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I. Summary

The services sector, accounting for 54% of European GDP and for 67% of employment, is of immense significance for the economic and social development of the EU. To better exploit the potential of the Internal Market for this sector, the EU and the EC in recent years have both taken a number of measures in certain areas as well as created a new overarching framework with the new Directive on Services in the Internal Market 2006/123/EC. In addition thereto the Community has been keen, in the wake of its initiatives to liberalise and regulate utilities (energy, electronic communications, postal services) to define universal service obligations that Member States can impose on providers of services in some relevant sectors. These obligations tend, in essence, to guarantee a minimum service to consumers.

In comparison with the measures to promote the Internal Market and consumer protection for the cross-border supply of goods, a considerable deficit remains for services, in particular regarding common standards for the obligations of the service provider and the remedies of the customer. This concerns the cases in which the service provider does not perform a service or performs it badly, as well as the additional cases in which the safety of the customer in connection with the service is compromised. In contrast to the harmonization of laws for the supply of goods (*inter alia* by the Consumer Sales Directive 99/44/EC and the Product Liability Directive 85/374/EEC) here is a lack of instruments with comparable aims and breadth of application for services.

The varied nature of the structures and individual provisions in the laws of the Member States therefore currently produces a great lack of transparency and uncertainty for cross-border services both for the customer as well as for the provider. The study explores these variations in five illustrative areas of particular significance for the Internal Market (Entertainment, Telecommunications, Rail Transport, Legal Advice and Health). The analysis reveals considerable differences in terms of the duties of the service providers particularly with regard to non-performance and bad performance in the following respects:

- under what conditions obligations exist at all
- which remedies are available to consumers when these obligations are breached
- the permissibility and the limits of exclusions of liability by individual arrangements or standard terms; possible upper limits on damages; burden of proof for the existence of an obligation of the service provider, for the breach of an obligation and for damages
- legal terminology and the systematic structure of the provisions on the liability of providers

Measures to harmonize the law relating to the obligations of service providers could above all better enable small and medium sized businesses to appreciate their obligations and associated risks and chances in cross-border transactions. At the same time the confidence of the consumer to avail himself of cross-border services and thereby to make increased use of the Internal Market would be strengthened (corresponding to the increased technological possibilities above all due to the internet). To be completely effective in this respect, these measures should strengthen the already existing tendency that the rules for the obligations of service providers apply to private and public sector providers alike.

For the preparation of such measures one must have regard to the major problem that on the one hand, in the interests of strengthening the confidence of the consumer clear, transparent rules which encompass as many sub areas as possible are preferable, on the other hand however the great variety of services can make such solutions very difficult. Therefore the following options may be considered to outline the strategy:

(1) no legislative proceeding;

(2) sector-specific harmonization of individual types of services;

(3) horizontal instrument containing some general rules plus sector specific individual legislation;

(4) global harmonization of the service contract.

In a step-by-step development, in particular a combination of option (2) and option (3) could be considered. A horizontal instrument according to option (3) could in particular contain some general rules on duties of information and some general rules on performance and remedies of those services that constitute an „*obligation de résultat*". As a legislative technique a balance between full harmonization, minimum harmonization and optional instruments could be aimed for.

Concerning the differences between private and public service providers it is recommendable to improve existing Directives in two respects (possibly in the context of the current review of the consumer acquis). It should be clarified that public entities in principle fall within the scope of application of the Directives on consumer protection; further it should be clarified to what extent services provided by public bodies also fall in the scope of consumer protection Directives if this relationship is determined by rules of public law. New legislative provisions should also contain a corresponding clarification.

II. Current Status

1. Freedom of Services and the Internal Market

Services become increasingly important in the economy of the EU. The provision of services occurs in almost all areas of economic and social activity, both in B2B (business-to-business) as in B2C (business-to-consumers) relationships. They are provided in large volume across borders and therefore they are crucial for the Internal Market. Services range from traditional services (like handicraft, services of liberal professions, medical services) to new types of services (estate planning, investment services, complex insurances, maintenance of household equipment, leisure services, personal care etc.). The service sector in the EU accounts for 54% of European GDP and for 67% of employment [Report on Competition in Professional Services, COM (2004) 83 final, p.6].

Community law has recognized the importance of cross border services from the outset. The free provision of services is one the basic Internal Market freedoms of the EC Treaty: Article 49 EC. Even though in systematic terms it is closely related to the freedom of establishment in Art. 43 et seq. EC (as shown for example by the reference in Art. 55 EC that certain provisions of the freedom of establishment apply correspondingly to the freedom of services), today it is recognised - in accordance with the immense economic and social significance of the service sectors in the Internal Market - as an autonomous basic freedom. Its essential function is to enable the provision or use of services across borders without the provider or the user having to relocate.

Beneficiaries of the freedom of services are nationals of Member States who are established in a State of the Community as well as companies or firms within the meaning of Art. 48 EC. Third country nationals can also avail themselves of the freedom of services, however only as recipients (not as providers) within the territory of the Community. Via this final limitation the freedom of services affords its beneficiaries the right to provide or receive services in another Member State under the same conditions as nationals of that State. Article 49 EC however is not limited to a prohibition of discrimination, it also prohibits any other measure, which in any way can prevent, hinder or make less attractive the provision or receipt of services (see table below, A.)

Such measures are for example requirements to obtain official permission for activities, which are not necessary in the State from which the service originates. The freedom of services is also directed towards potential and indirect barriers. In relation to the free movement of goods the European Court of Justice (ECJ) held (in Joined Cases C-267/91 & C-268/91 *Criminal Proceedings against Keck & Mithouard* [1993] ECR I-6097 and subsequent judgments) that Article 28 EC (free movement of goods: import restrictions) does not apply to national rules concerning “selling arrangements”, i.e. rules concerning the circumstances in which goods are offered (such as rules on advertising and sales promotions), provided these rules apply without discrimination to all economic operators active on the territory of the Member State concerned and affect in the same manner the sale of goods imported from other Member States and domestic goods . Where these conditions are met the national rules are not deemed to restrict access to the market of a Member State for goods originating in other Member States. By contrast in Case C-384/93 *Alpine Investments BV v Minister van Financiën* ([1995] ECR I-1141) the Court refused to apply the ‘*Keck*’ ruling to services. Subsequent judgments have confirmed this tougher approach with regard to services.

However a few recent judgments suggest that the ECJ might grant immunity against the application of the prohibition of Article 49 EC to rules on the exercise of services that do not really have an impact on the access to the market of a Member State for providers of services established in other Member States (see e.g. Case C-134/03, *Viacom Outdoor,* [2005] ECR I-1167).

According to Arts. 55 and 46 EC barriers can be justified on grounds of public policy, public security or public health. In addition there are "unwritten" justifications for barriers on the basis of "mandatory requirements in the general interest" in accordance with the corresponding decision for the free movement of goods The ECJ recognised *inter alia* the following as objectives of general interest that can justify restrictions to the cross-border provisions of services: the protection of consumers and investors, the protection of the stability of financial markets, the plurality of the press, the safeguarding of the financial equilibrium of the national social security system and of the medical infrastructure, the safeguarding of a sufficient and permanent access to high quality hospital treatment and controlling medical costs.

<u>Overview on some more leading cases of the ECJ</u>

A. WITH REGARD TO THE PROHIBITION OF ANY MEASURE WHICH CAN PREVENT, HINDER OR MAKE LESS ATTRACTIVE THE PROVISION OR RECEIPT OF SERVICES	B. WITH REGARD TO THE JUSTIFICATION OF SPECIFIC BARRIERS TO TRADE
Case C-33/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case C-222/95 *Société civile immobilière Parodi v Banque H. Albert de Bary et Cie* [1997] ECR I-3899	ECJ, C-33/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299)
Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.* [1991] ECR I-4221	Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) - aka *"Cassis de Dijon"*
	Case C-178/84 *Commission v Germany* [1987] ECR 1227 - "*German Purity Law for Beer* "

2. Obligations of Service Providers towards Customers

For all the multifarious sectors, in which services are provided in the individual Member States and across borders, Community law guarantees the freedom to provide services via the aforementioned provisions of the EC Treaty, without thereby providing any further general regulation of the legal relationship between providers of services and customers through provisions of secondary law. In this respect, although the number of Community law provisions has constantly increased over the last two decades (within the aforementioned sectors *inter alia* with respect to financial services, transport services and telecommunications services), for the most part these concern individual issues within a specific sector. This holds true also for the innovative introduction of the Universal Service Obligations which apply to the provision of electronic communications networks and services to end users only (Art. 1 (1) Universal Service Directive 2002/22/EC).

Most rules which are relevant for the relationship between service provider and customer however are to be found within the laws of the Member States and vary considerably in different Member States. In the early 1990s the Commission made a proposal for a Directive which would establish a body of rules for the regulation of an important chapter of the obligations of the service provider (COM (90) 482 final). The proposal aimed at establishing a general rule of liability for damages caused by the fault of the service provider to health and bodily integrity as well as to moveable and immovable property including those which were the subject of the service (*cf.* Art. 1 of the proposed Directive). In addition to the duty to compensate for such damages the proposed Directive also laid down rules relating *inter alia* to the burden of proof both for the service provider in respect of fault and for the injured party concerning damages and the causal relationship between the damage and the service (Arts. 1 (2), 5 of the proposed Directive) as well as a limitation period in respect of such claims. The Commission however withdrew this proposal in 1994, thus a sector overarching regulation of liability for service providers does not exist in Community law.

It will be analysed more precisely in Chapter III. to which extent the rules of Member States differ concerning relationships between service providers and users. Where a service provider wants to provide services across the Community, by relying on the free provision of services, it will nevertheless have to comply with different legal rules governing its business transactions in each Member State. The same applies correspondingly if a customer uses services from another Member State or wishes to compare offers from service providers in several Member States. In all these cases use of the (legally unlimited) freedom of services in practice places the additional burden upon the provider and the customer of informing themselves about the diverging legal conditions in other Member States (and the related costs of doing so) or of accepting an incalculable risk with respect to the legal framework for the relevant transaction. In particular from the perspective of the customer, who wishes to make use of the advantages of the Internal Market, this burden (or the risk of an adverse transaction) is immensely increased by the fact that he must regularly not only find out what the legal conditions in his own country are, but in order to comparatively determine the offer with the best value he must also consider the legal conditions in other Member States. This is particularly burdensome not only for consumers, but also for small and medium sized enterprises when they are recipients of services, since in comparison to the provider they are often in an economically weaker position and less experienced. They will mostly not be in the position to prevent, on the basis of the existing rules of private international law, the application of the domestic law of the Member State where the provider of the service is established.

These problems concern both the original obligation for the service provider arising from the contract with the customer to provide the service and the consequences of non-performance (by a failure to provide the service or performing a bad service) and in particular the remedies for the customer. Already the differing divisions of contracts for services in the legal systems of the Member States results not only in differing obligations of the service provider and remedies for the customer, but also in information costs.

Although these circumstances alone indicate a particular need for legal instruments to facilitate cross border business transactions, until now - neither within nor without Community law - no starting points for facilitating cross border services comparable with those in respect of cross border supply of goods have been developed. For the latter two different kinds of significant sets of rules are available, which each systematically regulate the obligations of parties in core areas of their legal relations: on the one hand, mainly for contracts between businesses (B2B) is the United Nations Convention on Contracts for the International Sale of Goods (CISG, Vienna, 11th April 1980), which independently of Community law has been applicable in most Member States for a long time; on the other hand for contracts between businesses and consumers (B2C) the Consumer Sales Directive 99/44/EC, which harmonizes the laws of the Member States governing the sale of goods in respect of the obligations of sellers and the remedies of buyer.

However, a comparable body of rules for services is missing both in international unitary law as well as in European Community law and both for B2B and B2C contracts. The relevance of the so far unresolved issues is also reflected in the fact that in recent years a number of studies and reports have examined the topic from different angles (see list in the Annex 2).

3. Consumer Protection

From the perspective of consumer protection deficits are evident in particularly large measure in the present state of the law regarding cross border services. Increasing the confidence of consumers to partake in cross border transactions serves both the further development of the Internal Market (Art. 3 (1) lit.(c), Art. 14 EC) as a main objective of the European Community as well as to ensure a high level of consumer protection according to Art. 153 EC. Consumer protection according to Art. 153 (1) EC extends in particular to the areas of health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. The Community must also take account of this goal in defining and implementing other Community policies and measures according to Art. 153 (2) EC and, to contribute to the attainment of this goal, can enact secondary legislation both in the context of realization of the Internal Market as well as independently thereof (cf. Art. 153 (3) EC).

Lik !the fundamental freedoms of the Internal Market, the fundamental provisions of the EC Treaty on consumer protection apply as a matter of principle to all economic activities. They apply in the same way for protection of consumers in the context of the supply of goods as in the context of provision of services. However, if one considers the legislative activity of the Community and legal practice in the area of consumer protection, it is evident that only some of the legislative acts ensure protection of consumers in the services context in the same way as in the goods context. Furthermore, a series of legislative acts specifically relate to consumer protection in the services context (and not or at least not to the same extent to the supply of goods). However, they are regularly limited to provisions on individual specific issues for special kinds of services. By contrast, in the context of the supply of goods there are numerous significant legislative acts, which regulate central aspects of the obligations of businesses and have a wide scope of application.

These differing approaches in secondary legislation can be illustrated by certain examples without attempting to provide an exhaustive list.

The first group of legislative acts which in principle protect the consumer in the context of the delivery of goods and services in equal measure includes certain Directives which constitute milestones in the development of European consumer protection:

- Doorstep Selling Directive 85/577/EEC
- Distance Selling Directive 97/7/EC [also see Communication from the Commission to the Council COM (2006) 514 final]
- Unfair Contract Terms Directive 93/13/EEC [also see Report of Commission COM (2000) 248 final]
- Unfair Commercial Practices Directive 2005/29/EC (which does not directly concern contract law and the contractual obligations of the providers towards consumers, see Art. 3 No. 2)

The second group which serves the protection of the consumer in respect of certain specific issues in the services context, *inter alia*:

- Consumer Credit Directive 1987/102/EEC
- Package Travel Directive 1990/314/EEC (see also Report on the Transposition of the Directive, SEC 1999/1800 final)

- Timeshare Directive 1994/47/EC (see also Report on the Application of the Directive of the European Parliament and of the Council, SEC 1999/1795 final)
- Distance Selling of Financial Services Directive 2002/65/EC [see also Communication of the Commission on the Review of the Directive, COM (2006) 161 final]
- Directive 2006/123/EC on Services in the Internal Market (This Directive is particularly relevant here. Mainly Article 21 amongst others provides rules with regard to information in the context of service activities, especially relating to consumer protection.)

