards are the direct result of the EC policy on establishing a common market for cross border postal services. They bear a strong regulatory background.

The 1992 Green Paper⁴⁰⁷ identified the need to have common rules in order to improve the services. This eventually led to the adoption of Directive 97/67/EC on postal services as amended by Directive 2002/39/EC. These Directives on

407 Green Paper on the development of the single market for postal services (COM/91/476).

postal services are currently under review. In 2006 the European Commission published a Proposal for a Directive concerning the full accomplishment of the Internal Market of Community postal services⁴⁰⁸. Neither the existing EC Directives 97/67/EC on postal services and 2002/39/EC, nor the proposal, contain much guidance on the six analytic categories. The only material change concerns the revision of Article 19 that regulates complaint handling and dispute settling⁴⁰⁹.

The policy of the European Commission has always been to tie regulation and standardisation together. This is clear in Article 20 already adopted in 1997 which remained unchanged for 10 years and which will probably not be changed under the recently presented proposal. Article 20, headed “harmonisation of technical standards” says:

“The harmonisation of technical standards shall be continued, taking into account in particular the interest of the users.

The European Committee for Standardisation shall be entrusted with drawing up technical standards applicable in the postal sector on the basis of remits to it pursuant to the principle set out in Council Directive 83/189/EEC of March 1983 laying down a procedure for the provisions of information in the field of technical standards and regulations.

This work shall take account of the harmonisation measures adopted at international level and in particular those upon within the Universal Postal Union.

The standards applicable shall be published in the Official Journal of the European Communities once a year.

Member States shall ensure that universal service providers refer to the standards published in the Official Journal where necessary in the interests of users and in particular when they supply information referred to in Article 6 (particular features of universal services offered).

The Committee provided for in Article 21 shall be kept informed of the discussion within the European Committee for Standardisation and the progress achieved in this area by that body.”

This Article gives a broad mandate to Standards Bodies. The scope is in no way defined. The only thing needed is for technical standards to be harmonised in the interests of users. The latter reference is certainly a step forward, but the Postal Services Directive remains largely behind the relevant Articles in the

408 COM (2006) 594 final, 18.10.2006.

409 See for a full account of consumer protection issues formulated prior to the adoption of the proposal, in particular on universal services, but also the missing rules on the quality of services, such as delivery time, opening hours and delivery and collection times, security and reliability, BEUC Postal Services – Public consultation – BEUC’s comments, BEUC/X/2005/2006, 8.2.2006.

Services Directive 2006/123/EC⁴¹⁰. So far the standard-setting bodies have elaborated a broad array of technical standards, five of them, those being studied here, directly or indirectly affect consumers.

Four out of five deal with highly technical issues, the opening of a private letterbox, the measurement of transit time for first and second class mail and the measurement of loss of registered and other mail. The fifth deals with consumer protection issues, complaint handling and dispute settling. ANEC has been involved in all five standard-making procedures and it seems as if ANEC has managed to influence standard-making.

However, none of the standards deal more specifically with contractual relations and the implications of bad and insufficient performance on services⁴¹¹. That is why the link between the more technical standards and the civil law implications, liability for theft, delay and loss, are only dealt with to a very limited degree.

1. Scope, education and skills

None of the five standards contain rules on education and skills of the service provider. This is all the more astonishing as there is an ongoing debate in legal doctrine as to whether the service providers should be obliged to exercise control over the supply of unsolicited services⁴¹².

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
Scope/purpose	Specifies the requirements and the test methods of	EN 13850 Specifies methods for measuring	Specifies requirements for the measurement	Specifies methods for measuring the level of	In addition to EN 13850 specifies methods for

410 See Chapter III, I, 2, g).

411 The respective category 4 b) remains empty throughout the analysis.

412 This has started together with the adoption of Directive 97/7/EC on distance selling, with due regard to the reach of Article 10.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
	<p>the apertures for the delivery of letter post items when fitted in accordance with the manufacturer's instructions.</p> <p>It takes into account security, impregnability, safety and performance for the recipient, and ergonomics and efficiency of delivery personnel. It allows the daily delivery in good condition of a great majority of letter post items</p>	<p>the end-to-end transit time of the domestic and cross-border priority single piece letter mail, collected, processed and distributed by postal service operators</p> <p>The quality of service indicator does not measure the postal operator's overall performance in a way that provides direct comparison of postal service operators</p> <p>Guide CEN/TR 14709 shall facilitate implementation of EN</p>	<p>t of complaints and redress procedures related to the domestic and international postal service</p> <p>It defines various types of complaints and for each of them establishes a methodology for measuring response rates for their acknowledgment, processing, and resolution by the service provider</p>	<p>loss and substantial delay of domestic and cross border registered letter mail, collected, processed and delivered by postal service providers</p>	<p>measuring the end-to-end transit time of domestic and cross-border non priority single piece mail, collected, processed and distributed by postal service operators</p>

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
		13850			
Management and staff					
Service provider/personnel					

2. Equipment and premises

Only one out of five standards deals with the equipment, that is with letterboxes. European standard 13724 contains rules on the aperture size of private letterboxes. The compromise found has not been unanimously accepted. In Austria traditional post boxes have been replaced by ones conforming to the new European standard. In contrast to the old ones they allow private mail service providers to drop their letters and so forth because they have a slit. The old ones were completely closed and could only be opened by the postmen who had a key. The trouble is that now the post is accessible for everyone and everyone can easily retrieve letters if they so wish. There is now a heated public debate on this in Austria and it may be that the standard is revised as a result.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
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	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
Equipment	4.1. classification (aperture types and sizes), corrosion resistance, security, 5. requirements 5.3. ergonomics and safety, 5.3.1. installation height of the aperture, 5.6. security (theft protection)				
Premises					

3. Pre-contractual stage and conclusion of contract

None of the technical standards deal with the pre-contractual stage or rules on how to conclude the contract. The relevant Directives 97/67/EC and 2002/39/EC require universal accessibility for posting letters also in rural areas. The technical standards do not pick up on that issue.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
Accessibility of the service					
Freedom to contract (choice)					
Transparency					
Information obligations of the supplier					
Information available on request only					
Advice					
Availability of contract terms prior to the conclusion of the contract					
Information on the applicable law					
Form of contract conclusion					

4. Content of the contract

The technical standards do not fill the gap left by EC Directives 97/67/EC and 2002/39/EC. In theory there would have been the opportunity to develop European standards on how a contract between a consumer and a private mail service should appear. It seems as if the standards do not bear witness to the fact that postal services are becoming more and more a privately run business.

Rules are therefore needed on practical aspects of services: to pick up the letter at the resident's home, to deliver the letter in due time and to protect the consumer against possible delays and losses.

a) *Affordability, minimum content, safety, quality, payment*

The technical standards only contain rules on the quality of the postal services. They focus on the transit time. Again, the two EC Directives have set binding requirements, at least on cross border services. Safety should be an issue not only in terms of the accessibility of letterboxes and the size of the slit. However, only the European standard 13724 on apertures of private letterboxes and letter plates contains rules on the safety of private letterboxes, none of the other standards deal with the risk that letters are opened during the transit time. Billing and payment modalities are excluded, although postal services are becoming private business.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
Affordability					
Minimum content through contract terms					
Quality	5.3. Ergonomics and safety 5.4. confidentiality 5.5. corrosion and water	4. Transit time as a quality of service indicator, 5. methodology , 6. test mail characteristics		4. Measurement (minimum period before an item is considered to be lost or substantially delayed; calculation of number of lost or	4. methodology , 5. Real mail studies, 6. geographical stratification, 7. estimators for real

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
	penetration			substantially delayed items). 5. Methodology	transit time, 10. quality control and auditing
Safety	5.3.2. safety (apertures cannot be reached when inserting a letter), Self closing of the aperture, Fire protection regulations, 5.6. security (against theft)				
Billing					
Payment modalities					

b) Rights and remedies (withdrawal, compensation and liability)

The consumer who has posted the letter will learn whether and under what conditions he may claim damages if the letter is delayed despite the guaranteed transit time, or if it goes lost. The requirements laid down in the two Directives 97/67/EC and 2002/39/EC are concretised to some extent in EN 14137 on quality of service, measurement of loss of registered mail and other types of postal services using a “track and trace” system. However, the European

standard EN 13724 on apertures of private letterboxes and letter plates does not provide for liability rules in case of theft, for example.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
Right to withdrawal and cancellation rights					
Compensation for improper information supply					
Compensation for incomplete/in sufficient performance				4.2 defines minimum period before an item is considered to be lost or substantially delayed, but no concrete compensation is discussed	
Joint/subsidiary liability in trilateral contracts					
Liability for personal injury and belongings					