A series of further legislative acts can also be listed which link the protection of consumers and other persons or pursue similar goals to consumer protection, such as with respect to financial investments (e.g. the 2006/31/EC Market in Financial Instruments Directive 'MiFiD'; Investment Services Directive 93/22/EEC) cross border money transfers (Cross-Border Credit Transfers Directive 97/5/EC, Cross-Border Euro Payments Regulation 2560/2001) or the protection of flight passengers [Flight Passengers' Regulation 261/2004, see also Communication from the Commission to the European Parliament and the Council: "Strengthening Passengers' rights within the European Union", COM (2005) 46 final]. Legislative acts in other areas are also relevant [e.g. Proposal for a Regulation on International Rail Passengers' Rights and Obligations COM (2004) 143 of 3.3.2004. See also the proposal for a Directive of the European Parliament and of the Council on payment services in the Internal Market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC {SEC(2005) 1535}].

The third group of legislative acts (referring to the supply of goods) includes in particular Directives with a wide scope of application for the protection of the consumer in the event of non-performance by the business of its obligations and in the area of consumer safety with respect to dangers to health and other more personal rights. Important legislative acts in this area are, in particular:

- Consumer Sales Directive 1999/44/EC
- Product Liability Directive 85/374/EEC
- Product Safety Directive 2001/95/EC

The Consumer Sales Directive 1999/44/EC regulates the obligations of the seller to a large extent, particularly insofar as it prescribes that the seller is obliged to supply the consumer with goods that are in conformity with the contract and lays down precise presumptions about when goods are in conformity with the contract (Art. 2 Consumer Sales Directive). Furthermore it *inter alia* lays down remedies for the consumer (including their conditions and their legal consequences), time limits, requirements as to form and content of guarantees and rights of redress in the contractual chain. These provisions ensure the harmonization of laws to a minimum level; they are however without prejudice to more stringent provisions to protect the consumer in individual Member States (Art. 8 (2) Consumer Sales Directive).

The Product Liability Directive imposes liability on the producer for damages caused by a defect in his product (Art. 1 Product Liability Directive). If the producer cannot be identified, then the consumer has a remedy against each supplier of the product [Art. 3 (3) Product Liability Directive]. Also, if two or more people are liable for the same damage, they shall be liable jointly and severally (Art. 5 Product Liability Directive). It lays down specific requirements as to safety a consumer can expect, having regard to *inter alia* the use to which it could reasonably be expected that the product would be put [Art. 6 (1) Product Liability Directive]. It does not explicitly establish liability for damages caused by defective performance of a service; such liability is only possible if the defect in a service is due to a defect in a product (an illustrative example is the English case of *A v National Blood Authority* [2001] 3 All ER 289, in which the claimants, who were infected with hepatitis C following blood transfusions, only succeeded under the English implementing Act because blood was held to be a product).

For the supply of goods the consumer is thus protected both against non-performance and deficiencies in product safety to a large extent and at a relatively high level. In some Member States the level of protection can of course be higher than this standard; the consumer can nevertheless rest assured that the standard prescribed by these Directives, both for transactions within his own country as well as cross-border, is ensured. This far-reaching protection as a basis for confidence in cross border consumer transactions in the Internal Market is ensured by Directives which relate to the supply of goods and the safety of products (i.e. essentially of moveable goods). This protection does not exist thus far to the same extent for services, not even closely, even though services have a similarly great significance for the Internal Market as the movement of goods.

III. Exemplary Approach

1. Notion and Types of Services

The freedom to provide services covers a very wide spectrum of economic activities. This is because the notion of services within the meaning of the EC Treaty encompasses all services, which are normally provided for remuneration, insofar as they are not governed by the provisions relating to the freedom of movement for goods, capital and persons [Art. 50 (1) EC]. In particular, activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions are considered as services [Art. 50(2) EC]; this list is however only illustrative and not exhaustive. A service is provided for remuneration when the relevant economic activity is normally pursued with a profit motive (*cf*. ECJ, Case C-352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2085). If services are publicly financed and not provided for consideration (such as the education of schoolchildren by the State), then it is not a service within the meaning of Art. 50 EC.

The Treaty articles on the free provision of services only apply to services provided in the market, i.e. by self-employed natural persons and legal persons. Services provided by employees for their employers fall within the cope of application of the rules on the free movement of workers (Article 39 et seq. EC). The decisive criterion to distinguish the provision of services from the provision of labour is the absence or presence of authority exercised by the person to whom the service/labour is supplied, in particular the freedom or not for the supplier of the service/labour to arrange his own working hours, and the extent to which he carries the financial risk of his activity himself (cf. ECJ, Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd.* [1989] ECR 4459).

For the distinction between the freedom to provide services and the free movement of goods the decisive factor is whether or not the supply of tangible products is concerned, whereas services are non-tangible. On the other hand the answer to the question whether in a situation where both a good and a service are provided (in combination) the freedom to provide services or the free movement of goods should apply is less certain. The ECJ has held that where the provision of a service is ancillary to the supply of a good (e.g. the provision of an advertising service for a company selling goods) the national restriction at hand (e.g. the restriction of the way the sale of a good can be advertised) shall only be examined in the light of the free movement of goods (ECJ, Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025). Where, by contrast, the supply of goods serves the provision of a service (such as the supply of replacement pArts to repair a machine) then viewed as a whole it is a service. This also applies in other cases whereby the supply of goods and services are linked to one another and the main emphasis is on the latter (ECJ, Case C-275/92 *H.M. Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039).

Sometimes, like in electronic communications, the free movement of goods and the free provision of services may apply simultaneously. In *Canal Satélite Digital* (ECJ, Case C-390/99 [2002] I-607, para 31) the question was whether obstacles for systems of conditional access to (premium) TV, consisting of conditional access services and the equipment (the decoder), where to appraised in the light of the free movement of goods or the free provision of services. In that case goods and services formed one whole. The Court applied the "*accessorium sequitur principale*" rule and found that there was no "*accessorium*", so both freedoms applied.

On the understanding of an economic activity as a service according to Art. 50 EC it is the aforementioned criteria that are decisive and not the criteria or classifications of national law.

In some Member States a distinction is made between various kinds of services contracts in the broader sense. For example German law distinguishes between contracts to pursue an activity, such as consultancy contracts ("*Dienstverträge*"), contracts to achieve a specific result, such as construction contracts ("*Werkverträg*e") and contracts to acquire a transaction, such as estate agency or insurance brokerage ("*Geschäftsbesorgungsverträge*") or certain specific kinds of services within the German BGB (*Bürgerliches Gesetzbuch* - Civil Code) and individual types of services in commercial law or special areas of business law (*cf.* e.g. for German law §§ 611, 631, 651a, 675 BGB; §§ 84, 383, 407, 453, 467 HGB (*Handelsgesetzbuch* - Commercial Code); for Spanish law Arts. 1544, 1583-1587, 1588-1600, 1601-1603 *Código Civil* (Civil Code); Arts. 244-280, 349 et seq. *Código de Comercio* (Commercial Code); for Italian law Arts. 1655, 1678, 1703, 1731, 1737, 1742 Codice civile (Consumer Code); for Czech law §§ 631 et seq., 644 et seq., 724 et seq., 765 et seq., 852a et seq. *Občanský zákoník* (Czech Civil Code); Belgian law by contrast does not make these distinctions; the Code Napoleon, that is still in force in Belgium and that has never been amended on this point, only contains a brief chapter on the hire of work (Article 1779 - 1799) with some very general provisions on all kind of service contracts (handicraft, intellectual services, etc..) and some more specific provisions that essentially aim at construction contracts); English law as well does not make a systematic distinction between different types of service contracts as do the civil systems of continental Europe; deviations from general principles of contract law have only arisen during the course of transposition of EC Directives, see e.g. the Commercial Agents Regulations 1993 (transposing the Commercial Agents Directive 86/653/EEC), the Package Travel, Package Holidays and Package Tours Regulations 1992 (transposing the Package Travel Directive 90/314/EEC)). These divisions within national law do not however affect the fact that they are services according to Community law.

Community law itself however has hitherto not developed a unitary autonomous classification system for services. Rather, the numerous individual provisions in legislative acts of Community law that concern services are regularly attributed to different policy aims according to their respective aims, and different sectors according to their subject matter, without thereby prescribing any binding categories. Provisions of Community law which concern services thereby cover numerous areas such as for example transport services, postal services, energy services, financial services (banks, insurance companies, capital markets), health services and the care of older people, leisure, catering and tourism services as well as the liberal professions (*cf.* the list under: http://eur-lex.europa.eu/de/repert/chap_06.pdf).

2. Selection Criteria

From the multitude of services that are provided which are provided within the Internal Market some illustrative areas have to be selected for a precise analysis within this study. This exemplary approach allows closer consideration of the legal provisions of some individual Member States in respect of the obligations of service providers. Equally it is necessary to select certain Member States for detailed scrutiny.

Only after this detailed consideration is it possible to ascertain whether differences exist in the legal provisions and/or whether these differences between the legal provisions of several Member States result in barriers to the cross border provision of services in the Internal Market [Czech Republic, Finland, Spain, United Kingdom; in addition Belgium and Germany]. Furthermore the study focuses on substantive law; procedural law requires separate scrutiny which cannot be provided in here.

On the selection of sectors and examples the following criteria were determinative:

a) areas particularly relevant for the Internal Market

b) services that are provided cross border to consumers

c) services provided by private and public entities

d) services which are comparable with the supply of goods

On the basis of these criteria the following sectors were chosen in which to consider examples relating to specific areas:

(1) entertainment, in particularly safety of the customer in this area

(2) telecommunications

(3) transport, in particular rail travel

(4) advisory services of the liberal professions

(5) personal care services, in particular health

Within each of these areas the investigation is orientated above all on perspectives which are important in terms of strengthening the confidence of customers, in particular consumers, in cross-border transactions. Central aspects thereof are the obligations of the service provider both in respect of the agreed service as well as the safety of the customer. The issues in relation thereto are dependent upon the specifics of the respective area. Regularly incorporated elements however are:

- the liability for breach of these obligations
- the possibility of the service provider to exclude or limit its liability
- legal provisions limiting liability to a certain amount
- whether it makes any difference if the service provider is a private entity or a body of public law

The results will be presented hereinafter in brief summaries and tables, a detailed description of the legal situations in different Member States can be found in Annex 1. Having regard to the limitations of the study a detailed presentation of the legal situation can only be undertaken for some of these countries, whereas only brief comments are given for other countries.

IV. Illustrative Areas

1. Entertainment

a. Existing European Regulatory Framework

No specific rules of Community apply to the provision of leisure services, except for rules on transport and the Directive on package holiday tours. This Directive only applies to organised travel and the contractual relationship between tour operators and travel agents on the one hand and consumers on the other.

The Package Travel Directive (Directive 90/314/EEC) only covers 'packages' i.e. a pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation. Since consumers book more and more themselves (on line) more and more travel packages will fall outside the scope of the Directive. Therefore the problems linked to a consumer booking a flight or a hotel room without using the intermediary of a travel agency or travel organizer become more and more important.

Where a consumer books a 'package' he has, apart from other rights (regarding e.g. information to be given prior to departure and the protection against bankruptcy of the organiser), *inter alia* the following rights regarding performance of the travel contract (Article 5):

1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:

- the failures which occur in the performance of the contract are attributable to the consumer,

- such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,

- such failures are due to a case of force majeure such as that defined in Article 4 (6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.

In the cases referred to in the second and third indents, the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.

In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2.

4. The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity.

This obligation must be stated clearly and explicitly in the contract. Article 6

In cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions.

Directive 2006/123/EC (Services in the Internal Market) and its provision on assistance of beneficiaries of services applies to leisure and entertainment. Transport and gambling services are however excluded.

b. Case Examples

Case 1

A consumer is injured by the breakdown of a roller coaster in an amusement park.

Case 2

A consumer is injured by falling from a dangerous staircase in a hotel.

Case 3

A consumer who booked a hotel room cannot benefit from certain facilities in a hotel (iron, TV, bath, internet access, games…) because of a lack of these facilities, a technical defect or a lack of maintenance.

c. Legal Situations in Different Member States (Overview)

aa. Case 1

In such a situation there will most probably be a contractual relationship between the owner of the roller coaster (or of the amusement park) and the victim.

Nevertheless in all the Member States examined (Belgium, the Czech Republic, Finland, Germany, Spain and the UK) the owner will be liable under tort law. Sometimes the owner is also liable under contract law (Germany and the UK).

In all of the reviewed Member States the victim has a right to compensation. Exclusion or limitation of liability for personal injury is not possible in any of the Member States reviewed, either on the basis of the general rules (e.g. the German BGB) or the rules on unfair contract terms (as in the UK), but sometimes there is a legal cap on damages to be paid (Spain: 3 million €).

In this sector public bodies are hardly involved. If they are it should be observed that according to the law of all but one of the Member States reviewed it does not make any difference whether the owner is a public or private person. In Germany an objective and proportionate limitation of liability for personal injury is possible in case of public bodies.

The consumer acquis does not deal with this question. However attention can be drawn to the new Directive 2006/123/EC on Services in the Internal Market. This Directive contains provisions on assistance to beneficiaries of services.

Member State	Regime of liability	Remedies	Exclusion/limitation Of liability	Difference public/private bodies
Czech Republic	§ 420a CC (Civil Code): objective liability (damage caused within operating activity)	compensation	No exclusion or limitation possible by simple warning/ CC limits liability for damage to health	Makes no difference
Finland	General tort law	compensation	At least liability for personal injury cannot be excluded or limited by way of standard terms	Makes no difference
Germany	Contract law § 280 (1) BGB (presumption of fault) and tort law: § 823 (1) BGB (no presumption of fault)	compensation	§ 309 No 7 a) BGB: Liability for personal injury cannot be excluded or limited by way of standard terms	Objectively and proportionate limitation of liability possible in case of public body for personal injury
Spain	Art. 1902 CC, extra-contractual fault based liability, but with jurisprudential presumption of fault	compensation	General consumer law forbids exclusion of liability for death or personal injury	Makes no difference
United Kingdom	Tort and contractual liability;	compensation	Exclusion or limitation of liability for negligent breach of obligations impossible (Unfair Contract Terms Act)	No public bodies involved, but would make no difference
Belgium	Non-contractual liability under Art. 1384 (1) CC: objective liability for defect	compensation	Exclusion of liability for personal injury not possible/uncertain whether limitation is possible	Makes no difference

bb. Case 2

In this case, in the Member States reviewed, more or less the same rules apply as in the previous case 1.