5. Post-contractual stage – after-sales services, complaint handling, dispute settling, collective redress, protection against insolvency

The issue is dealt with in a horizontal European standard, EN 14012. This goes back to the two Directives 97/67/EC and 2002/39/EC, which put much emphasis on the availability of appropriate dispute settlement schemes. If one compares the relevant provisions in the Directives to the stipulations in the technical standard, one may wonder to what extent the technical standard provides additional guidance. The European Commission has developed at least two Recommendations 98/257/EC⁴¹³ and 2001/310/EC⁴¹⁴ which lay down specific requirements on how dispute settlement procedures should look like.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
After-sales services					
Insolvency					
In-house complaint handling			4. Making a complaint (process, information provided to users, information required when making a complaint), 5. Classification of complaints (process, categories, lost items)		

413 OJ L 115, 17.4.1998, 31

414 OJ L 109, 19.4.2001, 56.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
			6. complaint management system (complaints handling, replying to complaints) 7. Redress procedures (how they are operated, and how the level and form of compensation and the time taken to pay compensation should be determined)		
Out of court dispute settlement procedures					
Collective redress					

6. Monitoring and inspection

Again, this is an issue which is tackled in the horizontal standard on complaints and redress procedures, EN 14012. Some basic rules are foreseen on the measurement of complaints.

	Apertures of private letterboxes and letter plates Requirements and test methods EN 13724	Quality of service Measurement of transit time of end-to-end for single piece priority mail and first EN 13850 Guide to implementation of EN 13850	Quality of service, Measurement of complaints and redress procedures EN 14012	Quality of service, Measurement of loss of registered mail and other types of postal service using a track and trace system EN 14137	Quality of service Measurement of transit time of end-to-end for single piece non-priority mail and second class mail EN 14508
Monitoring and inspection in binding law					
Monitoring and inspection in co-regulation and self-regulation			8. Measurement of complaints (records, statistical indicators, reporting statistics about complaints), 9. Quality control system	6. Reporting 7. Quality control	

7. Impact on standardisation of services

The set of standards available in this field seem to start from the premise that contract making and contract shaping should be left outside the scope of standardisation. This is all the more astonishing given that the two Directives 97/67/EC and 2002/39/EC set the issue aside and thereby pave the way for initiatives at European level. One reason might be that the market for postal services has only been opened up gradually. That is why private contracts, in particular between consumer and service providers are of limited importance so far. The market for letters below 20 grams will not be opened before 1st January 2008. One may even wonder to what extent private postal services are more and more replaced by emailing. However, these tendencies can not fully explain why the technical standards under scrutiny are dealing with three issues only, aperture of private letterboxes, transit times and complaint management. Set

against the six core consumer elements, the five standards cover only a small extract of the relevant consumer issues.

European consumer organisations wanted to see the issues solved in the intended revision of the Directive, i.e. by way of regulation. However, as the proposal⁴¹⁵ does not respond to the consumer demands, the question remains as to whether standards could cover that gap⁴¹⁶.

VI. Current practices in standardisation of transport services

The few standards in this area do not really concern consumers. EN 13816 on public passenger transport – service quality definition, targeting and measurement, and EN 1514 on public passenger transport – basic requirements and recommendations for system that measures delivered service quality – must be read together. They deal with methods of how to measure service quality – with little guidance of what the level of quality to be provided should be. EN 13876 on ‘Goods transport chains – code of practice for the provision of cargo transport services’ deals with cargo transport only. More interesting seems the business plan of CEN TC 320 on transport, which contains an indication on a future that integrates the consumer point of view. As far as is known, however, no concrete action has been taken so far or is envisaged to pay tribute to the new policy target.

1. Scope, education and skills

Public passenger transport is undergoing a substantial change all over Europe. The European Commission has put pressure on privatisation of public transport services. The overall idea is to have competing services, for example different bus lines, in order to improve customer satisfaction and keep prices low. So far the existing standards deal with management and staff in broad terms only.

415 COM (2006) 594 final, 18.10.2006.

416 See BEUC Postal Services – Public consultation – BEUC’s comments, BEUC/X/2005/2006, 8.2.2006.

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
Scope/purpose	Specifies the requirements to define, target and measure quality of service in public passenger transport and provides guidance for the selection of related measurement methods	Designed to assist customers, carriers and freight arrangers to identify a best operating practice capable of operation in conjunction with existing customs or trade and commerce to minimise errors and to reduce claims of lost and/or damage to cargo	The document provides basis requirements and recommendations for systems that measure delivered service quality of public passenger transport to be applied in the framework of EN 13816	It is suggested that CEN TC 320 should consider inter alia the formulation of a strategic, long term objective from a passenger's point of view
Management and staff	5. Recommendations on commitment between participating parties and allocation of responsibilities (5.2.)	4. responsibilities and control (clearly defined management systems)		
Service provider/personnel				

2. Equipment and premises

In contrast to the striking importance of quality and safety issues relating to equipment and premises in the field of transport the four technical standards remain rather modest. There are only a few broadly termed requirements on the security of the equipment (European standard EN 13816 on public passenger

transport – service quality definition, targeting and measurement) and on suitable equipment and adequate facilities which ensure that quality of cargo does not deteriorate (European standard EN 13876 on goods transport chains, code of practice for the provision of cargo transport services).

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
equipment	3.2. quality criteria, 7) security=sense of personal protection	4.2.3. suitable means of transport		
premises		4.2.2. storage – provision of adequate facilities which ensure that quality of cargo does not deteriorate		

3. Pre-contractual stage and conclusion of contract

The only standard dealing with pre-contractual information is European standard EN 13816 on ‘Public passenger transport – service quality definition, targeting and measurement’ (see table below). None of them deals with the conclusion of contract.

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
Accessibility of the service	3.2. 2) access to PPT system including interface with other transport modes			
Freedom to contract (choice)				
Transparency				
Information obligations of the supplier	3.2. 3) systematic provision on knowledge about a PPT system to assist the planning and execution of journeys			
Information available on request only				
Advice				
Availability of contract terms prior to the conclusion of the contract				
Information on the applicable law				
Form of contract conclusion				

4. Content of the contract

The technical standards being studied here are not designed to systematically deal with contract issues.

a) *Affordability, minimum content, safety, quality, payment*

Emphasis, however, is put on the quality that has to be provided. This is true for at least three standards; EN 13816 on public passenger transport – service quality definition, targeting and measurement, EN 13876 on goods transport chains, code of practice for the provision of cargo transport services, and 15140 on public passenger transport – basic requirements and recommendations for systems that measure delivered service quality. The latter one is devoted entirely to laying down quality requirements and systems for measuring the quality. Safety issues, i.e. sense of personal protection experienced by customer, show up in EN 13816 on ‘Public passenger transport – service quality definition, targeting and measurement’ only. The quality criteria cover the sense of personal protection experienced by customers.

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
Affordability				
Minimum content through contract terms				

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
Quality	3. methodology (service targeted and service sought) 4. requirements of service quality (management	5. Management of quality, 6. Performance (packaging, preparation and dispatch, transport, subcontractor, proof of delivery, transport conditions, quality planning)	4.1. General Requirements (design, conduct of measurement,) 4.2. Specific requirements according to the type of measurement, 5. recommendations of the design of the measurement system, conduct of measurement	
Safety	3.2. 7) security and 8) environmental impact			
Billing				
Payment modalities				

b) Rights and remedies (withdrawal, compensation and liability)

One out of four of these technical standards deals with rights and remedies. However, EN 13876 on goods transport chains, code of practice for the provision of cargo transport services does not directly impose compensation duties on the service provider. It lays down a set of obligations to supervise the packaging and the transport, to ‘identify damage – not to calculate damage’ and to ‘prove delivery’ – not to ensure delivery. These obligations, if violated, may cause damage to consumers. From a legal point of view the question remains whether violations of these obligations may entail civil liability. Strictly speaking

this is only possible if the national law at stake provides for the appropriate remedies. The technical standard itself may then contribute to shaping the reach of the responsibilities.

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
Right to withdrawal and cancellation rights				
Compensation for improper information supply				
Compensation for incomplete/insufficient performance				
Joint/subsidiary liability in trilateral contracts				
Liability for personal injury and belongings		6. performance, obligations of the service provider to identify damage, to control suitable transport and proof delivery		

5. Post-contractual stage – after-sales services, complaint handling, dispute settling, collective redress, protection against insolvency

Consumer complaints in public transport are not uncommon. That is why it would make sense to develop appropriate complaint handling schemes and

dispute settlement procedures. The contrary is true. Only technical standard EN 13876 on ‘Goods transport chains – code of practice for the provision of cargo transport services’ provides for formal and effective complaint management.

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
After-sales services				
Insolvency				
In-house complaint handling		4.2.4. provide formal and effective management, which ensures that any loss or damage to the cargo can be identified throughout the transport process		
Out of court dispute settlement procedures				
Collective redress				

6. Monitoring and inspection

Monitoring and inspection could easily be regarded as a prominent field for standardisation. EN 13816 on ‘Public passenger transport – service quality definition, targeting and measurement’ provides for an evaluation scheme of consumer satisfaction “throughout the transport process”.

	Public passenger transport – Service quality definition, targeting and measurement EN 13816	Goods transport chains, Code of practice for the provision of cargo transport services EN 13876	Public passenger transport - Basic requirements and recommendations for systems that measure delivered service quality EN 15140	Business Plan Transport – Logistics and services CEN TC 320
Monitoring and inspection in binding law				
Monitoring and inspection in co-regulation and self-regulation	4. requirements of service quality (management, inter alia customer satisfaction Annex C).			

7. Impact on standardisation of services

The review of the consumer related technical standards in the field of public transport reveals that standard-making is largely made without taking the consumer perspective into account, at least not if one accepts the six core consumer elements to be used as a yardstick. The major reason might be that public transport is still public, that means it is subject to statutory regulation. In such a perspective public transport appears as a service that has to be supplied by public bodies, mainly by municipalities. The consumer here is the customer in the proper sense of the word. He has no choice, he has to accept what is offered to him. If this understanding is true, there is still room for the elaboration of technical standards, on quality and safety requirements as well as complaint handling and dispute settlement.

VII. Comparative analysis of the review

Reviewing the analysed EC directives and regulations on the one hand, and the technical standards on services on the other, there is one striking difference to be noted: the EC directives and regulations are focussing much more on the content of the contract, on minimum content, and in particular on rights and remedies. The same cannot be said for technical standards. The closer the standards approach the content of the contract, the more vague they become.

1. Scope, education and skills

All rules being studied here define the scope and the purpose of the project in a clear-cut way. If the field in question is governed by a whole series of technical standards, there are even meta-standards at play, which explain how the different more specific standards fit together.

From a consumer's perspective it is of utmost importance whether the service is executed by a professional or not. Information on the applicable rules, however, remains scarce. The reason might be found in Directive 2005/36/EC on professional qualifications, which leaves it for the Member States to decide over the education of the relevant professions. However, this does not explain why European Standards Bodies do not make use of the leeway left to them, some notable examples set aside. For sure, any involvement would require a careful analysis of the scope and requirements laid down in Directive 2005/36/EC in order to avoid conflicts between EC rules and voluntary standards. The degree to which there is leeway for European Standards Bodies may therefore differ⁴¹⁷.

2. Equipment and premises

The review process reveals that most of the directives, regulations and standards are dealing with equipment and premises in some form or the other. However, there is no systematic approach on equipment and premises, although they are of utmost importance for consumers. Particular equipment and premises are only needed in case of tangible services. In this case, the consumer may reasonably expect that the devices meet the necessary safety standards as well as quality standards. Safety-related equipment and premises are covered either by New Approach-type directives or by the GPSD. However, on safety, no link between the standards and the binding EC law can be found. This is, however, what is needed to fully consider the interplay of legal norms and technical standards.⁴¹⁸

3. Pre-contractual stage and conclusion of the contract

It goes without saying that all rules, mandatory or non-mandatory, put much emphasis on the pre-contractual stage, in particular on the transparency of the service and on comprehensive sets of information requirements. All regulatory techniques are united in the idea that information obligations are seen as a means to give shape to the substance of the service. There is even a tendency

417 With regard to the consequences see under Chapter VI, III, 1.

418 With regard to the consequences see under Chapter VI, III, 2.

to provide the information in writing, however, without making clear whether this could also mean providing the information in an electronic form.

Whilst the common trend is obvious the EC regulations and technical standards vary considerably in detail. All in all the EC rules rely heavily on pre-contractual means as an appropriate means to strengthen the consumer autonomy. The trend is less clear where technical standards are concerned. Here only those standards that directly or indirectly refer to contract making contain information requirements.

4. Content of the contract

The definition of the content of the contract is the acid test for law-makers and standard-makers. The existing EC regulations on services are patchy, in that they do not deal fully and comprehensively with the content, the quality, the safety requirements and the payment modalities. However, the EC legislator does not refrain from dealing with sensitive issues such as affordability of the network services. No complementary provisions, however, exist for consumer credit. A strong consumer bias includes the need to lay down minimum content rules. Billing, again a sensitive issue, is usually exempted from EC regulation. The EC directives and regulations are deficient, however, when it comes down to define the consumer rights in case of improper service, liability for loss and damage as well as protection via insurances. Cancellation rights and the right of withdrawal are relatively well-developed. Sanctions for improper information supply are completely missing. Compensation rules for insufficient performance and liability rules for personal injury and belongings are the exception to the rule.

However, there is a world of difference between lawmaking and standard-making. Few standards contain some sort of minimum requirements for the content of the contract. If any, technical standards focus on quality requirements and quality management which constitutes a prominent field for standardising activities. A notable example is the BSI standard on billing.⁴¹⁹ Most of the standards being studied here, however, do not spend a single word on the concrete obligations of the service providers or on the rights consumers might benefit from in case the service provider fails to execute the service properly. Sometimes liability is mentioned, mostly in conjunction with possible (not clearly) recommended insurances.

419 BS 8463:2005 'Specification for customer billing practice'.

5. Post-contractual stage

The picture drawn from the EC directives and regulations is ambiguous. After-sales services are largely set aside, rules against insolvency protection are relatively well-developed. Complaint handling and dispute settlement shows up in most of the directives and regulations, but are in no way linked to already existing more fully developed concepts, which can be found in Recommendations 98/257/EC on out-of-court settlement and 2001/310/EC on consensual resolution. Astonishingly enough some areas even contain rules on collective redress, though in rudimentary form.

One might have expected that the post-contractual stage could become a major field of activities of standardisation. This is partly true, however, much less so for after-sales services than complaint handling and out of court dispute settlement. Contrary to the official EC policy to foster out of court dispute settlement, however, the standards put much more emphasis on in-house complaint handling. This goes along with the policy behind the Service Directive. On the other hand there is little preparedness to protect consumers in case of insolvency of the service provider.

6. Monitoring and inspection

EC directives and regulations do not scrutinize monitoring and inspection duties. If there are any, they can be found not in the directives and regulations, but in codes, guidelines and recommendations elaborated by coordinating committees or informal cooperation of national agencies. The exception to the rules is the Service Directive. However, this is due to the fact that the Directive is build on the interplay between binding law and voluntary standard-making.

The concept of best practice suggests the need to organise a constant learning process, via evaluation of customer satisfaction and mechanisms for taking corrective action. Whilst the standards under review are still far away from the draft ISO DIS 10001 on 'Quality management – customer satisfaction – guidelines for codes of conduct for organisations', there is an obvious tendency to take a much harder look at the practical effects of the relevant standards, on the management of customer satisfaction via inquiries and on the need to take corrective action. Again, this is a tendency, but clear-cut rules are missing in most technical standards.

7. Consumer representation

Whether and to what extent consumer organisations have been heard in the law making process remains largely outside the scope of the analysis. The survey

on the new regulatory techniques and the new regulators provides at least an oversight on the changing role of consumer organisations, even in the law making process⁴²⁰.

Representatives from the consumer committees of National Standards Bodies and/or from ANEC have accompanied the elaboration of a number of technical standards being studied here⁴²¹. Through their active participation the agreement between CEN and ANEC leads to palpable results. Consumer representatives have had access to the relevant documents, they are allowed to make proposals and to provide scientific advice. The minutes of the working session and meetings are not publicly available. Consultation remains confidential. That is why it is hard to say, whether and to what extent the 'consumers' voice' has been heard in the relevant technical committees. Whether or not consumers are satisfied with the relevant standards becomes clear only after the standard has been adopted and published in the Official Journal or made accessible via the National Standards Bodies. This has been the case with regard to European standard EN 13724 on apertures of private letterboxes and letter plates. The fact that the slit does not protect consumers against theft has led to an outcry in Austria.