Member State	Regime of liability	Remedies	Exclusion/limitation of Liability	Difference buplic/private bodies
Czech Republic	§ 420a CC: objective liability (damage caused within operating activity)	compensation	No exclusion or limitation possible by simple warning/ CC limits liability for damage to health	Makes no difference
Finland	General tort law applies	compensation	Exclusion of limitation of liability is generally only possible where owner proves to have behaved as *bonus pater familias*, however at least liability for personal injury cannot be excluded or limited by way of standard terms.	Makes no difference
Germany	Tort law: § 823 (1) BGB : proof required of breach of obligation to maintain safety	compensation	§ 309 No 7 a) BGB: Liability for personal injury cannot be excluded or limited by way of standard terms	Objectively and proportionate limitation of liability possible in case of public body for personal injury
Spain	Art. 1902 CC: extra-contractual liability, but with jurisprudential presumption of fault	compensation	Courts can moderate compensation/ General Consumer Law: cap of compensation at 3 million €	Makes no difference
United Kingdom	Tortuous and contractual liability, *res ipsa loquitur* rule establishes prima facie negligence	compensation	Exclusion or limitation of liability for personal injury impossible (Unfair Contract Terms Act)	Makes no difference
Belgium	Non contractual liability under Article 1384 (1) CC: objective liability for damage caused by defect	compensation	Exclusion of liability for personal injury not possible/uncertain whether limitation is possible	Makes no difference

cc. Case 3

In all the reviewed Member States the hotelier is liable for the absence of a facility which was contractually promised (promises in advertising being generally binding on the hotelier, e.g. in Spain, the United Kingdom, Finland; expectations raised by the category in which the hotel is classified can also lead to a duty to provide certain facilities, e.g. in Belgium, Finland).

Where the consumer has booked a hotel room as part of a package holiday he has a claim against the tour operator pursuant to the Package Travel Directive and the implementing provisions in the Member States. According to Art. 4 (7) of the Directive the organizer shall make suitable alternative arrangements, at no extra costs.

The remedies the consumer can expect according to domestic laws are largely the same in the Member States reviewed. If the problem cannot easily be remedied (another room, providing the facility lacking) as such the consumer will generally have a right to a price reduction.

On the other hand the possibility for the hotelier to limit his liability differs from Member State to Member State. In the United Kingdom an exclusion or limitation of liability is impossible unless the unavailability was unforeseen. In the Czech Republic and in Germany a limitation of liability is not possible in case of bad faith. In other Member States (Belgium, Spain) an exclusion or limitation clause has to be appraised in the light of the general clause on unfair contract terms in consumer contracts.(in Spain a total exclusion is considered unfair in any event).

In none of the examined Member States does it make any difference whether the hotel is a public or private body.

Member State	Regime of liability	remedies	Exclusion/limitation of liability	Difference public/private bodies
Czech Republic	General contract law: breach of contract	§ 507 CC: if defect cannot be remedied the consumer may claim an appropriate price reduction	Yes, but not in bad faith and subject to mandatory provisions of consumer law	Makes no difference
Finland	Breach of contract	Price reduction if minor (rescission if essential)	At least liability for personal injury cannot be excluded or limited by way of standard terms	Makes no difference
Germany	Mixed contract (primarily lease)	Price reduction	No limitation or exclusion in case of bad faith	Makes no difference
Spain	Breach of Contract (Art. 1101 CC) (if facilities advertised?)	Another room/ price reduction/rescission of the contract in case of essential breach	Limitation possible in case of intentional damage; but might be contrary to general clause ; Unfair Contract Terms; exclusion not possible in consumer contracts	Makes no difference
United Kingdom	Implied promise is advertised; breach of contract	Damages	Unless the unavailability was unforeseeable, no limitation of liability possible	Makes no difference
Belgium	Breach of contract if facilities do not correspond to what consumer could expect in a hotel of the category	Price reduction	Possible, subject to general clause on unfair contract terms	Makes no difference
EC law	Package Holiday Directive as the case may be	Claim against the travel organiser	Art. 4 (7) Directive: the organizer shall make suitable alternative arrangements, at no extra cost	Makes no difference

2. Telecommunications

a. Existing European Regulatory Framework

The provision of services in the telecommunications sector represents an extremely relevant market in economic terms within the Community. According to the data available for the EU-25 in 2004 the number of fixed line connections alone was 226.3 million. The number of mobile phone connections between 2003 and 2004 increased by 11.2% to 409 million. 1.2 million people were employed in the telecommunications industry in 2004 (*Martti Lumio*, *Telekommunikation in Europa*, in: *Industrie, Handel und Dienstleistungen,* Volume *9/2006*, see http://www.eds-destatis.de/de/downloads/sif/np_06_09.pdf).

Following the complete opening of the telecommunications markets on the basis of Directive 96/19/EC, in 2002 the Community legislator passed a package of altogether six Directives and a decision, with which above all the following aim is pursued: First of all a simplification of the European legal framework should be achieved; secondly the "fusion of telecommunication, media and information technologies" should be reflected; thirdly the Directives achieve a more flexible mapping of sector specific regulation on the one hand and the deployment of instruments of national and Community competition law on the other hand; ultimately the substantive, procedural, and organisational requirements for a community wide, increasingly harmonized application of a European legal framework should be achieved.

The aforementioned legislative acts of the Community in the area of telecommunications are:

- Framework Directive 2002/21/EC
- Authorisation Directive 2002/20/EC
- Universal Service Directive 2002/22/EC
- Access Directive 2002/19/EC
- Directive on Privacy and Electronic Communications 2002/58/EC
- Competition Directive 2002/77/EC
- Radio Spectrum Decision No. 676/2002/EC

Community law rules, which specifically deal with protection of the consumer in the area of telecommunications, are by contrast lacking. The legislative acts of the Community which generally aim at consumer protection, such as the Doorstep Selling Directive (85/577/EEC), the Unfair Contract Terms Directive (93/13/EEC) and the Distance selling Directive (97/7/EC) do of course in principle apply to services of all kinds and thus to telecommunications services [Article 3 (1), 3rd indent Distance Selling Directive contains in this respect only one exception for contracts, which are concluded with telecommunications operators by the use of public payphones]. Thus, where a consumer concludes a doorstep or distance contract for the provision of telecommunications services, he has, as a matter of principle a right of withdrawal pursuant to Art. 5 of the Doorstep Selling Directive or according to Art. 6 of the Distance Selling Directive. By contrast, there are no unitary European standards on the non-performance or defective performance by the provider of telecommunications services.

On the other hand Community law contains however provisions on universal service obligations, in particular in the electronic communications sector (*cf*. Universal Service Directive 2002/22/EC).

According to the Commission's White Paper on Services of General Interest [cf. COM (2004) 374 final] the consultation on the Green Paper the Commission had issued on the subject a year before has shown that there is broad agreement that the provision of services of general interest must be organised in such a way that a high level of consumer and user rights is ensured. The Commission intends to base its policies on the principles identified in the Green Paper and in the Commission Communication on services of general interest in Europe of September 2000. These include in particular the access to services, including to cross-border services, throughout the territory of the Union and for all groups of the population, affordability of services, including special schemes for persons with low income, physical safety, security and reliability, continuity, high quality, choice, transparency and access to information from providers and regulators. The implementation of these principles generally requires the existence of independent regulators with clearly defined powers and duties. These include powers of sanction (means to monitor the transposition and enforcement of universal service provisions) and should include provisions for the representation and active participation of consumers and users in the definition and the evaluation of services, the availability of appropriate redress and compensation mechanisms and the existence of an evolutionary clause allowing requirements to be adapted in accordance with changing user and consumer needs and concerns, and with changes in the economic and technological environment.

Where services are not provided, as it used to be, by public entities, public law principles, such as the principles of objectivity, equality, proportionality, neutrality or the compulsory provision of services do not apply automatically anymore. Thus the liberalisation process was accompanied by regulation at EC level of services of general economic interest, in particular "universal service obligations". "Universal service" means a guaranteed access for everyone, whatever the economic, social or geographic situation, to a service of a specified quality at an affordable price. The concept of universal service was first used in EC telecommunications law but is now also present in the postal and energy Directives.

b. Case Example

The case example is intentionally limited to the ordering of a fixed line telephone connection via a telecommunications provider of the customer's choice, so as not to unnecessarily complicate the study by a plethora of individual problems which can arise from the multitude of offers available in the telecommunications business (such as prefix codes to re-route the call through a different provider, mobile phone contracts and internet services):

The consumer concluded a contract with a telecommunications provider to install a fixed line telephone connection. In return the consumer is obliged to pay a fixed price. Due to a severe storm the telephone lines belonging to the provider are damaged to such an extent that the fixed line telephone connection cannot be restored for several days.

c. Legal Situations in Different Member States (Overview)

Under the legal systems of each of the examined Member States the consumer would be able to claim for reimbursement of the due fees for the time the telephone connection cannot be provided. In each of the reviewed Member States the telephone provider would also be liable for any other damages caused by his inability to perform.

Differences between the Member States exist as to whether or not it is possible to limit the provider's liability via contractual clauses. Whereas in Spain contractual limitation clauses would generally be invalid, the legal systems of all other examined Member States allow the provider to contractually limit his liability. In Germany however there are some restrictions in case the provider's liability is limited by reference to standard contract terms.

In the United Kingdom the provider's liability largely depends on the contract between him and the consumer, so it is possible for the provider to exclude or limit his liability to a great extent (*cf.* the more detailed analysis in the Annex 1).

The most significant distinction between the examined Member States is the existence of legal provisions limiting the provider's liability to a certain amount in some Member States, whereas in other Member States such limitations do not exist. Under Czech law the general limitations for compensation of the Czech Civil Code apply. In Spain compensation for liability would be fixed at 3 million Euros, if Art. 28.3 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* applies. German law even limits the liability of the telephone provider (for unintentional damages) to 12,500 Euros per customer and to an amount of ten million Euros in total for each incident causing disruption. In Finland and the United Kingdom on the other hand there is no legal ceiling for the damages caused by the telephone provider's failure to provide the connection.

Member State	Reimbursement of fees	Additional Damages	Contractual Limitation Clauses	Legal ceiling (for economic loss)	Difference for Public Bodies
N° of column	**1**	**2**	**3**	**4**	**5**
Czech Republic	Liability due to the general provisions of the Civil Code.	Liability due to the general provisions of the Civil Code.	Valid due to the general provisions of the Civil Code.	The general limitations for compensation of the Civil Code apply.	No.
Finland	Yes.	Yes (15 - 120 Euros due to the Consumer Market Act. Amount of compensation can be bigger due to consumer protection principles in case of negligence).	If all reasonable measures have been undertaken to prevent the loss, limitation may be possible	No.	No.
Germany	Yes. No obligation to pay the fees for the time the tele-phone connection cannot be provided. Reimbursement of fees if already paid.	Yes.	Valid (can be invalid when re-gulated by stan-dard contract terms; liability also cannot be limited to an amount lower than the amount for minimum damages mentioned in column n° 4).	12,500 €per customer (for unintentional damages); 10 million € in total (for unintentional damages).	No.
Spain	Proportional reimbursement of the due fees for the time the telephone connection is interrupted if the amount exceeds 1 €	Yes.	Invalid.	Uncertain. If Art. 28.3 *Ley 26/1984, 19 July, General para la Defensa de los Con-sumidores y Usuarios* applies, the limit on compen-sation is fixed at 3 million €	No.
United Kingdom	Liability due to the normal rules of contractual liability (but widely limited by contractual limi-tation clauses, see column n° 3).	See column n° 1.	Valid.	No.	No.

3. Rail Transport

a. Existing European Regulatory Framework

Transport in particular by rail and air is an area of enormous importance for the Internal Market. This is not only true for cross-border business trips, but also for travel services provided to consumers. Especially with regard to air travel, the Internal Market should lead and has apparently led to strong cross-border competition of airports and air carriers, in particular if airports are close to national borders. Rather often travel by air is combined with rail travel in order to get to and from the airport. Such travelling by train can be purely in one direction, be it within one Member State (e.g. train journey from Bielefeld, which is situated in northern Germany, to Düsseldorf Airport) or cross-border (e.g. train journey from Bielefeld to Amsterdam Airport).

As flights often cross borders and as there is usually a return flight, the consumer may need all in all four train journeys. This would be the case, e.g., if I travel from Bielefeld to Hull with the following itinerary: Bielefeld - Düsseldorf (train); Düsseldorf - Manchester (plane); Manchester - Hull (train) and return following the same route.

Air travel and train travel is widely regulated. With regard to damages, international conventions like the Warsaw/Montréal Convention or the COTIF/CIV Convention (in the version of the 1999 Vilnius Protocol) apply. In case of cancellation or late running of trains, the COTIF/CIV rules grant in Art. 32 (1) CIV not more than a compensation for the costs of a necessary overnight stay and the costs occasioned by the need to notify persons expecting the passenger. According to Art. 32 (3) CIV, the applicable national law determines whether and to what extent the carrier must pay damages for harm other than that.

Delayed flights are covered by EC Regulation 261/2004. By contrast, delayed train journeys are not subject to a comparable supranational regulation. However, the proposed EC Regulation on International Rail Passengers' Rights and Obligations, COM (2004) 143 final, will contain a delay compensation scheme, which would be applicable also for purely domestic services (cf. the opinion of the Commission on the European Parliament's amendments to the Council's common position regarding this proposal, COM (2007) 79 final). According to the actual draft (cf. the Common Position (EC) No 19/2006, OJ C 289 E, 28/11/2006, 1), the passenger shall be entitled for the reimbursement of the full cost of the ticket where it is reasonably to be expected that the delay in the arrival at the final destination under the transport contract will be more than 60 minutes (Art. 14). Alternatively, the passenger may request compensation for delays from the railway company if he is facing a delay for which the ticket has not been reimbursed. The minimum compensation for delays shall be: (a) 25 % of the ticket price for a delay of 60 to 119 minutes, (b) 50 % of the ticket price for a delay of 120 minutes or more (Art. 15). Actually, it is in dispute between Parliament and Commission whether the passenger may require payment in cash or whether the carrier may alternatively issue a voucher. The carrier shall be relieved of this liability, when the cancellation, late running or missed connection is attributable to certain causes like *force majeure* or fault of the passenger [Annex I, Art. 32 (2)]. The legislative procedure regarding this proposed Regulation is still pending (cf. http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=189475).