Chapter VI: General observations, best practice and baseline requirements

The sixth chapter aims at widening the perspective. The review process allows for general observations on standard-making in the field of services (I). These pave the way for measuring the existing EC regulation and technical standards against the five leading principles which have been deduced from the concept of best practice. This includes the opportunity to pinpoint to a limited set of best practice in the existing array of standards (II). Based on the core consumer elements and the findings of the screening process the minimum or baseline requirements will be developed which could be used as a yardstick for consumer representatives to measure the consumer input into standardisation of services (III). The chapter concludes with a checklist that serves as a guide in the standardisation process (IV).

420 See Chapter II, IV and V.

421 See Chapter IV, II, 3. with concrete references.

I. General observations

1. Disclaimer

Regulation of services as well as standardisation of services is a relatively new field, for lawyers and for standardisers. Consumer contract law in the area of services is basically general contract law, the law of obligations. However, the law of obligations all over Europe has developed together with the industrialisation process. The main legal area of concern was the producing, dealing, buying and selling of *products*. Contract law in essence still today is sales law. National private legal orders that emerge in the age of industrialisation had to deal with services only in labour law and with services provided by craftsmen, legally speaking the contract to manufacture. The so-called service society emerged in the last decades of the 20th century. National and the European legislators dealt with contracts for services in a sector-specific way. This is exactly what can be shown in the EC regulation of services. However, there was no attempt so far to look into common denominators of all the services and to define ground rules. A first and more systematic attempt has been made by the study group which proposes a non-binding set of rights and duties in the area of services⁴²².

Standardisation of services is even younger, at least for consumer services. Although standardisation of services started long ago, before the Service Directive had been adopted, the scope and range of available standards is still rather limited, even more limited than sector-specific EC directives and regulations. This is to say that the basis of analysis, the standards which could be screened, is rather slim. Standardisation of services will gain pace in the future. For this reason the conclusions drawn from the reviewing process should rather be read as an invitation to more fully consider the identified core consumer elements in future standard-making.

2. The regulatory divide – traditional law making and less traditional regulation via standardisation

There is a clear divide between traditional lawmaking and less traditional regulation via standardisation. The existing EC regulation of services puts emphasis on the regulation of the *content* of the service and its legal implications – it is command and control regulation. The recent initiatives on standardisation of services are less focussed on the content, they are much

422 See Chapter IV, I, 7.

more circumscribed to the surroundings, i.e. the relevant parameters, and they rely on cooperation and voluntary compliance.

The language of regulation constitutes another major difference, which results from the different approaches. Law making is based on the idea how people have to behave. Here the law ideally sets clear-cut standards on social and economic behaviour. Standard-making via standardisation is characterised by soft wording, i.e. it does not define how people *must* behave, but how people *should* behave. So the language is not that service providers *shall* have the obligation to do this and that, but rather *should* have the obligation to do this and that.

3. Legalistic outlook of standards

The outlook of technical standards resembles very much a piece of legislation. This comes clear in the introduction which clarifies the purpose of the project, the set of definitions on which the standard is based and the scope of application.

However, despite the look-alike strategy standards are often not made by lawyers and they do not constitute law in the proper sense. This comes clear in the missing precision of value loaded legal terms. Here and there legal terms are redefined without taking existing EC rules on the relevant area into consideration. This is particularly so in the area of tourism services, where the European standards on travel agencies and tour operators EN 13809 or on hotel and other type of tourism accommodation EN ISO 18513 are standing side by side with EC regulation on package tours.

Similar experiences may be drawn from the relevant articles in technical standards dealing with complaint handling and dispute resolution. The European Commission has adopted two Recommendations 98/257/EC and 2001/310/EC which lay down minimum requirements for dispute resolution. These regulatory concepts are not taken into account. The same is true when not simple but whole concepts are given a different meaning, e.g. the concept of after-sales services in EN 14873-2 on furniture removal is being understood as management of customer satisfaction.

4. Voluntary standards and (binding) law side by side

Standardisation is a thorny field as laws and regulations may have a varying impact on the relevant field of standardisation. Whilst it must be assumed that standardisation work will normally start with a stocktaking of all national, European and international conventions, laws and regulations as well as

already existing national, European or international standards, codes, guidelines or recommendations, these findings are not reflected in the adopted version of the standard. Technical standards are usually unrelated to their legal environment. That is why the world of standardisation appears to be separated from the legal world of binding or default regulation. The two worlds might co-exist without too much overlapping if standardisation is limited to defining technical issues in the proper sense⁴²³. However, the more standardisation is overstepping these boundaries – and it is the explicit policy of the European Commission that the Standards Bodies are moving this way – the more it is necessary, even indispensable, to indicate the legal environment in which the standards have to be embedded.

The here chosen approach of reviewing technical standards against the core consumer elements provides ample evidence for such an assessment. The first step into that direction has been the well-known New Approach which pushed the development of safety related standards. The Service Directive now delegates the broad issue of laying down standards on the quality of the services into the hands of European and National Standards Bodies. This includes more than ever all issues around contract making.

In short, standard-making has become less technical and much more political. Instead of weighing and measuring technical specifications, weighing and measuring of social behaviour is increasingly required⁴²⁴. This implies the need to link legal regulation to technical regulation and vice versa technical regulation to legal regulation. So far the communication remains one sided. Whilst more and more references to standardisation may be found in legal regulation, no such development can be reported from the standardisation business.

5. Systematic versus piecemeal standardisation

EC regulation and standardisation suffer from the same deficiencies. Most of the rules and standards are sector-specific, although quite a number of issues bear a horizontal character. In law, the vertical approach leads to inconsistencies and to frictions, at least if one undertakes the attempt to compare the vertical regulations. It is a well-known reaction that each vertical approach produces its own communication process. Just one example might highlight what is meant. Network services cover telecommunications, postal services, electricity and gas, railway services and public transport. Despite a

423 The question of whether and to what extent technical standards in particular in new technologies may limit legislative leeway in the long run has been deliberately left aside.

424 This aspect has been underlined by one of ANEC's observers in technical committees.

number of similarities and common issues such as the concept of universal service, the different network services remain legally separated.

The same phenomenon may be observed in the field of standardisation. Historically speaking standard-making is business-induced. This means that the business circles which need a specific technical standard will support its elaboration. It is a bottom-up and not a top-down approach. Sector-specific initiatives may not create frictions as long as they are bound to merely standardising technical specifications. However, once they overstep these boundaries and enter into areas that affect public policy issues such as safety or security or contract making or complaint handling, sector-specific approaches may end up in confusion, if similar or identical issues are dealt with differently⁴²⁵.

It might suffice to refer to complaint handling and dispute resolution. Most of the technical standards being studied here provide for some sort of complaint handling, dispute resolution and management of consumer satisfaction. It is one thing that the technical standards do not take the relevant EC recommendations into account, however, it is another that the stipulations in the relevant standards seem in no way coordinated. Each technical committee, dealing with complaint handling and dispute resolution seems to proceed on its own understanding.

The deficiencies in both areas in law making and standards making are revealed by the horizontal character of consumer protection. Consumer protection is needed whenever a service is supplied to the final consumer, independent of the type of services. In this respect consumer law can be understood as a device that puts pressure on legislators and standardisers to look more systematically into the field they intend to regulate and/or standardise.

6. Proactive and retroactive standardisation

At least at the European level standardisation of services is mainly retroactive. The National and European Standards Bodies take action in the shadow of a forthcoming EC directive or regulation. Then standardisation is no longer voluntary. It is top-down standardisation. The European Commission, i.e. the legislator becomes the key player and it designates specific tasks to the Standards Bodies. This is abundantly clear in postal services and services coming under the Services Directive. In both cases, the EC legislator had linked

425 Comment of an ANEC observer to the author, stressing the need for a more horizontal approach, where appropriate.

law making and standard-making in the text of the relevant Directives. In this respect European and National Standards Bodies are pushed into action.

National and European Standards Bodies do not really benefit from the leeway which is left to them even by the legislator. The review process revealed endless fields of possible activities where the national and the European legislator remain silent, where there is room for standardisation, not only for contract formation and rights and remedies, but in particular with regard to education and skills, equipment and premises, and, last but not least, monitoring and inspection.

A notable exception to the rule is the French and German standards on residential homes for the elderly. There has been no legal-political pressure from the EU and none from the Member States. The law, at least with regard to contractual rights and duties, is still underdeveloped. The two initiatives might be triggered off by market desires. In this respect they are proactive.

7. The gap between codes/guides/recommendations and concrete standards

There is an obvious gap between the codes of practice, the guides and recommendations that are developed at national, European or international level, and the degree to which these are referred to, or integrated in concrete standards.

None of the technical standards here under review, with the sole exception of the French NF 50-056 on 'Services for resident people', and NF X 50-058 on 'Residential homes for the elderly', set out the legal environment in a clear cut way. This is also true with regard to the two Recommendations 98/257/EC and 2001/310/EC on dispute settlement and mediation, which only provide for non-binding rules. However, the concrete technical standards neither refer to the relevant ISO 10002 on complaint handling, nor integrate the work invested already in draft ISO DIS 10003 on complaint handling, although these provide much clearer guidance than the concrete standards do.

II. Leading principles and best practice

1. The leading principles in light of the general observations

The concept of best practice allowed for the development of five leading principles:

- completeness,
- innovation,

- expertise,
- legal language,
- democratic accountability.

Measured against these principles, the findings of the review process (the six parameters – education and skills, equipment and premises, pre-contractual stage and contract conclusion, content of contract, post-contractual stage, monitoring and inspection), cannot be regarded as satisfactory.

None of the standards meet the requirement of completeness. They differ in the degree to which they cover the six parameters. EC directives and regulations may be ranked higher than the technical standards.

Innovation is a hard standard to meet. Whenever standardisation is retroactive, innovation fails to appear. In these circumstances the legislator has set the tone, not the Standards Bodies. There are, however, two notable exceptions to be mentioned. The initiatives, taken by French and German Standards Bodies, to lay down standards for residential homes for the elderly and for services for resident people have opened up new perspectives outside and beyond legislative requirements. The same is true for the European standards on furniture removal which deal extensively with matters of defining and processing quality.

EC directives and regulations are usually drafted by lawyers. If they are not drafted by lawyers, they are counterchecked by lawyers. Technical standards are not necessarily lying in the hands of lawyers. Without knowing who has drafted what standard with what expertise, it is assumed that the vast majority of the technical standards being studied here have not been drafted or reviewed by lawyers. These standards suffer from a lack of legal expertise.

At a closer look it is striking to recognise that the EC directives and regulations, in particular those which follow the new regulatory avenues, with new techniques, including new regulators, suffer from a lack of legal precision. Broadly framed concepts replace clear-cut rules. In this respect law making approaches the language currently used in standard-making. Technical standards look like laws and they make the users believe that they bear a quasi-legal character by its proper wording. However, if one tests the message behind cloudy stipulations, the results are not convincing at all.

Democratic accountability in standard-making is definitely underdeveloped. Consumer representatives need to be granted a clear legal status, rights and

duties in standard-making, and rights and duties in challenging the publication of standards by the European Commission.

2. Examples of best practice

There are four initiatives which come near to what consumers might expect from such voluntary efforts, the first is EN 14804 on language tours, the second is the French/German initiative on residential home AFNOR XF 50-058 and DIN 77800 assisted living for the elderly, the third is BS 8463:2005 'Specification for customer billing practice' and the fourth EN 125222-2 on furniture removal.

The first initiatives are more or less covering the full range of items which allow to measure, to our understanding, of what best practice might constitute. This is especially the case for education and skills (parameter 1), to equipment and premises (parameter 2), the pre-contractual stage (parameter 3), to the content of the contract (parameter 3 a), the post-contractual stage (parameter 4) and the monitoring and inspection (parameter 6). However, even these identified best practice are not very helpful when it comes down to define the consumer rights and remedies (parameter 3 b). The availability of enforceable rights however, will decide over the use and usefulness of the whole exercise of standard-making.

The French AFNOR standard on services for resident people, XF 50-056, has set a unique highlight in that it contains references to the Code de la Consommation⁴²⁶, that is the law that defines the consumer rights and duties.

BS 8463:2005 'Specification for customer billing practice' fills an important gap left by the EC regulator in that the standard provides for a fully fledged billing scheme with regard to services for which periodic billing is made.

The third example to be mentioned concerns standardisation on furniture removal. It is not so much the completeness of the standard EN 12522-2, but it is innovate character which deserves attention. The set of standards constitutes a rare example where the quality of services is not only circumscribed by a set of items, but where there are concrete rules foreseen on how the quality of the relevant items could and should be processed.

III. The minimum or baseline requirements in standard-setting

"Minimum" or "baseline" requirements aid those who are involved in standard-setting to have clear-cut criteria at hand by which to measure whether the envisaged technical standards take the consumer interests into account. The

426 See Chapter V, III, 4, a).

minimum or baseline requirements are deduced from the six core consumer elements, in their two forms: as a *theoretical concept* which unites EC regulation, technical standards and best practice, as well as a *yardstick* to review six major areas of already existing EC regulation and technical standards on services. They are not meant to fully cover all of the issues that might be of importance in the standardisation of services. Rather they are conceived as minimum or baseline requirements. The range of possible issues could easily be extended⁴²⁷.

The minimum or baseline requirements are set against the existing legal background. The purpose is twofold: first, to highlight the legal environment which restricts standard-setting, and second to indicate clearly where there is leeway for standard-setting.

1. Education and skills

If the relevant professional activity can only be executed by a regulated profession in the meaning of Article 3 (1) (a) of Directive 2005/36/EC⁴²⁸, the technical standard should indicate that the relevant national legislative, regulatory or administrative provisions have to be observed and that Member States are obliged to mutually recognise professional qualifications in one or more Member States.

If the relevant professional activity does not require educational training which is specified in national legislative, regulatory or administrative provisions, that is if everybody is in principle legally allowed to provide that service, even without any particular educational training, standardisers should proceed as follows:

- For most professional activities, statutory requirements are in place. Therefore technical standards should indicate that a certificate of such particular educational training is in principle needed, even if the performance of the profession is not bound to the existence of such a certificate,
- If no such statutory requirements exist, the relevant standards will specify professional qualifications with regard to management tasks and proper services provided to consumers,
- Management tasks will be taken over only by those who can provide evidence that they have solid knowledge and solid practical experience

427 See for a broader approach, ISO/IEC Draft Guide 76 Development of service standards – Recommendations for addressing consumer issues.

428 OJ L 255, 30.9.2005, 22.

in accounting and business administration, thereby distinguishing between the top management and customer service management⁴²⁹,

- A minimum number of managers of employees will be given⁴³⁰,
- Proper services provided to consumers will only be carried out by personnel who possess a minimum degree of education and training, supported by a level of intellectual and/or physical fitness needed to carry out the tasks related to the service, as well as the necessary communication and language skills,
- A minimum number of staff, differentiated according to the type of service provided should be given⁴³¹,
- If there is need, a person responsible for the safety should be appointed. This person should have adequate language, first aid, safety and fire-extinguishing skills⁴³²,
- Personnel requirements on management skills and proper execution of primary services towards the consumer should include constant professional development of skills and competencies. Training should include communication with consumers, complaint handling, safety requirements, in particular on how to handle risk and emergency situations,
- Whilst the requirements will vary according to the profession, voluntary qualifications requirements set out in codes, guidelines, programmes, elaborated by the relevant business branch as well as by the European Centre for the Development of Vocational Training (CEDEFOP)⁴³³, should be taken into account to give clearer shape to define particular service profiles⁴³⁴.

429 See for such an approach BS 8477:2007 'Code of practice for customer service', under 4.1. and 4.2.

430 ISO/IEC Draft Guide 76 Development of service standards – Recommendations for addressing consumer issues, 8.2.8.

431 ISO/IEC Draft Guide 76 Development of service standards – Recommendations for addressing consumer issues, 8.2.8.

432 Finnish Consumer Agency's Guidelines for the Promotion for Safety in Program Services, 11/2003 under 8.1. and 8.2.

433 http://europa.eu/agencies/community_agencies/cedefop/index_en.htm.

434 In the same direction, BS 8477:2007 Code of practice for customer service, Annex 2.

2. Equipment and premises

From a consumer point of view *safety* of equipment and premises ranks on top, *quality* comes second⁴³⁵. Both areas constitute a prominent field for standardisation.

Equipment should be regarded as “products”. In this respect the safety requirements of the General Product Safety Directive should apply irrespective of whether the consumer uses the equipment him or herself or whether the service provider uses the equipment to fulfil his obligations⁴³⁶,

- Therefore safe *equipment* should mean any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the equipment's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons⁴³⁷,

There is a limited set of EC rules that deal with the *safety of premises*, the EC Recommendation 86/666/EEC on fire safety of hotels, Directive 89/106/EC⁴³⁸ on construction products, Directive 89/654/EEC⁴³⁹ on safety and health requirements for the workplace, and Directive 95/16/EC⁴⁴⁰ on lifts.