Even if such a Regulation were enacted, the expected remaining differences in the national laws might influence the consumers' expectations and his confidence in the reliability of his protection under contract law. This may cause consumers not to visit a foreign country or at least lower his confidence in their legal systems.

b. Case Example

A consumer books a train ticket, which costs 50 Euros, from A to B (airport). The train is delayed for 150 minutes, because it turns out in the cause of a routine control, that the locomotive driver is drunk. The service provider is unable to replace him for some time. Caused by this delay, the consumer misses his plane, which causes him damage. He has to pay an additional fee of 500 € for the necessary booking of a later flight.

c. Legal Situations in Different Member States (Overview)

The consumer would get a reduction of the ticket price (50 €) in Finland, Germany (only 10 € in vouchers), Spain (25 €) and the UK (depending on the train company, minimum 10 € in vouchers). In the Czech Republic the Railway Regulation would exclude any refund (but it is at least possible that the railway operator is liable under the Civil Code).

The planned EC Regulation would grant a minimum **of 25 € (possibly in vouchers)** to the consumer. Thus, the issue of price reduction would at least be solved on a minimum basis if the planned EC Regulation comes into force.

With regard to the additional damages caused by the missed plane (500 €), the situation of the consumer is rather unsatisfactory in some Member States. Finnish and Spanish law grant full compensation in such a situation, and German law excludes any limitation of liability. In the Czech Republic and in the UK the specific railway regulations do not grant compensation, but is seems at least possible that the consumer may recover his damage under general private law. The future EC Regulation would not cover this kind of damage and therefore leave the national laws untouched.

EC legislation could remove such differences. However, it would have to be taken into account that the railway operator must have the defence of *force majeure*, if, for example, weather conditions cause delays. Perhaps the Finnish law might serve as a starting point for further reflections on a possible EC regulation, also with regard to the duties of the passenger and a legal ceiling for such claims (cf. the more detailed analysis in the Annex 1).

Member State	Reduction of price	Additional Damages (500 €)	Contractual Limitation Clauses	Legal ceiling (for economic loss)	Difference for Public Bodies
N° of column	**1**	**2**	**3**	**4**	**5**
Czech Republic	No, under Railway Regulation (situation is somewhat uncertain, possibly liability under Civil Code)	No under Railway Regulation (situation is somewhat uncertain, possibly liability under Civil Code)	Uncertain (not relevant, see columns n° 1 and 2)	No, under Civil Code no limitation	No
Finland	Yes	Yes (500 €)	Invalid (for the case of a drunken driver; in general exclusion is possible, if all reasonable measures have been undertaken to prevent the loss)	5000 €	No
Germany	20% of price in vouchers = 10 € (under possible future regulation 75 % = 37,5 €)	No	Valid (also with regard to column n° 1)	No (ceiling is not necessary, see column n° 2)	No
Spain	50% = 25 €	Yes (500 €)	Invalid	3 million €	No
United Kingdom	Depending on Rail operator's Passenger Charter; minimum 20% of price in vouchers = 10 €	Uncertain: no damages under 'National Conditions of Carriage' (NCC), but possibly on a discretionary basis; moreover, a claim under general contract law may be successful)	Invalid	Exclusion of additional damages under NCC, no ceiling under general contract law (see column n° 2)	No

4. Liberal Professions (Legal Advice)

a. Existing European Regulatory Framework

Apart from Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services, OJ 1977, L 78/17, that may have an impact on consumers (because it concerns i.a. the applicability of national ethical rules to lawyers from other Member States) there are no rules of Community law applicable to the services of lawyers vis-à- vis consumers. However a recent judgment of the ECJ could be mentioned. In *Cipolla* (Joined Cases C-94/04 and C-202/04, Judgment of 5 December 2006, n.y.r.) the ECJ ruled ,with regard to a scale of minimum fees for lawyers existing in Italy that:

> *67. Although it is true that a scale imposing minimum fees cannot prevent members of the profession from offering services of mediocre quality, it is conceivable that such a scale does serve to prevent lawyers, in a context such as that of the Italian market which, as indicated in the decision making the reference, is characterised by an extremely large number of lawyers who are enrolled and practising, from being encouraged to compete against each other by possibly offering services at a discount, with the risk of deterioration in the quality of the services provided.*
>
> *68 Account must also be taken of the specific features both of the market in question, as noted in the preceding paragraph, and the services in question and, in particular, of the fact that, in the field of lawyers' services, there is usually an asymmetry of information between 'client-consumers' and lawyers. Lawyers display a high level of technical knowledge which consumers may not have and the latter therefore find it difficult to judge the quality of the services provided to them (see, in particular, the Report on Competition in Professional Services in Communication from the Commission of 9 February 2004 [COM (2004) 83 final, p. 10].*

The ECJ thus recognizes as a matter of principle the right of Member States to restrict the free provision of services by lawyers, by imposing scales of fees, in the interest of consumers. This case law is somewhat opposed to the belief, also adhered to by the ECJ, that the consumer will benefit from effective competition and that restrictions of competition cannot be justified in the interest of consumers.

Although probably not so frequently, it happens nevertheless that consumers engage a lawyer in another Member State to represent him or her in court. The average consumer will have great difficulty in understanding the nature of the services rendered by the lawyer. This will particularly be the case where the lawyer is working under a different legal and judicial system. Under most of the legal systems the lawyer will be the proxy of his client.

He will probably have a general mandate to take whatever legal steps he can reasonably consider to be required in the interest of his client. Most lawyers will consult with their clients before taking any new step, especially when these steps involve additional costs, particularly in terms of fees. Fees are often calculated per hour. It is generally impossible to estimate the number of hours that will be involved with a given case. The drafting of e.g written submissions in a given case may involve much more hours than the lawyer had expected and the client was aware of. This may lead to higher amounts of invoices or a more rapid exhaustion of the retainer the lawyer has received from his client. Even where, as a result of the ethical rules or the contract concluded with their clients, lawyers are under an obligation to give a detailed (and more or less binding) estimate of the costs of their services beforehand, disputes may still arise, since they are not under an obligation to keep their clients informed about the progress of the file and the consequences for the fees which will eventually be charged.

b. Case Example

A legal representation becomes more complex and time-consuming than expected. The lawyer charges higher fees without having previously informed the client.

c. Legal Situations in different Member States (Overview)

It appears that in all Member States reviewed there are (ethical or legal) rules concerning lawyers fees. These rules are often decentralised. From the reviewed countries only in Spain (Barcelona Bar) does there seem to exist, under certain circumstances, an obligation for a lawyer to warn his client if he foresees that the fees will exceed what the client would reasonably expect.

Member State	Legal regime	Specific duty	Remedies	Competent body
Czech Republic	Ethical Code of Czech Bar Association 1996 and Czech Attorney’s Remuneration Regulation 1996	No	Right to reduction of fee if excessive	Not available
Finland	Lawyers Fee Act	If communication breakdown about fee is lawyer's fault and there are no exceptional mitigating circumstances.	Right to reduction of fee	Board of the Bar Association, Consumer Complaint Board
Germany	Special Statute (*Rechtsanwaltsvergütungsgesetz*)	No (only where lawyer has been asked and the actual fee is much higher than estimate given)	Right for client to refuse to pay excess	Not available
Spain	Bar associations establish rules	Barcelona Bar: duty to inform when expected that fee will exceed 25% value of the case)	Disciplinary measures	Bar association (costs disputes in general: the courts or arbitration by Bar Association)
United Kingdom	Distinction between “contentious” business - Solicitors’ (Non-contentious business) Remuneration Order 1994 - and “non-contentious” business - sec. 70 Solicitors Act 1974	No	Non-contentious business: Remuneration certificate (of the Law Society) - fair and reasonable charge; maximum is the amount of the original bill. Contentious business: “cost-assessment” procedure in the High Court - (1) reasonableness of the work and (2) amount fair and reasonable; maximum is the amount of the original bill	For non-contentious business the Law Society; for contentious business the High Court
Belgium	Code of Civil Procedure	No	Right to reduction of fee if excessive	The Bar Council or the courts

5. Health

a. Existing European Regulatory Framework

Health services in and across the EU are becoming economically more important than ever in the past. For instance in the most populous Member State Germany roughly 240 billion Euros are annually spent on health services; that represents 10 % of the national GDP (source: BMG *Bundesgesundheitsministerium*, Federal Ministry for Health and Social Security). The cost of healthcare systems to public funds has risen significantly faster than inflation in recent years, and is projected to rise by one to two percent of GDP in most Member States between now and 2050 as a direct result of ageing populations (see EU Memo 06/348 of 26th September 2006, p.4).

Patient mobility is increasing, not only, but especially in border regions where more than half of the patients can sometimes be from abroad. Even beyond border regions consumers travel abroad for medical treatment since care outside hospitals, as for example dental care can be significantly less expensive in low-wage Member States. There are considerable differences between the domestic health care systems which can be based upon compulsory health insurance, optional private health insurance or combinations of the two. In practice mutual coverage of costs for medical treatment received abroad through governmental health insurance still causes certain problems (see e.g. ECJ C-385/99, *Müller-Fauré*, [2003] ECR I-4509).

So far the European legislator has regulated solely fringe areas of the health sector, particularly the authorisation and labelling of pharmaceuticals and other medical products (Regulations 726/2004; 2309/93; 297/95; 540/95; 141/2000; 847/2000; Directives 90/385/EEC; 93/42/EEC; 98/79/EC, 2001/82/EC; 2001/83/EC; 2002/98/EC; 2003/94/EC; 2004/23/EC ; 2004/33/EC).

The new Services Directive does not apply to healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private [Art. 2 (2) lit. f Directive 2006/123/EC]. Indeed in the Consumer Aquis, the Doorstep-Selling Directive 85/577 and the Distance-Selling Directive 97/7 theoretically provide rights of withdrawal for contracts for health services concluded by way of direct marketing (i.e. in doorstep situations or by means of distance communication). However health services will rarely be offered by way of direct marketing. The Unfair Contract Terms Directive 93/13 is also applicable to contracts for health services, but solely the prohibition of exclusion or limitation of the legal liability of a seller or supplier in the event of the death of a consumer or personal injury [Art. 3 (3), Annex No. 1(a)] may be of practical relevance for the health sector. After all crucial issues such as rights in case of non-performance are not regulated in the general consumer law Directives. Especially in cross border situations there is considerable legal uncertainty to the detriment of the consumer who can hardly recognize who is responsible for potential harm or injuries, which liability rules apply and whether he is entitled to compensation.

b. Case Examples

Case 1

A needy patient (consumer) in a nursing home falls out of his wheelchair and is injured. The accident is caused by negligence on the part of the caregiver in charge.

Case 2

A consumer receives a dental implant in a dental practice and suffers injury caused by a medical malpractice.

c. Legal Situations in Different Member States (Overview)

aa. Case 1

Under the legal regime of all reviewed Member States, the consumer is entitled to sue the operator of the facility for compensation. In most of the examined countries, general rules on contractual or tortious liability apply, solely Finnish Law provides special provisions for medical treatment. In Finland the consumer may also receive compensation from the Centre for Treatment Injuries (*potilasvahinkokeskus*).

As to contractual exclusion of liability, all Member States have certainly transposed the aforementioned Unfair Contract Terms Directive, thus liability for death or personal liability cannot be excluded or limited by means of standard terms. This is of crucial importance for the health sector; in practice other contractual exclusions or limitations of liability will rarely be found. Conversely further restrictions on the freedom of contract have not been explicitly reported.

Most of the Member States under scrutiny do not have special provisions limiting liability, Spain is the only reviewed Member State that adopted a such limit (to 3 million Euros by Art. 28.3 *Ley 26/1984, 19 July*).

Whether the operator of the facility (nursing home) is a private or a public entity mostly does not influence liability towards the consumer. Admittedly in Spain, where 90 % of all health services, and most nursing homes are public i.e. provided by the *Seguridad Social*, it can make a difference in terms of jurisdiction i.e. the consumer will have to bring his action for damages in a different court if it is directed against the administration (see also the more detailed analysis in the Annex 1, 5.a.).

Member State	Regime of Liability	Remedies	Contractual Exclusion of Liability	Legal Ceiling for Liability	Difference Private / Public Bodies
N° of column	**1**	**2**	**3**	**4**	**5**
Czech Republic	General rules on liability for damages (§§ 420 - 450 Civil Code).	Compensation	Valid, the provider can in principle limit his liability if it does not contradict good morals and observes the consumer protection rules	No	No
Finland	Act on the Status and Rights of Patients (*laki potilaan asemasta ja oikeuksista*) and also *potilasvahinkolaki* (Act on Treatment Injuries). Caregiver can be held liable under tort law.	Compensation from *potilasvahinkokeskus* (Centre for Treatment Injuries) or from the caregiver (civil jurisdiction)	Invalid	No	No

Member State	Regime of Liability	Remedies	Contractual Exclusion of Liability	Legal Ceiling for Liability	Difference Private / Public Bodies
Germany	General Contract Law §§ 280 (1), 278, 611 BGB provides claims against operator. Under Tort Law, §§ 823, 831 BGB, caregiver and operator can be made liable	Compensation for all material and also non-pecuniary damages, §§ 249, 253 (2) BGB	Invalid, liability for death or personal injury cannot be excluded or limited by way of standard terms § 309 No 7 a) BGB	No	No
Spain	Caregiver can be held liable under tort law, Art. 1902 CC. Also a direct claim against the hospital (if it is a private Hospital) where the caregiver is employed, for *culpa in vigilando* (Art. 1903.1 & 4 CC)	Compensation for all material and also non-pecuniary damages	Invalid, exclusion of liability for death or personal injury by way of standard terms is prohibited by the *Disposicion adicional primera* of *Ley 26/1984, 19 July*	Art. 28.3 *Ley 26/1984, 19 July,* sets the limit on compensation at 3 million €	There can be differences but primarily in terms of jurisdiction of courts and in that responsibility is not contractual where the service is provided by a public body. Like 90 % of all health services, most nursing homes are public i.e. provided by the *Seguridad Social.* However pursuant to Art. 28 *Ley 26/1984, 19 July,* liability is strict, and it is irrelevant whether the provider is private or public.
United Kingdom	The home may be liable under Health and Safety Rules, a breach of a contractual duty or tortious liability.	Compensation	Valid unless prohibited by unfair contract terms and health and safety regulation, but normally prohibited as standard terms	No	No. (Most nursing homes are run privately)

bb. Case 2

The legal situation for the consumer in case of malpractice is basically similar to Case 1 (see above). Again, in all examined Member States the consumer can sue the dentist for damages under general contract law or tort law; special provisions for medical treatment exist exclusively in Finland; and Spain remains the only reviewed Member States legally limiting liability.