- The requirements on fire safety as defined in Recommendation 86/666/EEC should be extended to all sorts of premises where consumers are located, accommodated or where they simply stay, whether the premises are new or old⁴⁴¹,
- The requirements on construction products that have been elaborated under Directive 89/106/EC should be taken as a yardstick to measure the safety of construction material – both for new and old premises.

435 Quality of equipment and premises is dealt with under 4. a).

436 The Directive 2001/95/EC applies only, if the product is designed to be used by the consumer, see Article 2 (a) definition of product.

437 The formula is more or less literally taken from Article 2 (b) of the GPSD 2001/95/EC. It differs with regard to the reference to equipment.

438 OJ L 40, 11.2.1989, 12.

439 OJ L 393, 30.12.1989, 1.

440 OJ L 213, 7.9.1995, 1.

441 The later requirement is of particular importance as the recommendation applies to new hotels only. The Commission Report COM (201) 348 final on the application of recommendation 86/666/EEC revealed major deficiencies to that respect.

3. Pre-contractual stage and contract conclusion

The regulation of the pre-contractual stage constitutes a proper domain of EC law on consumer protection. That is why the drafting of standard contract terms becomes rather complicated. There are sector-related rules on particular types of contracts that have to be taken into account and there are the requirements under the Services Directive which seem to be much more important for standardisers. Despite the relatively tight legal framework, there is ample room to further develop the requirements in the pre-contractual stage, in particular on those services which are not, or only to a limited extent covered by EC law.

- Services should be accessible to consumers, in particular universal services,
- Services, including equipment and premises, should be designed so as to be used by specific users to achieve their intended goals with effectiveness, efficiency and satisfaction in a specific context⁴⁴², if there is need, also by children, the disabled and the elderly. In this respect technical standards should take ISO/IEC Guide 71 or CEN/CENELEC Guide 6 into account⁴⁴³,
- Any information provided to consumers should be: provided promptly, and should be comprehensible, easily accessible, clear in providing contact details, in formats readily available, tailored to the specific needs of customers, up-to-date, and capable of being easily stored⁴⁴⁴,
- Pre-contractual information should be built around three parameters, (1) information on the supplier, (2) information on the service and (3) information on the contract⁴⁴⁵,
- EC law contains highly differentiated information requirements depending on the type of the service (package tour, time sharing, consumer credit, financial services and “network” services (telecommunication, energy, transport)). In addition, Article 26 of the Services Directive defines a complete and fully harmonised set of information that has to be made available in case of *cross-border services*,

442 See ISO/IEC Draft Guide 76 Development of service standards – Recommendations for addressing consumer issues, 3.13.

443 ISO/IEC Policy statement, Addressing the Needs of Older Persons and Peoples with Disabilities in Standardisation Work.

444 Based on BS 8477:2007 Code of practice for customer service, under 5.2.1.

445 This distinction can first be found in Directive 2002/65/EC distance selling on financial services, OJ L 271, 19.1.2002, 16.

- Within the *harmonised area* of cross-border services under the Services Directive, i.e. if the relevant item is dealt with by the Directive, the latter does *not* leave room for standard-writing beyond that level. In this respect the requirements of Article 22 have to be respected. If, however, the particular item is not regulated at all (such as advice), or is regulated in broad terms only (such as essential facilities⁴⁴⁶), the Services Directive does not pre-empt the adoption of technical standards,
- With regard to services that are provided *through a subsidiary* of a company that has its main office in Member State A, but provides services to a consumer who has its domicile in Member State B via its subsidiary in that Member State B, i.e. the service is not provided across the border but by a company which has a subsidiary at the consumer's residence, the Services Directive does not set limits. Here the full set of the Article 22 requirements could be taken as a starting position for standard-writing,
- If the price of the service is composed of different elements, the price of each element, as well as the final price, has to be given⁴⁴⁷. If the price cannot be given in advance, the consumer should be informed on the price calculation methodology or be given a sufficiently detailed estimate,
- Information on the quality should distinguish between tangible and intangible services and clearly describe the rights and duties of the parties under the contract (see under 4. b))⁴⁴⁸,
- The service provider should provide *advice* on the basis of a fair analysis of the service in question, in accordance with recognised professional criteria, regarding which service would be adequate to meet the consumer's needs⁴⁴⁹,
- The contract should preferably be concluded in writing. In that case, the consumer should be handed over a copy of the contract.

446 See Article 22 (1) j.

447 This is in line with Article 22 (3) a) of the Services Directive, which leaves room to specify the calculation method.

448 As Article 22 (1) j) of the Services Directive refers to "essential features" only, there is room to specify what it means with regard to the service in question.

449 See also BS 8477:2007 Code of practice for customer service, 5.3.5. on customer appointment services.

4. Content of the contract

EC law does not directly deal with the content of the contract. In most directives and regulations here at stake, the EC legislator indirectly defines the content of the contract via the above-mentioned information requirements. In this respect there is ample room for standardisation of services.

a) *Affordability, minimum content, safety, quality, billing, payment*

- Affordability: universal services should be affordable,
- Minimum content: The more consumer related service Directives 90/314/EEC on package tours and 94/47/EC on time share provide for a minimum content. Other directives, including the Services Directive link mandatory information requirements directly or indirectly to the content of the contract,
- The following items belong to the minimum content: (1) information on the supplier, name address (see more particularly Article 22 (1) (a) – (d) of the Services Directive which contains detailed requirements), (2) the price and its composition, the main characteristics of the service according to the type of service in question, the professional qualification of the personnel, safety standards on equipment and premises, and whether there is a need for a degree of comfort if accommodation is granted,
- Quality of the services⁴⁵⁰: services, including equipment and premises, must be (1) either fit for the purpose for which the consumer requires them and which he made known to the service provider at the time of the conclusion of the contract and which the service provider has accepted, or (2) services must be reasonably fit for the purposes for which services of the same type are normally asked for. However, this rather general formula would then have to be expanded on with reference to the particular service in question,
- Safety of services: Service providers should provide for safeguard and emergency measures. Procedures, appropriate equipment and access to emergency services for various relevant scenarios should be specified⁴⁵¹,

450 As a working tool or as a starting point it might be helpful to use the definition provided for on the quality of products in Article 2 Directive 99/44/EC on consumer sales. This is indeed what some Member States are doing, such as Sweden.

451 ISO/IEC Draft Guide 76 Development of service standards – Recommendations for addressing consumer issues, 8.12.1.

- Billing: billing documents should be transparent and comprehensible to the layman. It should be presented in paper or in electronic form as agreed, contain fundamental information on the parties, the contracts and the period, indicate the method of price calculation, the price of separate elements as well as the final price if there is need. A standard format should be developed⁴⁵²,
- Payment modalities: Modes of payment should include cash vouchers, debit or credit card and electronic fund transfer, such as payments through internet, debits from bank account. Any surcharges related to particular modes of payment should be clearly indicated⁴⁵³. Advance payment should in principle be prohibited. If the consumer is requested to pay in advance he or she should be given securities,

b) Rights and remedies (withdrawal, compensation and liability)

EC law provides only very basic rights and remedies to consumers. A major exception is the right of withdrawal, which essentially applies to goods and services. However, this does not mean that there are no rights and remedies beyond the right of withdrawal. These may be usually found in national private legal orders. Standard-setting may therefore refer to the relevant national rights and remedies and/or develop a European wide approach.

- Cancellation rights: technical standards should foresee the right of the consumer to cancel the contract, thereby referring to the relevant national rules⁴⁵⁴,
- Compensation for improper information supply⁴⁵⁵: if the service provider does not provide the information which he is required to provide under a given technical standard, the contract should be regarded as being null and void,

452 See in particular BS 8463:2005 Specification for customer billing practice, which distinguishes between the billing process and the billing document, lays down the respective requirements with regard to periodic billing and provides for a set of recommendations for bill presentations.

453 ISO/IEC Draft Guide 76 Development of service standards – Recommendations for addressing consumer issues, 8.7.2.

454 This seems necessary as cancellation implies the question of whether and to what extent the consumer will have to compensate the service provider for the service he has already provided up to the time of cancellation.

455 The vast majority provide for insufficient remedies, even for those types of services which have been harmonised by the European Community. This has been officially recognised by the European Commission in the Green Paper on the Revision of the Consumer Acquis, COM (2006) 744 final, 12.2.2007, p. 22.