In Spain most Dental services are not provided by the *Seguridad Socia*l, i.e. they are only provided by private entities. For basic dental services provided by the *Seguridad Social*, tort law will apply and specialized administrative courts will hear claims against the Administration. In the United Kingdom the NHS (National Health Service) as a public body provides basic dental services for free. Therefore in these cases there is no contractual liability, but of course the dentist remains liable for damages resulting from malpractice under tort law.

Member State	**Regime of Liability**	**Remedies**	**Contractual Exclusion of Liability**	**Legal Ceiling for Liability**	**Difference Private / Public Bodies**
N° of column	**1**	**2**	**3**	**4**	**5**
Czech Republic	General rules on liability for damages (§§ 420 - 450 Civil Code).	Compensation	Valid, the provider can in principle limit his liability if it does not contradict good morals and observes the consumer protection rules	No	No
Finland	*Potilasvahinkolaki* (Act on Treatment Injuries) provides claims for damages, Act on Health Care Professionals section 26 defines public law sanctions for misconduct	Compensation from the dentist	Invalid	No	No
Germany	General Contract Law §§ 280 (1), 611 BGB; Tort Law § 823 BGB	Compensation for all material and also non-pecuniary damages, §§ 249, 253 (2) BGB	Invalid, liability for death or personal injury cannot be excluded or limited by way of standard terms § 309 No 7 a) BGB	No	No
Spain	Contractual liability under 1.101 *et seq.* CC (Spanish Civil Code) Tortious liability pursuant to Art. 1903.4 CC	Compensation for all material and also non-pecuniary damages	Invalid, exclusion of liability for death or personal injury by way of standard terms is prohibited by the *Disposicion adicional primera* of *Ley 26/1984, 19 July*	Art. 28.3 *Ley 26/1984, 19 July,* sets the limit on compensation at 3 million €	Yes. But most dental services are not provided by the *Seguridad Socia*l, ie they are only provided by private entities.
United Kingdom	A private dentist may be liable under usual contract law or tort law. If the service is provided by the NHS (public and free) only tortious liability applies	Compensation	Valid unless prohibited by unfair contract terms and health and safety regulation - will normally be invalid as standard term	No	Not in terms of tortious liability. However since the public NHS provides services for free, there is no contract and therefore no contractual liability.

V. Public Sector Entities as Providers of Services

In a number of Member States public bodies or so-called public sector entities play a special role in the provision of services in a series of significant branches of the economy. Depending on the respective legal form of the peculiarities for public entities this can effect the free movement of services within the Internal Market as well as the level of consumer protection. For instance public bodies providing utilities will not necessarily be subject to the rules on e.g. unfair contract terms and/or will benefit from protection against competition.

Particularly in certain Member States some services, such as health care or the supply of water, are entirely regulated under public law [see *Simon Wittaker*, ''Consumer Law and the Distinction between Public and Private Law'', in*: J.-B. Auby* and *M. Freedland* (eds.), *La distinction du droit public et du droit privé: regards français et britanniques*/ The Public Law/Private Law Divide: *une entente assez cordiale*, Paris, 2004, 233 - 245; also the Finnish study: *Legal Position of Social Welfare and Health Service Customer - Comparison between services arranged by private sector and local authorities* - Consumer Agency Publication serie 2/2007].

In addition in certain service areas, such as health care, child care and care of the elderly private non profit bodies also play an important role in several Member States.

In other sectors - some of them reviewed in this study - like travel and entertainment and the provision of legal services public entities do not play a role (except marginally bar associations when they give legal advice). Generally, under the law of the Member States, where public bodies do (exceptionally) provide services in these areas they are subject to the same rules as private entities.

To the extent that services provided by public bodies are not considered to be economic they are likely to fall outside the application of the freedom to provide services. This is evidenced by the recent Services Directive 2006/123/EC which excludes from its scope of applicability non-economic services of general interest as well as healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private.

But even services that fall as a matter of principle within the scope of the Treaty provisions (on the provision of services) may sometimes not be caught by specific consumer protective measures of secondary Community law.

Thus, a recent study on eight consumer Directives has shown, that it is uncertain to what extent state owned service providers are covered by EC consumer law and the national laws of the Member States transposing them (EC Consumer Law Compendium - Comparative Analysis -, ed. by *Schulte-Nölke/Twigg-Flesner/Ebers*).

Only some of the consumer Directives (such as Directive 93/13/EEC on Unfair Contract Terms and Directive 2002/65/EC on Distance Marketing of Consumer Financial Services) make explicitly clear that public bodies fall within their scope of application. The other Directives leave this question open and therefore allow the interpretation that public bodies are not covered.

Even the two Directives that explicitly include public bodies (Directives 93/13/EEC and 2002/65/EC) are not very clear with regard to the question whether only contracts governed by private law or also services provided by public bodies where the relation to the consumer is governed by public law, fall within their scope.

In this respect the Consumer Law Compendium observes (p. 689) that Directive 93/13/EEC e.g. emphasises in recital 14 that the Directive also applies to trades, businesses or professions of a public nature. According to the English version of the text of the Directive [Art. 2 lit. (c)] the nature of ownership of the "trader or supplier" is immaterial [Art. 2 lit. (c): „'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned."]. In the German language version, the Directive refers to a trade or profession even when its is attributable to the area of public law, (*"dem öffentlich-rechtlichen Bereich zuzurechnen ist"*). The French version refers to the professional activity, whether public or private ("*activité professionnelle, qu´elle soit publique ou privée*").

In addition Article 1 (2) of the Directive excludes from its application 'contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions'. These exclusions are unclear. In the recent book *Unfair Contract Terms in European Law,* (Hart, Oxford, 2007), *Paolisa Nebbia* writes: on p. 96: "*The effect of these two limitations is dramatic as they could act as a Trojan horse to (ere) introduce a means to shelter public services from the fairness control embedded in the Directive, especially if one takes into account the fact that before the EC measure was adopted national courts were 'reluctant to review the terms which under public services are provided on the ground that basically these services are governed not by contract but by regulation. In practice therefore, whole swathes of the economy are not subject to control in respect of unfair commercial terms. ['Commission Report on Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts COM (2000) 348 final, 27]*." The same author, who has examined the law of Germany, Italy and the United Kingdom describes how these exclusions have let to uncertainty and indeed exclusions of public services from the protection offered by the Directive.

In view of these formulations it must be assumed that the Directive in any event extends to private law contracts between consumers and public legal persons/bodies. Whether in addition not only private law, but also public law contracts are encompassed, is by contrast uncertain. In support of this is the fact that the public/private divide is drawn differently in each country and therefore it cannot be at the discretion of the national legislator whether contractual clauses are subject to Directive 93/13/EEC or not. Legal certainty can in turn only be achieved if the ECJ decides the issue, or the Community legislator in the context of the acquis review undertakes a corresponding clarification.

Therefore the EC legislator should clarify two issues, where the relevant Directive does not allow an unambiguous interpretation or, more generally, if the Community legislature were to favour a horizontal approach to the review of the consumer acquis [see the Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final] namely:

(1) Whether public bodies fall inside the scope of the consumer protection Directives;

(2) To what extent also services provided by public bodies where the relation is governed by public law can fall in the scope of consumer protection Directives?

It would also be advisable for the Community legislature to clarify that the obligations imposed on service providers by the consumer Directives apply to all service providers irrespective of whether they act for profit (*animo lucri*) or not.

A possible future improvement of community legislature in this respect could take into account that

some Member States have already made attempts to clarify the applicability to public bodies/public services (see Consumer Law Compendium, p. 693):

"In some Member States it is additionally (beyond the scope of application of Directive 93/13/EEC) expressly regulated that not only legal persons of private law, but also legal persons of public law are covered. In Austria legal persons of public law always qualify as businesses. In Belgium, the term "seller" (used in the Trade Practices Act for doorstep and distance selling and price indication) refers to governmental institutions that pursue commercial, financial or industrial activity and sell or offer for sale products or services. In Cyprus, according to Art. 2 of the Consumer Protection Act the word "business" includes "a trade or profession and the activities of any government department or local or public authority", "courts" and "directors". Also in Greece it is emphasised in Art. 1 (3) of the Consumer Protection Act that public sector suppliers can also be regarded as traders. Italian law subsumes (for sales contracts) under the definition of "seller" every natural or legal person of private and public law. In Slovenia, a "trader" is defined as a legal or natural person "regardless of its legal form or ownership". Similarly in the United Kingdom in the context of transposing the Consumer Sales Directive it is clarified that "business" includes a profession and the activity of any government department (including a Northern Ireland department) or local or public authority. In other Member States like Germany it follows from the general definition of legal person that public bodies are included as well."

Notwithstanding these efforts made by Member States to clarify the point, the scope of application of the Directive - and other Directives - should be clarified in the interest of an optimal protection of consumers and legal certainty for consumers and businesses.

VI. Conclusions and Recommendations

1. Results of the Case Examples - Differences of Liability in the National Laws

The case examples have shown a rather clear distinction with regard to the liability of service providers between cases where consumers sustain a physical injury and such cases where they solely incur an economic loss.

The first category are those cases, where the customer suffers a personal injury because of unsafe service facilities or medical malpractice (e.g. the examples brought under IV.: roller coaster, hotel staircase, wheelchair accident and dental implant). In such cases the customer usually has a claim for damages, often both under contract and under tort law, in any case under tort law. Contractual exclusion clauses which attempt to limit the liability for personal injuries are invalid. This already follows from the particular transposition laws of EC Directive 93/13/EEC on Unfair Contract Terms in Consumer Contracts [cf. Art. 3 (3) and No 1a of the Annex to this Directive]. Legal ceilings of liability may occur, but are usually rather high (e.g. 3 million Euros) or they have their basis in international agreements, for instance, in the area of transport. However, despite the broad similarities with regard to the substance of the consumers' rights, it may nevertheless be difficult to enforce such rights in a foreign legal system. With regard to possible differences of the liability of public and private entities only some traces could be found in the case examples, but it should be borne in mind that more substantial differences may exist in areas not under consideration in this briefing paper (cf. above under V.)

The other category consists of cases in which the consumer does not sustain personal injury, but just suffers an economic loss because of the bad quality of a service. In all examples of that kind (i.e. lacking hotel facilities, telephone breakdown, missed plane because of delayed train and higher lawyers fees) substantial differences between the national laws could be made out. Such differences may already occur with regard to the duties of service providers when performing a contract (e.g. lawyers' duty to inform about higher fees). In some cases, for instance in the area of rail transport, there are specific national statutes which exclude service providers' liability in particular Member States. In cases, where different remedies like price reduction, damages or recession of the contract could be appropriate, the national laws seem to offer different solutions (cf. the lacking hotel facilities case).

The broadest spectrum of variations can be found with regard to contractual exclusion or limitation clauses. All Member States must have some controls of unfair terms because they all had to transpose the Unfair Terms in Consumer Contracts Directive 93/13/EEC. Nevertheless, the degree of harmonisation reached under this Directive does not seem to be very high. Apparently, at least in some Member States it seems to be rather easy to exclude or limit the liability of service providers to a great extent. The following table outlines some of the preliminary findings on national differences. It should be noted that this information has been collected under great time pressure for this briefing paper and therefore a more thorough research may lead to further differentiation.

Overview: Differences of the Member States Laws in the Illustrative Areas

Liability in Case of Personal Injuries

Roller Coaster

Claim for Damages: no substantial differences

Exclusion clauses: invalid (possibly, if public body, objective and proportionate limitation)

Legal Ceiling: none or 3 million Euros

Hotel Staircase

Claim for Damages: no substantial differences

Exclusion clauses: invalid (possibly, if public body, objective and proportionate limitation)

Legal Ceiling: none or 3 million Euros

Wheelchair accident

Claim for damages: no substantial differences

Exclusion clauses: invalid

Legal Ceiling: none or 3 million Euros

Difference for public bodies: possible, e.g. action is to be brought at a different court

Dental Malpractice

Claim for Damages: no substantial differences

Exclusion clauses: invalid

Legal Ceiling: none or 3 million Euros

Difference for public bodies: possible, e.g. no contractual claim, solely claim under tort law

Liability in Case of Pure Economic Loss or Inconvenience

Lacking Hotel Facilities

Available Remedies: another room, price reduction, damages, rescission (possibly differences between Member States with regard to the question which of these remedies are available)

Exclusion clauses: different criteria for validity, e.g. only unforeseen unavailability, not in case of bad faith, or general clause modelled along Dir. 93/13

Telephone Breakdown

Reimbursement: apparently no differences

Additional Damages: yes in principle (minor differences)

Exclusion clauses: substantial differences, e.g. generally invalid; invalid under standard terms controls; possibility to exclude liability to a great extent

Legal ceiling: exist in some Member States, e.g. 12500 Euros for unintentional damages/10 million Euros total per accident; 3 million Euros; no ceiling in other Member States

Missed Plane because of Delayed Train

Price reduction (refund): 0-50% (possibly in vouchers; under future Directive: 50 %

Additional damages: substantial differences between Member States, e.g. full compensation, total exclusion, or exclusion under specific railway regulations, but possible claim under general rules

Contractual limitation clauses: invalid in most Member States, in others valid under unfair standard terms controls or if all reasonable measures have been undertaken to prevent the loss.

Legal ceiling: (only appropriate in Member States where additional damages are covered) e.g. 3 million Euros, 5000 Euros

Higher Lawyers' Fees

Duty inform about higher fees than expected: substantial differences, e.g. no duty, duty in certain situations, duty if fees exceed calculation more than 25%

Remedies: (only appropriate in Member States where such a duty exists): Right to refuse payment of the excess, disciplinary measures

2. Unpredictability Caused by Differences of the Applicable Laws

There is not much EC legislation which regulates the rights and obligations of the parties to a service contract. This is widely left to the laws of the particular Member States. In cross-border situations, both the services provider and the customer therefore must be aware that the contract may be governed by the law of another Member State than the state, where they have their place of residence. It requires real expertise in the field of International Private Law to find out which is the applicable law. It may even be that individual aspects of the same case are governed by different national laws [e.g. in the case of Art. 5 (2) Rome Convention where a provision from the law of the consumer's place of residence can overrule the applicable law; or, if contract law aspects are governed by the law of the service provider and tort law aspects by the law applicable at the customer's place of residence]. From the perspective of the parties to a service contract it may seem unpredictable which law is applicable. The subsequent EC regulations (Rome I and Rome II) will certainly improve the situation but it will remain unsatisfactory for both parties to a service contract that they will have difficulties finding out which law is applicable.