- Compensation for incomplete and insufficient performance: technical standards should foresee the right of the consumer to cancel the contract, thereby referring to the relevant national rules,
- Liability for personal belongings: technical standards should provide for the right of the consumer to claim compensation if his or her personal belongings have been negligently damaged,
- Liability for personal injuries: technical standards should provide for the right of the consumer to claim compensation if he or she suffered from personal injuries which result from negligent performance of a service, or from negligent violation of a duty of care,
- The general standard of care requires that reasonable care is exercised. The standard must correspond to the relevant service and its inherent risks. Non-binding rules, such as technical standards or recommendations, may provide guidance for fixing the level of care. Compliance with such non-binding rules does not automatically exempt service providers from liability⁴⁵⁶,
- Service providers should provide for liability insurance at an adequate level depending on the type of services at stake⁴⁵⁷.

5. Post-contractual stage – after-sales services, complaint handling, dispute settlement, collective redress, protection against insolvency

Legally the post-contractual stage is rather underdeveloped. That is why standard-setting could help to set up a common regulatory framework on services. This might, however, be rather difficult in fields where European law and the majority of the Member States laws are underdeveloped, such as in the field of collective redress, at least beyond injunctive relief⁴⁵⁸.

- After-sales services⁴⁵⁹: Service providers should provide for an after-sales service that guarantees the availability of spare parts for ten years and for the regular maintenance of the equipment and of the premises which are used in fulfilling the service, as well inspection duties to ensure

456 More detailed rules maybe found in the proposal presented by *Magnus/Micklitz*, Liability for the Safety of Services, 2006, p. 575.

457 In the same direction, Finnish Consumer Agency's Guidelines for the Promotion for Safety in Program Services, 11/2003 under 15.

458 This can be regarded as the minimum standard provided for in EC law, in particular by way of Directive 98/27/EC on injunctions.

459 The early effort of the European Commission to integrate after-sales services in the Directive 99/44/EC on consumer sales failed, see COM (93) 509 final, 16.11.1993, p. 76.

that the consumer has fulfilled his own obligations to guarantee successful provision of the service,

- After sales services with regard to health care: service providers should make all relevant information immediately and comprehensively available a consumer needs if he or she particularly vulnerable, e.g. if he or she suffers from allergic reactions, if he or she consumes or comes into contact with particular products or services,
- Customer interaction should be based on accessibility, thereby distinguishing between counter service, telephone service and web-based service⁴⁶⁰,
- Hotlines and helplines: service providers should provide for easily accessible and constantly available hotlines/helplines, available 24 hours where immediate response is needed⁴⁶¹ and in principle at no cost. If hotlines/helplines are costly, the price has to be indicated in advance. Call waiting time should not be charged,
- In-house complaint handling: Article 27 (1) of the Services Directive defines ground rules for the service providers. They are legally obliged to supply contact details, in particular a postal address, fax number or email address and telephone number to which all recipients, including those resident in another Member State, can send a complaint or a request for information about the service provided. In addition technical standards should refer to Part 7 of ISO 10002 which sets up a fully fledged mechanism on in-house complaint handling⁴⁶²,
- Principles on out-of-court dispute settlement: The technical standards should refer to the two EC Recommendations 98/257/EC and 2001/310/EC. The former allows for decision-making by the dispute settlement body, whereas the latter is restricted simply to mediation. In line with Recommendation 98/257/EC, dispute settlement bodies envisaged by technical standards should be founded on seven principles: independence, transparency, adversarial principle, effectiveness, legality,

460 BS 8477:2007 Code of practice for customer service, see under 5.3.2.-5.3.4.

461 BS 8477:2007 Code of practice for customer service, 5.3.6.2.

462 The full title is: Quality management – customer satisfaction – guidelines for complaints handling in organizations, ISO 2004.

liberty, and representation⁴⁶³. Whilst the draft ISO DIS 10003 establishes similar principles, these are formulated in less clear language⁴⁶⁴,

- Requirements on the out-of-court settlement procedure: draft ISO DIS 10003, which sets up guidelines for the dispute resolution external to organisations, should be taken into account, for the concrete shaping of the dispute settlement procedure,
- Protection against insolvency: The technical standard should provide for sufficient evidence of security for the refund of money paid to the service provider⁴⁶⁵.

6. Monitoring and inspection

Monitoring and inspection is clearly a domain for standard-setting. The major means for business to evaluate consumer satisfaction is effective monitoring and review of consumer complaints, and consumer dispute settlement. On the basis of effective monitoring and evaluation, corrective action can be taken to improve the quality of the services.

- Monitoring and evaluating consumer satisfaction: the technical standards should refer to part 8) of ISO 10002 'Guidelines for complaints handling in organisations' and to part 8) of the up-coming ISO 10003 'Guidelines for dispute resolution external to organisations',
- Taking corrective action: In this respect the technical standards should refer to part 8) of ISO 10002 'Guidelines for complaints handling in organisations' and to part 8) of the up-coming ISO 10003 'Guidelines for dispute resolution external to organisations',
- Reporting: In addition to ISO 10002 'Guidelines for complaints handling in organisations' and the envisaged ISO 10003 'Guidelines for dispute resolution external to organisations', technical standards should provide for the obligation to make the findings of the monitoring and evaluation of the complaint handling and dispute settlement procedure publicly available.

463 OJ L 155, 17.4.1998, 31.

464 The full title is: Quality management – Customer satisfaction – Guidelines for dispute resolution external to organisations.

465 The ruling in Article 7 of Directive 90/314/EC on package travel could be taken as a yardstick.

IV. Procedural requirements of standard-writing

The procedural requirements should serve as a guide in the standardisation process. They are presented in the form of a checklist, thereby distinguishing between the different stages of standard-making: (1) the process of drafting, (2) the elaboration of the standard, and (3) the building of links between technical standards and contract making.

1. In the process of drafting the scope of the standard

(1) *Checking the national, European and international **legal context**, in which the standard project is embedded, in particular with regard to:*

- *professional qualifications, the required equipment and the premises made available,*
- *the rights and duties under the contract to be concluded,*
- *the inspection and monitoring of all rights and obligations laid down in the respective standard,*

(2) *Checking the **completeness** of the envisaged content of the technical standard under six main parameters:*

- *education and skills,*
- *equipment and premises,*
- *pre-contractual and contract conclusion stages,*
- *content of the contract,*
- *post-contractual stage,*
- *inspection and monitoring.*

(3) *Checking the availability of **legal expertise** at the **preparatory stage** and **the final outcome** before the adoption of the standard.*

2. During the elaboration of the standard

(4) *Checking the **need and feasibility** for standards to put into practice the legal framework, in particular on: education and skills, equipment and premises, quality, billing, payment modalities, after-sales services, complaint handling and dispute settling, collective redress,*

- (5) Checking the **coherency** of the standard's structure with regard to the six main parameters: education and skills, equipment and premises, pre-contractual obligations and contract conclusion, content of the contract, post-contractual duties, inspection and monitoring,
- (6) Checking the **clarity** of the language,
- (7) Checking the **enforceability** of rights and duties,
- (8) Checking whether a **horizontal solution** is appropriate in particular with regard to: education and skills, equipment and premises, quality, billing and payment modalities, after-sales services, monitoring and inspection strategies.

3. Building links between technical standard and contract making

- (9) Pushing for the opportunity of a **binding declaration** of the user of technical standards to obey its rights and duties, such as the following⁴⁶⁶:
- (10) "If the service provider claims, or purports to claim that his services comply with the relevant technical standards, the service provider must exercise the care and skill expressed in these standards."

Chapter VII. Conclusions and recommendations

Standardisation of services is still in its infancy. This makes it easier to formulate recommendations on how to further proceed. These recommendations are addressed to the European Commission and Member States, to the European Commission and Standards Bodies, and to ANEC.

I. To the European Commission and Member States: Establishing a European regulatory framework on standardisation of services

The regulatory framework on the standardisation of services is deficient compared to the rather developed framework on standardisation of products. The particularities of services require for a stronger and tighter regulatory framework. This is due to the fact that standardisation of services is much more political than standardisation of products. However, the few references in the

⁴⁶⁶ Article 6 (2) b of Directive 2005/29/EC on unfair commercial practices, OJ L 149, 11.6.2005, 22 could serve as a precedence.

Services Directive⁴⁶⁷ cannot compensate for the lack of a clear-cut regulatory framework.

- The European Commission should develop a quasi-*New Approach to technical standards and harmonisation of services* provided that a horizontal legislative framework for the safety, quality and liability of services is first established at the European level, and provided that consumer organisations and other societal stakeholders are given a stronger position in the Standards Bodies (formula of so-called balanced representation). Whilst the European Commission seemed in principle prepared to extend the New Approach to services, the latest revision of the existing New Approach to products no longer deals with services. Such a project should openly discuss the similarities and differences between products and services. Only an official document approved in the Council, and in line with the changes noted above, could legitimise the strong involvement of the Standards Bodies in the field of services.
- The General Product Safety Directive (GPSD)⁴⁶⁸ should be extended to the *safety of services*. This Directive had been adopted to compensate for the gaps left in New Approach to products and the subsequent New Approach type directives. In this respect the European Community accepted statutory responsibility to protect the consumer's health and safety against unsafe products. There is no reason why the safety of services can be better guaranteed through technical standardisation alone. The GPSD could easily be extended to services. Quite a number of Member States have adopted legislation to protect consumers against services as well. The proactive protection cannot and must not be left to standardisation.
- The European Commission should elaborate a proposal on the *liability for unsafe services*. The 1991 proposal which had to be withdrawn⁴⁶⁹ could be used as a starting point that integrates the research which was initiated by the Commission itself⁴⁷⁰. It should be borne in mind that the New Approach to products legitimated standardisation with reference to Directive 85/374/EC⁴⁷¹ on product liability which was said to suffice to protect consumers. In the field of services there is not even an EC rule

467 Article 26 of the Services Directive, OJ L 376, 27.12.2006, 36.

468 OJ L 11, 15.1.2002, 4.

469 OJ C 12, 18.1.1991, 8 et seq., withdrawn 23.6.1994 COM (1994) 260 final.

470 http://ec.europa.eu/consumers/cons_safe/keydocs/index_en.htm, see under various reports.

471 OJ L 210, 7.8.1985, 20.

on liability, let alone a proactive Directive on the safety of services as counterpart to the GPSD. The Services Directive 2006/123/EC⁴⁷² does not take liability issues into account, although a tight and uniform liability regime may raise consumer confidence if he or she makes use of the new freedoms granted under this Directive.

- The European Commission should investigate more deeply the mandatory requirements that should govern the *quality of services*. In the field of products the European Community sets out a relatively dense network of minimum requirements that protect the consumer, in particular the Consumer Sales Directive 99/44/EC⁴⁷³. However, there is no regulatory counterpart for services. The different sector-specific directives and regulations affect the quality of services to a varying degree, they sometimes shape consumer rights. The standard-setting within Standards Bodies should be backed by a European set of legal rules which protect the consumer against insufficient quality, improper performance and economic losses. The recently adopted Green Paper on the Review of the Consumer Acquis⁴⁷⁴ which proposes as an option a general fairness test, remedies against violations of information obligations and remedies against improper and insufficient performance, should be regarded as a step into the right direction.

II. To the European Commission and Member States: Elevating the role and function of consumer representation in European standardisation of services

The New Approach to products was adopted in 1985⁴⁷⁵. Already prior to its adoption, consumer organisations and their representatives have argued that the increasing role of standardisation in the European integration process could only be legitimised by granting consumer organisations a clear-cut legal status in the New Approach. More than twenty years have passed by, without such a claim getting the support it needs. Although standardisation under the Services Directive and the envisaged extension of the New Approach to foodstuff, cosmetics and environmental protection⁴⁷⁶, is gaining pace, democratic accountability of law making via standardisation is not openly discussed.

472 OJ L 376, 27.12.2006, 36.

473 OJ L 171, 7.7.1999, 12.

474 COM (2006) 744 final, 8.2.2007 p. 14 et seq.

475 OJ C 136, 4.6.1985, 100.

476 A Horizontal Legislative approach to the harmonisation of legislation on industrial products, 6.9.2006, European Commission, DG Enterprise, Certif doc 2005-16 Rev. 2.

- Consumer representation in standardisation should be given a *legal status*. This might best be realised in the requested establishment of a quasi New Approach to services. The vague reference to the involvement of consumer organisations in the shaping of quality of services under Article 26 of the Services Directive does not suffice. What is really needed is a binding piece of EC legislation, ideally a directive or regulation that clarifies the status of consumer organisations.
- Consumer representation in European Standards Bodies should benefit from equal rights and duties: they should be given an EC law based right to participate in standardisation, to have free access to all relevant documents, to make proposals for standards in whole and in part and, in case these proposals are not taken into consideration, or in case the consumer representation does not agree with those standard which have to be published in the Official Journal of the European Union, the right to ask for review. Such review might be dealt with in a dispute settlement body that meets the requirements of Recommendation 98/257/EC on out-of-court settlement.
- Consumer representation in European Standards Bodies should be granted adequate funding. The European Commission and the Member States are united in the idea that standardisation is not restricted to technical issues, but that public policy issues – such as consumer protection, health, safety, environmental protection – maybe dealt with as well. If Member States and the European Commission delegate public policy issues to Standards Bodies, there is ample justification for consumer representatives to claim adequate funding.

III. To the European Commission and CEN/CENELEC: Improving the consumer impact on European standardisation of services

The European Commission and Standards Bodies understand standardisation to be a success story. However, there is no hard empirical evidence on whether it is a success story for consumers, and whether consumer representatives succeeded in influencing standard-setting to the benefit of consumers, and if so, to what extent. Standardisation of services is a relatively new field. It therefore permits the development of new strategies, whether this be to monitor the existing consumer impact on standardisation and to test and verify the impact of consumer representations, or be it to strive for new ways of increasing the impact on standardisation in future.

- Technical standards should be *reviewed* in order to assess the consumer impact on the respective standardisation project. This could best be done in form of *impact assessments* to be executed by independent consultants. Whilst the European Commission would have to provide the necessary funds, CEN and CENELEC would have to grant access to the documents.
- Standardisation of services should start from a *horizontal approach* wherever feasible; e.g. education and skills, equipment and premises, and billing methods, payment modalities, after sales services, consumer satisfaction, complaint handling and dispute settlement. As consumer representatives are not bound to a particular sector of services, unlike business representatives in technical committees, they are in a far better position to advocate for horizontal issues.
- Consumer representatives should take the lead in a *pilot project on the elaboration of a consumer focused technical standard* on e.g. one of the horizontal issues or on health and safety related issues. These would allow close cooperation between consumer representatives in National Standards Bodies, from national consumer organisations, from national consumer agencies – as far as they exist – and from ANEC and BEUC. It is for the European Commission to provide for adequate funding of the pilot projects on a regular basis.
- *Legal experts and technical experts should closely cooperate* in the elaboration of technical standards. Legal experts should set out the regulatory framework, embedding the project of service standardisation into the existing EC directives and regulations, as well as national legislation, if there is need. Legal experts should check the outcome of a technical standard before it is adopted.

IV. To ANEC: The need for further studies

The broad approach which underpins this study has revealed the need to initiate further studies in order to allow for a more systematic input into standardisation of services. Available information has to be drawn together to forge much stronger links between standardisation of services and the work which has already been done in various fields such as:

- On education and skills; the European Centre for the Development of Vocational Training (CEDEFOP)⁴⁷⁷ has worked since 1975 on collecting

477 http://europa.eu/agencies/community_agencies/cedefop/index_en.htm.

and comparing national professional requirements on a very broad array of professional activities. The aim is to define European wide acceptable professional profiles. It would be worth finding out whether these profiles could be used in giving clear shape to the relevant professional qualifications.

- On safety of services: amongst others, the European Commission has initiated a number of research projects which deal with particular sectors of services or particular risks to the consumer which result from services. This research has to be taken together in order to define common standards on the safety of equipment and premises, as well as on those intangible services which might cause harm to consumers⁴⁷⁸.
- At the pre-contractual stage, contract conclusion and content of the contract: the *acquis* group⁴⁷⁹ and the study group⁴⁸⁰ are both working on the so-called “Common Frame of Reference”⁴⁸¹ which will form the major result of the European project on the codification of private law. The Common Frame of Reference will in all probability contain a set of definitions and explanations of major legal categories, such as contract and damage. The Common Frame of Reference will not become binding law, but it will and should guide the European Commission in its legislative activities. It remains to be seen to what extent the new tools and devices can and should be used in the standardisation of services once they are made public.

In terms of a blueprint for a consumer related technical standard on services: The findings of this report, the expected results from the studies proposed here, as well as ISO/IEC Draft Guide 76 ‘Development of service standards – recommendation for addressing consumer issues’ and the draft ISO DIS 10001 ‘Quality management – customer satisfaction – guidelines for codes of conduct for organisations’, should contribute to the elaboration of a blueprint for a consumer related technical standard on services.

478 See *Billaux*, DG Sanco speech at ANEC Services working group, 16.5.2006, who gives in overview on EU priorities for consumer services.

479 www.acquis-group.org.

480 www.studygroup.com.

481 Whilst this term has been used in the diverse communications from the European Commission (since COM (2001) 398), it is not yet clear, what the Common Frame of Reference should look like.

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