The question of the applicable law is of importance because there are considerable differences between the national laws. The case studies reveal that the national laws on services already widely differ with regard to the place where the relevant material, e.g. statutes and case-law, is located within the legal 'infrastructure' of the individual Member States. Taken for itself, such differences of structure can make it rather difficult to find out about the rights and obligations of the parties to a services contract, if a foreign law is applicable.

Moreover, the preliminary results of the case studies indicate that there are areas, where the rights and obligations under a service contract considerably differ in the national laws. Customers who avail themselves of services in other Member States cannot rely on their experience under their own law. The expectations on the quality of services shaped by their domestic experience may be wrong with regard to the obligations of a service provider from another Member State. The illustrations given in this study exemplify such differences. Deeper research will most certainly reveal further examples (cf., also with regard to the following sentences, pp. XIII et seq. of the Annex 1 to this Study). For instance, it may be a surprise for a consumer from another country that UK based telecommunication companies have a relatively wide discretion to determine by individual code of conducts the quality of their services and the remedies of the customer, whereas in other countries there is a more uniform legal framework governing all operators and thereby securing the same level of protection. Such differences may become relevant, e.g., in the case of an interruption of service, with regard to the question whether the customer has to pay the agreed price also for the time period when he was offline. However, consumers from the UK might expect that also the law of other Member States grants a comparable specific protection to domestic and small business clients.

They might also expect to find a brochure of the provider explaining the customers' rights in plain language, as they are used to having in their home country. Such differences, even if they are relatively small, may cause distrust in the legal framework governing the relation between service provider and customer. A consumer will not be very confident that he receives the same protection he is used to. This may be even then the case, when the level of protection offered in the foreign country is higher or similar. Even in those areas where apparently there is sufficient protection throughout the Union - as it seems to be the case with regard to personal injuries suffered because of bad services - the customer may face minor differences like atypical rules on the burden of proof or different maximum limits for damages.

To summarize the results of this overview which has been given in Chapter IV. on some main areas of the service sector, the national laws differ considerably with regard to the obligations of service providers in many respects:

- under what conditions obligations exist at all (*inter alia* sometimes more stringent statutory requirements, sometimes more contractual freedom)
- which remedies are available to consumers when these obligations are breached (in spite of according tendencies in respect of the recognition of damages claims, differences in conditions and scope of the individual claims exist)
- sometimes in respect of the permissibility and the limits of exclusions of liability by individual arrangements or standard terms; in respect of possible upper limits on damages; in respect of the burden of proof for the existence of an obligation of the service provider, for the breach of an obligation and for damages (including issues of causation)
- in respect of the legal terminology and the systematic structure of the provisions on the liability of providers (predominantly no uniform type of contract for services and no uniform liability regime, rather divergence in the individual Member States according to varying conditions in different kinds of contracts with different respective liability rules; e.g. according to the respective subject of the service, according to branch or according to the content of the obligation; consequently, these are located in different parts of the legal system within the case law or within a code or in specific statutes or codes of practice *etc.*).

Providing services in another Member State therefore may be a rather risky lottery for the service provider with regard to the applicable law and the particular obligations under that law. This same applies correspondingly for a customer who considers using services from a service provider in another Member State. The Services Directive 2006/123/EC has not touched upon such differences of the substance of the applicable laws. It only contains in Art. 21 a rather vague obligation of the Member States to ensure that the recipients of services can obtain some "general information", for instance, on the means of redress available in the case of a dispute between the service provider and a customer. It is hardly imaginable that such "general information" can be much more than a short brochure on the law of each country. Such a brochure will most probably not be of any use for the customer when he wants to find out about his rights in a concrete case.

3. Public Sector Entities as Providers of Services and Universal Service Obligations

The preliminary results of the case studies have not delivered much evidence for the assumption that public sector services providers widely exclude or limit their liability. By contrast, in the course of liberalisation and privatisation of the former state monopolies, there seems to be a clear tendency to treat service providers equally irrespective of whether they are a public body, a state owned private legal person or a purely private business. However, in some areas like rail transport or supply of electricity, water *etc.*, where former state monopolists still have an enormous share of the market, some remains of traditional exclusions or limitations of liability are still to be found.

The current consumer protection Directives, in particular Directive 93/13/EEC on Unfair Terms in Consumer Contracts, do not ensure that all public sector entities which provide services, fall within their scope of application (cf. above in this study under V.). This shortcoming could be removed in the course of the current review of the consumer acquis or at a later stage.

Universal service obligations are not very common in EC law; some more exist in particular Member States. There is no evidence that the level of consumer protection is significantly lower with regard to such services.

4. Options for Action

On the basis of the case examples examined in this briefing paper, in particular with regard to the differences of the national laws, further consideration could be given to the following measures:

- Introduction of information duties with regard to services, in particular information on the price, on possible additional costs. It should be borne in mind that the Price Indication Directive 98/6/EC is not applicable on services, but that many Member States have comparable regulations in the area of services (cf. Consumer Law Compendium, pp. 561 s.).
- Introduction of information duties with regard to the remedies available in case of non-performance or bad quality of the rendered service.
- Provision for a clear set of standard remedies like price reduction, rescission and damages in case of a breach of a service contract. Such a European set of basic remedies could create a common basis of understanding and reference and thereby make the national legal systems more accessible to (foreign) customers.
- Stricter controls on contractual exclusion clauses especially with regard to remedies in case of breach of core duties in consumer cases.
- Clarification that also public entities which provide services are covered by the European consumer Directives.

It will have to be taken into account that the great variety of services and of problems which may occur under a service contract make it rather difficult to find concrete solutions. Improving the Internal Market in the field of services must be seen as a process which will take some time. After the enactment of the many individual measures and the horizontal Services Directive 2006/123/EC, the actual task is to identify options and to outline a strategy towards the Internal Market.

The following options may be considered:

- **Option 1: No legislative proceeding**. This possibility would be based on the idea that the market economy will organically improve the Internal Market.
- **Option 2: Sector-specific harmonization of individual types of services**. This option implies legislation in individual areas, in most cases by regulations or Directives, regulating in particular services which consumers are likely to use in other Member States. Examples could be insurance, banking and investment services, telecommunication and internet services, medical treatment, entertainment *etc.*
- **Option 3: Horizontal instrument containing some general rules plus sector specific individual legislation**. This option would advance and supplement option 2 by creating a general instrument applicable to all types of services, which would then relieve sector-specific legislation from the need for rules for all or most service contracts.
- **Option 4: Global harmonization of the service contracts**. This option would revitalise the old proposal of 1990.

If one does not follow option 1, option 2 would be the most natural way to proceed along the already existing *Acquis Communautaire*. Models could be the Cross-Border Credit Transfers Directive 97/5/EC, the Cross-Border Euro Payments Regulation 2560/2001, the Package Travel Directive 90/314/EEC, or the set of rules in the field of air travel (Warsaw/Montreal Convention, which is supplemented by the Cancellation of Flights and Denied Boarding Regulation 261/2004). These pieces of regulation only cover rather specific types of services, but they contain, although often somewhat incomplete, substantial law on the obligations of the service provider and the remedies of the customer in case of non-performance or bad performance.

It could be imagined to create more of this type of measures, regulating the core obligations of the parties and remedies in case of non-performance in the field of specific services. Services likely to be used in another Member State could be, as already mentioned, medical treatment, transport, car hire, insurance, banking and investment services (including consumer credit, which is currently under revision anyway), supply of water, gas or electricity and much more.

In case of an increasing density of such individual Directives or regulations according to option 2, the need to have a general horizontal instrument which contains rules common to many or all of the individual areas of services may arise. This would be option 3. Besides some definitions, such an instrument could contain some general rules on duties of information. It could also comprise some general rules on performance and remedies of those services which constitute an "*obligation de résultat*" (similar to a "*Werkvertrag*").

If one considers option 4 instead of the step by step approach which characterizes options 2 and 3, one would have to take into account the full range of services in order to leave room for necessary individual provisions for specific services. Because of the very broad variety of services covered by such an instrument, this could be a rather difficult task.

In respect of legislative technique and the level of harmonization to be reached, the following possibilities exist:

- Minimum harmonization Directives
- Full harmonization Directives
- Optional instruments (probably regulations)
- Full harmonization by regulations

As minimum harmonization Directives have not reached the intended effect for the Internal Market, this legislative technique should only be considered for transitory periods. However, it is hotly debated especially in consumer law whether the move from minimum to full harmonization - which seems to reflect the Commission's present policy - is in the interest of consumers and the Internal Market; Full harmonization is believed to have the advantages of removing disparities, creating a level playing field and thereby strengthening consumer confidence but not only does it prevent Member States from maintaining or introducing a higher level of consumer protection, it also excludes regulatory competition which, in the long run, might favour the achievement of the Internal Market, as well as taking into account local (cultural) differences. The latter preoccupation has become more important with the accession of new Member States. Therefore a balanced mix between full harmonization, minimum harmonization and optional instruments is to be preferred. It is more a pragmatic issue than a question of principle, which other types of measures will be chosen. For instance, the horizontal instrument envisaged in option 3 could be realized by a minimum or a full harmonization Directive, whereas at least individual services could be tackled by regulations or full harmonization Directives.

Optional instruments, which can be chosen by the parties as the applicable law, might form a later stage in the process of creating a level playing field for services in the Internal Market. A policy towards optional instruments would help to overcome the disadvantages of both the minimum and the maximum harmonization approach. Such optional instruments would have to take into account the ongoing comparative work done in the course of the European contract law exercise. It goes without saying that optional instruments would have to incorporate the actual standard of consumer protection granted by the EC and the Member States and that it must be open for further development.

Annex 1: Legal Situations in Different Member States in Detail

1. Entertainment

Case 1

A consumer is injured by the breakdown of a roller coaster in an amusement park.

Case 2

A consumer is injured by falling from a dangerous staircase in a hotel.

Case 3

A consumer who booked a hotel room cannot benefit from certain facilities in a hotel (iron, TV, bath, internet access, games…) because of a lack of these facilities, a technical defect or a lack of maintenance.

a. Spain

Case 1

All equipment of amusement parks has to comply with safety requirements laid down by the law. Technical aspects are regulated in different laws enacted by the Spanish Central Government and also by the Autonomous Regions. Just to put some examples: L. 4/1995, 10th November, *de espectáculos públicos y actividades recreativas* (Basque Country) and L. 4/2003, de 26 de febrero, *de Espectáculos Públicos, Actividades Recreativas y Establecimientos Públicos (Valencia).* As for Central Government Legislation, it is relevant to mention *Real Decreto 2816/1982, 27th August, por el que se aprueba el reglamento general de policia de espectáculos publicos y actividades recreativas.* This regulation only deals with technical aspects. Art. 46.1 establishes civil and/or criminal and/or administrative liability for damages caused by breach of technical provisions when the Operator is carrying out its activity, which is subject to an administrative license defining the activity (Art. 46.1). Companies and individual professionals are obliged to adopt safety measures and have a duty of maintenance of the installations (Art. 51 a). They are liable for damages caused to persons participating in the ride etc. and also to other people, as long as the damages are due to lack of foresight, negligence or lack of performance of their legal duties. Operators are obliged to take out insurance (Art. 51 b). Special rules concerning bullfights to be held in movable bullrings are provided by Orden 10th May 1982; Art. 1 obliges the operator to take out insurance. Operators or the Local Council would be liable as provided in legislation on Local Government liability. STS 18 April 2000 (RJ 2672) (Supreme Court Judgement) condemned the Project manager in charge of the bullring safety, ex 1902 CC (vicarious liability), and also the Local Government for having given permission for the event to take place without checking whether the legal requirements were fulfilled and, finally, for the same reason, Valencia's Government was also deemed to be at fault.

The main piece of legislation concerning safety is RD 1801/2003, 26 December, *sobre seguridad general de los productos*, which is a result of the transposition into Spanish Law of Directive 2001/95/EC, but both of them apply only to products and do not cover services. Services and the security thereof are generally covered by L. 26/1984, *de 19 de julio, General para la Defensa de los Consumidores y Usuarios* (General Consumer Protection Act), which considers health and safety to be basic consumer rights (Art. 2.1 a). Chapter II (Art. 3-6) is dedicated to "Health and Safety Protection" and also Art. 24, 30, 39.4.

So, when consumers are involved, liability falls within the scope of Art. 26 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios.* Art 26 sets a fault-based liability for service providers; they may not be deemed liable if they can prove that they acted in accordance with their duties of service maintenance. Therefore, the burden of proof lies upon the operator. However, on the other hand, Art. 28 seems to cancel this rule, since it provides for strict liability in the areas within its scope. However, this article does not specifically mention "entertainment service providers" (while it does for instance mention health, electricity or gas suppliers), but it generally establishes strict liability for providers of "services which include a guarantee of security, efficiency and functionality, which shall be maintained according to objective standards of quality before they are received by consumers". The article expressly includes "elevators", "transport services" and "motor vehicles".

Nevertheless, case law tends to apply Art. 1902 CC, i. e., the general fault based liability rule. The judgement of *Audiencia de Biscaia* 19 July 2002 (JUR 253402) summarizes how courts deal with liability in accidents occurring in leisure parks. Fault liability is the basic principle (Art. 1902 CC), which requires causation. However case-law has developed strict liability in two different ways: it reverses the burden of proof and applies higher requirements of due diligence when the circumstances of the case demand it. Fair rides are considered a dangerous activity and they create a risk, but this fact by itself does not mean that liability has to be strict. Users of these installations are aware of and undertake the risk, so only if there are other factors that aggravate the risk, the general rule of fault applies (operator's negligence). Also, there is a violation of the contractual duty of care when the necessary precautionary measures, concerning organization or equipment for certain leisure activities, designed to avoid accidents, have not been taken. The operator is liable when it does not warn the public about the risks that the fair ride involves or where there are no proper instructions with regard to how to use the fair ride or where it is insufficiently maintained. Some lower courts, however, and especially in cases relating to the so-called "mechanical bull" consider that the profit-making operator is generally liable on the basis of having created the risk.

Liability is vicarious, although the consumer has a contractual relationship with the amusement park Operator. Most cases of liability for leisure services will be based on tort law. Pecuniary and non-pecuniary damages are compensated.

General Contract Law (Art. 1103 CC) allows courts to moderate compensation. Courts usually do. If Art. 28.3 Ley *26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* applies, the limit on compensation is fixed at 500 Million Pesetas [circa 3 Million Euros] (the amount to be periodically revised by the Government).

General consumer legislation forbids standard terms excluding liability for death or personal injury (*Disposicion adicional primera* of *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* (Art. 10 bis, II No. 10) as modified by *Ley 7/1998 de 13 abril, sobre condiciones generales de la contratación).* Moreover, *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* would not permit such an exemption clause.

Amusement parks are not a public service, so private law always applies. When damages are caused in a children's public park by lack of due maintenance of its installations, the Administration can be found liable for *culpa* in *vigilando* or in *eligendo* (Art. 1903 CC) (STS 25 March 1995, RJ 2399). A different matter is the possible liability of the Administration that has unduly authorised dangerous activities.

Bodily harm caused by negligent behaviour and involuntary manslaughter are criminal offences; the Public Attorney and the victim may prosecute before the criminal courts; in this case, damages will be laid down by said court, according to the rules contained in the Criminal Code (109 to 115 Criminal Code, that refer to responsibility as established by the law, therefore including the general rule contained in Art. 1902 Civil Code); this may not always be convenient for the victim, since this forum does not specialize in awarding compensation, although the rules in the Criminal Code are quite flexible. It is often said that during a criminal case there is less “space” to discuss this matter.

Case 2

Liability is fault based (Art. 1902 CC). If the consumer fell in the dark, due to the fact that the emergency lighting was not on and therefore, a breach of norms governing security in hotels exists, the Hotel would be held liable. Vicarious liability of the hotel director does not arise, since Art. 1903.4 CC does not apply in this case. This article provides vicarious liability of owners and directors of establishments and businesses with regard to damages caused by their employees. Although one would think the director of a hotel should be included in this rule, case law shows that Art. 1903.4 does not apply in this case, there is no *culpa in vigilando*, but direct liability within the terms of Art. 1902, when applicable. *Vid. inter alia,* Supreme Court Judgements 4-XI-1991 and 20-IV-2005, the former granting damages against the director, the latter only against the owner of the hotel, but both rejecting vicarious liability. Contributory negligence and in the possibility that it breaks the chain of causation must me taken into account. Contributory negligence allows the Courts to reduce compensation. See SAP Madrid 20 July 2005 (JUR 204345). In the case, for instance, of a staircase without a banister, where the Hotel does not prove (inversion of the burden of proof) that the carpet on it was properly secured, the Hotel is liable (STS 21 November 1997).

General Contract Law (Art. 1103 CC) allows the Courts to moderate compensation. Courts usually do. If Art. 28.3 L*ey 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* applies, the limit on compensation is fixed at 500 Million *Pesetas* [circa 3 Million Euros] (the amount to be periodically revised by the Government).

Art. 1102 CC allows exclusion of liability in contracts, as long as breach is not intentional, i.e., caused by dolus. But the exclusion of liability for death or personal injury by way of standard terms is forbidden by *Disposicion adicional primera of Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* (Art. 10 bis, II No. 10) as modified by *Ley 7/1998 de 13 abril, sobre condiciones generales de la contratación*. Moreover, *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* would not permit such an exemption clause.

Case 3

L. 23/2003, 10th July, de Garantías en la Venta de Bienes de Consumo, which implements in Spanish Law Directive 1999/44, on certain aspects of the sale of consumer goods and associated guarantees deals only with products and excludes services, therefore it does not apply in this case. If a contract has been concluded with a Travel Agency, damages have to be claimed from the Agency (Art. 11 L. 21/1995, 6th July, *regularora de los viajes combinados,* implementing Directive 90/314, on package travel, package holidays and package tours). If not, claims should be filed directly against the hotel. It has to fulfil obligations arising from contract, and also from promises contained in advertising (Art. 8 *L. 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios*). Otherwise, there would be breach of contract (Art. 1101 CC).

Probably, the hotel should provide the consumer with another room if the defect is due to lack of maintenance. A reduction in the price is also possible. The consumer can rescind the contract when the defect was such that the contract wouldn't have been entered into had the consumer known about it (*aliud pro alio,* essential breach). Most of the examples allow rescission: let's just imagine the client is a lecturer in a foreign country, he or she has travelled hand-luggage only and arrives with a creased suit, a paper to finish that night at the hotel and a sleeping problem that is generally solved by having a warm bath and watching TV before bed. Surely the lack of laundry facilities, internet access and a bath and TV are sufficient reason to "cancel the booking" and walk out of the contract; he or she prefers to find a more convenient hotel and the remedy is proportionate: the hotel can stand cancellations and the client has the right to obtain what he or she has booked. The same would apply to a journalist who needs TV to keep up-to-date for a meeting the following morning or, why not, to an elderly lady who enjoys games and has specifically booked that hotel because it advertised this facility. Another typical example is that of booking a certain hotel because it offers secure parking and it is not available on arrival due to refurbishing; either the hotel can provide an alternative car park facility that is not too inconvenient, or rescission is more than justified. As we see it, there is a difference between minor defects in a sale of goods or property, and lack of facilities provided by a hotel, since in the latter case cancellation is a minor problem for the hotel and yet it may satisfy the consumer's needs much better. When purchasing a durable good, the buyer's needs may be satisfied by repairing the defect; when renting a hotel room, performance is usually a one-off and therefore when the hotel cannot provide a satisfactory alternative, rescission seems the best way out for both parties. In all cases, since there is breach of contract, compensation would be due (Art. 1101 and 1124 CC, i.e., even if the client chooses to rescind (Art. 1124 CC). Art. 25 *L. 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios* and Art. 1101 CC allow the consumer to claim for damages. If a hotel reservation has been made through a Travel Agency, the Agency should find another hotel according to the agreed conditions.

Freedom of contract allows limitation or exclusion of liability, unless damages have been caused intentionally ("*dolus*"): Art. 1102 CC and Art. 1103 CC allow the Courts to moderate compensation. However, the contract between a consumer and a hotel would surely contain standard terms. Art. 10. 1 c *L. 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios,* as modified by *Ley 7/1998 de 13 abril, sobre condiciones generales de la contratación*, forbids the creation of a manifest lack of equilibrium between the parties and Art. 10 bis 1 considers such clauses "abusive" (unfair) when contracting with a consumer. It is within the power of the Courts to consider whether a clause limiting liability is abusive and, where the contract is still in force, they may moderate obligations arising from it.

As for limitation of liability*, Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* would not permit an exemption clause.

The only cases that we know of in which the Administration (whether National, Autonomic or Municipal) is involved in the provision of entertainment services, concern parks or hotels operated through publicly owned companies that are subject to private law and not to administrative law. Therefore, the general rules on liability apply and no special jurisdiction intervenes. Only when the Administration has failed to survey the service (safety regulations and so on), liability may arise, the same as if a privately owned company provided the service. Special jurisdiction would then apply and the liability of the Administration would be strict, even where the provider's (whether public or privately owned) is fault-based.

b. United Kingdom

Case 1

There is no specific legal regime governing the liability of fairground operators towards consumers. Claims can be brought under contract and the tort of negligence. Negligence requires that the injury occurred as a result of a breach of a duty of care.

In contract the duty of care arises from the contractual relationship. A duty of care in tort arises if the injury is foreseeable, if there is a sufficiently proximate relationship between the parties and it is just and reasonable to impose such a duty (see *Caparo Industries plc v Dickman* [1989] 2 WLR 790, 816 per Lord Griffiths). These requirements are clearly fulfilled in Situation 1 and so no detailed enquiry is required here.

Liability in situation 1 would therefore boil down to whether the break down occurred because the operator failed in his contractual/tortuous duty of care. In tort the operator must take reasonable steps to avert dangers having regard to all circumstances of the case (thus one cannot rely on previous cases or precedents for what constitutes negligence, see *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, HL.) The burden of proof is normally on the claimant, however the maxim *res ipsa loquitur* (literally translated as "the thing speaks for itself) establishes a prima facie case of negligence in situations where (i) the defendant or his vicarious agent was in control of the thing that caused the damage and (ii) the accident must be such as would not normally happen without carelessness. If the operator of the roller coaster is in control of the machine and the fault, this is not problematic, but the accident might also be caused by a fault in the material which would result in liability of the producer (following product liability rules, especially the product liability Directives, implemented in the UK in the Consumer Protection Act 1987 and the General Product Safety Regulations 2005 (SI 2005/1803) and a comparison with the case law confirms that the accident in this case would normally not happen without carelessness: just as stones do not usually appear in cakes (*Chaproniere v Mason* (1905) 21 TLR 663) and trains do not normally usually collide (*Stafford v Conti Community Services Ltd* [1981] 1 All ER 691) fairground attractions do not normally break down while they are in use by the public and likely to cause injury unless someone has failed to take proper safety precautions. Apart from general contract and negligence rules, health and safety regulation may provide additional protection, requiring specific safety measures.

Assuming negligence on the part of the operator it is not possible for the operator to exclude or limit liability. Exclusion or limitation of liability for negligent breach of obligations (whether contractual or tortuous) is entirely excluded by Chapter 2 (1) of the Unfair Contract Terms Act 1977 (UCTA) as well as the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083, implementing the Unfair Contract Terms Directive).

Case 2

There is no special regime governing the liability of hoteliers to their guests. Liability in contact and the tort of negligence would be generally the same as for case 1. In particular, the facts would justify the inference of negligence (*res ipsa loquitur*). Whilst there is also liability under the Occupiers Liability Act 1957, it is of no practical significance here; the Act merely establishes a duty of care of the occupier of premises towards visitors, which in case 1 already exists in the tort of negligence anyway; liability is also fault based under the Act.

There is no possibility for the operator to exclude or limit liability in this case. As the staircase is dangerous it is to be assumed that this is due to the negligence of the hotel. Exclusion or limitation of liability for negligent breach of obligations (whether contractual or tortuous) is entirely excluded by Chapter 2 (1) of the Unfair Contract Terms Act 1977 (UCTA) and Unfair Terms in Consumer Contracts Regulations 1999.

All businesses have to carry out health and safety risk assessments under the Health and Safety at Work etc Act 1974. The assessment has to be "suitable and sufficient", which means that the assessment does not have to follow a specific structure, but can be adapted to the risks. The assessment has to be reviewed regularly. The assessment has to include five steps: identifying hazards, deciding who might be harmed by them and how, evaluating the risks and whether enough precautions are in place, recording of the findings. Businesses also have to adopt a Health, Safety and Environment policy (which has to be written, if the business has got five or more employees.

If in this case the staircase was not in use and this was notified with signs and blocking of the staircase, the hotel might not be liable, as long as the hotel has done everything necessary to avoid the accident.

Case 3

There is no special regulation of liability of hoteliers for not providing certain services. A remedy would lie in contract only if use of the relevant facilities were a term of the contract. The hotel would probably be taken to have promised these facilities if they were advertised in brochures or the facility is expected for a hotel of that star rating. If the hotel was booked as part of a travel package then the customer would have a claim against the travel organizer under the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288), which implement the Package Travel Directive 90/314/EEC. If the use of these facilities is advertised in a brochure then they become implied warranties [Reg. 6 (1)) and the organizer is liable (Reg. 15 (1)]. The organizer will have to compensate if they are not available [Reg. 15 (2)].

The possibility of excluding liability would depend on whether the hotel was booked directly by the customer or as part of a travel package. In the former case the Unfair Contract Terms Act 1977 (UCTA) and Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083) are relevant, in the latter the Package Travel, Package Holidays and Package Tours Regulations 1992.

In this case again, because it involves a contract between a business and a consumer, any term restricting or excluding liability must satisfy a test of reasonableness, S. 3 (2) (a) UCTA. Terms covered are also those which allow the user (i) to render a contractual performance substantially different from that which was reasonably expected of him or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, S. 3 (2) (b).

Chapter 3 would therefore certainly apply to terms restricting or excluding liability in respect of the failed provision of facilities in this case, so they would have to fulfil the requirement of reasonableness. The requirement of reasonableness "is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made", S. 11 (1). Assuming that the facilities the consumer could not use were part of the contract, the decisive factor is then the extent to which the hotel contemplated, or should have contemplated their not being available. It is unlikely that their unavailability is unforeseeable, therefore most likely the hotel would not be able to restrict its liability.

If the hotel was booked as part of a travel package, then liability cannot be excluded (Reg. 15 (3) Package Travel Regulations). The exceptions in Reg. 15 (2) do not apply in this case.

c. Belgium

There are no specific liability rules in case of accidents in the service sector in general or in the entertainment sector in particular. However all equipment of amusement parks has to comply with safety requirements fixed by law. Interestingly safety rules for "attractions" are set by a Royal Decree of 10 June 2001 on the operations of "attractions" that is based on the Act of 9 February 1994 on the safety of goods and services implementing the consumer safety Directive (Directive 2001/95/EC, that only applies to products). Service within the meaning of this Act is (only) the putting at the disposal of a consumer of a hazardous product or the use by the service provider of a product that is hazardous for consumers (according to an amendment by Act of 2001). The R.D. provides that the operator has to make sure that the attraction is installed, inspected, maintained and provided of warnings for the users in such a way that they do not bring the safety of the users in jeopardy in normal conditions of use or other conditions that are reasonably foreseeable for the operator. The attraction itself has to comply with the general safety requirement of the Act and the specific safety requirements for the manufacture of the attraction as provided in an Annex to the R.D.

Non observance of these requirements can be qualified as negligence giving rise to tortious liability. It has also been decided that the operator of an amusement park is a "guardian" of the park (the good) within the meaning of Article 1384 (1) Civil Code. According to that provision each person is liable for damage caused by a defect in a (movable or immovable) good which is under his care. On the other hand where a child entered an amusement park where a sign clearly indicates that it was closed and that access was prohibited the parents could not rely on Article 1384 (1). Note that the liability is extra-contractual, although the consumer who has paid for the access to the amusement park is in a contractual relationship with the operator. The general rule of exclusion of concurrence between contractual and extra-contractual liability which exists in Belgian law would not seem to exclude the liability under Article 1384 (1) (extra-contractual liability) in this case since the occurrence of the accident is not contingent on the existence of a contract and the responsibility for the accident will most often constitute a criminal offence (in which case concurrence is not excluded).

Apart from the safety provisions (for hotels there are safety provisions regarding the danger of fire) the regime in case 2 is the same as the one described in the answer to the first question [Article 1384 (1) Civil Code].

With regard to case 3 there are no specific provisions for hotel contracts in Belgium, although the classification of hotels (stars) may have civil law consequences. Where a consumer books a room in a four stars hotel he is entitled to expect the presence of certain facilities. Where they are not there would be breach of contract.

Conversely where a given type of equipment is not standard in a hotel of the category in question and the management has not specifically advertised with the presence of that equipment or promised that it would be available (at the request of the consumer) in case of non functioning or non availability of the equipment the consumer would not seem to have a claim.

A general exoneration of liability is not accepted in case 1 and 2. It remains however uncertain to what extent the operator could limit his liability.

The non performance of an ancillary service in case 3 would only give rise to a claim for compensation corresponding to the value of that service, i.e. in the form of a price reduction.

In case 1 and 2 there are no legal provisions limiting the amount of liability. Solely in case 3 such a limitation or exclusion would be valid subject to the application of the general clause on unfair contract terms (by creating a manifest lack of equilibrium between the parties: Article 31 Trade Practices Act).

Belgian law does not make a distinction between the liability of public bodies and private bodies in this respect.

d. Germany

A special statutory regulation of liability in the area of entertainment does not exist. Liability is determined according to general rules of civil law.

Relevant for case 1 is a contractual liability of the operator of the amusement park according to § 280 (1) BGB (*Bürgerliches Gesetzbuch* - German Civil Code), if the latter has breached an obligation arising from the contract concluded between it and the consumer. It must thereby be borne in mind that the operator is not only obliged to perform the obligations owed due to the contract (main performance duty), moreover so-called ancillary contractual obligations also exist. In particular so-called obligations to maintain safety represent such ancillary contractual obligations. An obligation to maintain safety requires that the person who creates or permits a sphere of danger must take all necessary and reasonable measures possible to prevent injury to third persons. Measures regarded as necessary are those which a circumspect and sensible and, within reasonable limits, careful person would regard as necessary and sufficient to protect others from injury. This requires firstly that the equipment erected or used must accord with the general construction safety requirements. General technical guidelines (such as the DIN-norms) can serve as a benchmark for these. Secondly it is necessary that the equipment is also kept in good working order. The operator of the amusement park can of course delegate these duties to third parties, he nevertheless retains the obligation of control and supervision.

If the operator breaches an obligation to maintain safety which results (causation) in a breakdown of a roller coaster and injury of the consumer, then the operator is liable to the consumer according to § 280 (1) BGB for the damages sustained as a result. Firstly, the necessary element of fault for contractual liability is presumed according to § 280 (1), 2nd sent. BGB, so that the operator must prove an absence of fault in respect of the breach of contractual obligation. Secondly, the obligations to maintain safety are also based on the benchmark of the general level of care to be observed, so that their breach indicates negligent conduct.

In addition to contractual liability in example 1, with regard to the breach of obligations to maintain safety, liability in tort according to § 823 (1) BGB is also relevant. The obligations to maintain safety represent obligations of conduct, the neglect of which can lead to tortuous liability.

Necessary elements for such liability are also the violation of a legal right named in § 823 (1) BGB (life, health, freedom, property or other right within the meaning of § 823 (1), 1st sent. BGB) as well as fault. In contrast to contractual liability no presumption of fault exists in tort. Thus the consumer must in principle prove the fault of the operator of the amusement park. As however the obligations to maintain safety are the benchmark of the level of care generally to be observed (see above), their breach indicates negligent conduct.

In the event of damage to health of the consumer, also relevant is liability of the operator of the amusement park according to § 823 (2) BGB in conjunction with §§ 229, 13 StGB (*Strafgesetzbuch* - German Criminal Code) (negligent bodily injury by omission).

In the second case liability on the same principles as in the first example is relevant. In such cases breach of an obligation to maintain safety is always necessary. Such a breach is given e.g. if the hotel owner has not kept the staircase in order or if the staircase is not secured with a banister despite its dangerousness.

Also relevant in cases 1 and 2 is that the obligor - here the operator of the amusement park and the hotelier respectively - cannot exempt itself from liability for intentional conduct in advance according to § 276 (3) BGB. According to § 309 No 7 a) BGB liability for injury of life, body, or health cannot be excluded or limited by reference to standard contract terms. Exemption or limitation of liability for other damages cased by gross negligence by reference to standard contract terms is impermissible according to § 309 No 7 b) BGB. If however the operator of the amusement park is a body of public law a limitation of liability for injury to person or health by reference to the body's charter may be relevant. Also in this case limitation of liability is not permitted to lead to exemption of liability for intentional conduct or gross negligence. The limitation must furthermore be objectively justified and accord with the principles of necessity and proportionality. A general statutory limitation of liability to a certain amount does not however exist.

In the third case the consumer can possibly reduce the price he has to pay for accommodation in the hotel (or alternatively afterwards claim a reduction if he has already paid the full price). The contract for accommodation in the hotel according to German law represents a mixed contract (German law distinguishes between different types of service contracts, see above III.1) with primarily rental elements. The absence of certain facilities in the hotel room can represent a defect in the subject of rental. This is the case if the presence of these facilities is to be expected according to either the prior agreement of the parties or by the consumer according to general business practice. The consumer then only has to pay a reduced price for the duration of the reduction in the appropriateness of the subject of rental according to § 536 (1), 2nd sent. BGB. If he has already paid the full rental price, then he can claim restitution of the difference between this and the reduced price. This reduction according to § 536 (1), 3rd sent. BGB is however in principle only relevant if the appropriateness of the subject of rental is considerably compromised by the defect. According to § 536d BGB the lessor cannot claim recourse to an agreement by which the rights of the lessee are excluded or limited if the subject of rental is defective and it has failed to mention the defect in bad faith.

e. Czech Republic

The liability for damage caused by breach of a statutory duty is relevant here. As in Czech law there is no special regulation on such tort liability, save for the liability of the state (a whole number of Acts, as e.g. the Act on fishing, railway transport, fire fighting etc. refer to the Civil Code), the provisions of §§ 420 *et seq.* of the Civil Code will apply to the given case. The owner or manager or operator of an amusement park may be liable either pursuant to § 420 (so-called "subjective liability") and/or pursuant to § 420a (so-called "objective liability").

Both provisions are general provisions in relation to a further special regulation. There is not much difference between them. The first case involves a liability based on a presumed culpability of offender; the second case involves a liability without culpability - the liability for damage caused by the operating activity, which is given, among other cases, if the damage has been caused by a thing used within the operating activity. Based on court decisions and academic opinion the preferred view is that operating activity does not necessarily represent an activity carried out for the purpose of a profit only and therefore the owner of the amusement park should be liable pursuant to § 420a.

Principally, liability for damage can be excluded by reference to a contract term. Only in exceptional situations the owner's liability could be limited or ruled out by a unilateral statement. Thus the mere fact that the owner has probably notified of the defects or risks of use of certain facilities in the park is not generally sufficient to exclude liability.

The Civil Code limits the compensation for damage in certain situations, e.g. damage to health (as in the given case).

In terms of liability it does not make any difference whether the service provider is a private or a public entity.

As to case 2 and 3 although the case of a hotel guest (consumer) and hotel manager is governed by an accommodation contract the general provision of non performance ought to be applied, if the performance (service) provided is defective since accommodation contract provisions (§§ 754-759 of the Civil Code) do not include relevant remedies.

Therefore in case 3 § 507 applies: if the defect cannot be remedied the consumer may claim an appropriate price reduction. As stated above, only a reduction of price for accommodation can be claimed. In case 2, for the reasons explained above general provisions on strict liability for damage (§ 420a) will be applied.

The liability of the manager of the hotel can be limited, subject to the observation of good morals and mandatory provisions of consumer protection. Again, it does not make any difference whether the service provider is a private or a public entity.

f. Finland

Case 1

There is no specific legal regime for amusement parks but the general *tuoteturvallisuuslaki* (Consumer Product Safety Act, inofficial translation) would apply. The Act partly implements the Consumer Safety Directive 2001/95/EC but contrary to the Directive *tuoteturvallisuuslaki* applies to both products and consumer services. There are also regulations provided by municipalities and the Consumer Agency.

Tuoteturvallisuuslaki and municipal safety regulations provide that the operator has to make sure that the attraction is installed, constructed, inspected, maintained and provided with warnings for the users in such a way that they do not jeopardise the safety of users under normal conditions of use or other conditions that are reasonably foreseeable for the operator.

In case of accidents tort law applies. Strict liability applies so that all damages to health and property must be compensated and in the event of personal injury compensation for pain and suffering.

Criminal sanctions may also be imposed for deliberate or negligent conduct resulting in personal injury, under the *tuoteturvallisuusrikos* (Product Safety Provisios) in the Finnish Penal Code.

In all three cases relating to entertainment services there are no real ways to limit liability.

Moreover in Finnish law in none of the 3 cases does it make any difference whether the owner is a private person or a public body.

Case 2

There are no special regulations for hotel safety as in case 1 *tuoteturvallisuuslaki* and tort law applies. Even if safety instructions are provided exoneration from liability is only possible where the owner has done everything with care and all is done by the book as *bonus pater familias* -principle requires. As in case 1 there is no possible limitation of liability.

Also it is irrelevant whether the hotel owner is a private person or a public body.

Case 3

There is no specific legal regime for hotel services in Finland. The star rating of a hotel is relevant for customers' expectations. For example in an expensive and highly-rated hotel the customer expected that iron, TV and other services are included. If these expectations are reasonable according to general principles of consumer law the consumer will have a right to a price reduction or compensation.

Where the hotel had advertised and promised such facilities there would be breach of contract. In all other cases customers' realistic expectations are considered.

The non performance of an ancillary service would only give rise to a claim for compensation corresponding to the value of that service, i.e. in the form of a price reduction.

As mentioned above in Finnish law it is irrelevant whether the hotel owner is a private person or a public body.

2. Telecommunications

Case

The case example is intentionally limited to the ordering of a fixed line telephone connection via a telecommunications provider of the customer's choice, so as not to unnecessarily complicate the study by a plethora of individual problems which can arise from the multitude of offers available in the telecommunications business (such as prefix codes to re-route the call through a different provider, mobile phone contracts and internet services):

The consumer concluded a contract with a telecommunications provider to install a fixed line telephone connection. In return the consumer is obliged to pay a fixed price. Due to a severe storm the telephone lines belonging to the provider are damaged to such an extent that the fixed line telephone connection cannot be restored for several days.

a. Spain

Contracts for telecommunications services have been regulated partially by different special statutes in Spain. The main Act is: *Ley 32/2003, 3th November, General de Telecomunicaciones*, which results from the transposition into Spanish Law of the Directives mentioned above (*cf*. III. 2. a.). Nevertheless, this Act only mentions but does not regulate service providers' liability. Consumer protection and liability for defective services are regulated in *Real Decreto 424/2005, 15 April, por el que se aprueba el Reglamento sobre las condiciones para la prestación de servicios de comunicaciones electrónicas, el servicio universal y la protección de los usuarios,* and, specifically for the internet, RD 776/2006, 23 Juny, *por el que se modifican el Real Decreto 1287/1999, de 23 de julio, por el que se aprueba el Plan técnico nacional de la radidifusión sonora digital terrenal, y el real Decreto 424/2005, de 15 de abril, por el que se aprueba el Reglamento sobre las codiciones para la prestación de servicios de comunicaciones electrónicas, el servicio universal y la protección de los usuarios*, which partially modifies the former.

Defective services include failure to supply, interruption in the supply and bad quality of the service. If the service is interrupted, the consumer has a right to compensation (Art. 38.2 *e Ley 32/2003, 3th November, General de Telecomunicaciones*), which is defined by Arts. 28.2 and 3, 115 (telephone) and 120 RD 424/2005, 15 April, *por el que se aprueba el Reglamento sobre las condiciones generales para la prestación se servicios de comunicaciones electrónicas, el servicio universal y la protección de los usuarios* (as amended by RD 776/2006, for internet services). This compensation amounts to proportional reimbursement of the due fees for the time during which the service was interrupted, if the amount exceeds 1 Euro. Art. 102.3 RD 424/2005 expressly states that this right to compensation does not impede the application of general liability rules and, specifically, of the General Consumer Protection Act (*Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios*) or equivalent legislative Acts of the Autonomous Regions. Claims are to be assessed according to rules of private law or sector-specific legislation. With regard to quality standards, Art. 105.2 *d* RD 424/2005 provides that the contract must detail the quality of the service, in what cases breach gives rise to compensation and how this will be calculated; otherwise, private law rules apply.

Art. 15 RD 424/2005, concerning the interruption of telephone services, obliges providers to compensate, the quantum of damages being determined by different mathematical formulae. This quantum is reduced to the minimum if the damage is caused by *force majeure* (Art. 115.3): the quantum of damages is assessed by reference to the subscription fee and the duration of the interruption. Art. 115.4 states that the contract should include terms and conditions on how this duty to compensate shall apply and excludes compensation when interruption has been caused by the consumer's fault.

Art. 120 RD 776/2206, which modifies RD 424/2005 for internet services, also obliges internet service providers to compensate for the interruption of the service (the quantum of damages is determined by reference to the subscription fee and the duration of the interruption of the service) and also establishes the duty for the provider to include terms and conditions on how this duty shall apply. However, there is no provision on *force majeure*. Art. 120.3 RD 776/2206 only expressly excludes liability when interruption of the service is caused by the consumer's fault.

Art. 1105 CC excludes liability for *force majeure*. However, for contracts with consumers, the general Consumer Regulations apply (*Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios*) and there is no distinction as to whether services are provided by public bodies or by private entities.

Art. 26 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios*, whilst establishing liability of service providers, requires this liability to be fault based because the provider can escape liability if he can prove that he acted in accordance with its duties of service maintenance. The burden of proof is thus borne by the customer. Art. 28 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* strangely contradicts this rule however, because it declares strict liability. The article does not specifically mention "telecommunications services providers" (whereas it does, for instance mention for electricity or gas suppliers), but generally ascribes strict liability to providers of "services which include a guarantee of security, efficiency and functionality, which shall be maintained according to objective standards of quality before they are received by consumers".

If Art. 28.3 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* applies, the limit on compensation is fixed at 500 Million Pesetas (approximately 3 million Euros) (the amount to be periodically revised by the Government). This Act does not permit exclusion of liability.

As telecommunications are public services, Art. 106 of the Spanish Constitution (1978) could apply. This article states that individuals have the right to be compensated for any damage suffered as a consequence of the non-conform provision of a public service. It also requires this right to be defined by an Act of Parliament (*reserva de ley ordinaria)* and it excludes liability in cases of *force majeure*. Contracts between service providers and consumers are governed by private law, but in all cases where the Administration retains control over regulated sectors (albeit operated by private providers) it may be possible for users (individually or collectively) to claim damages from the Administration when it fails in its supervisory function.

There are no public or publicly owned telecommunications providers. Liability of the Administration, subject to Administrative law and to the specialized administrative courts would only arise when it could be deemed responsible for the lack of or deficient provision of such a public service.

b. United Kingdom

Telecommunications providers are regulated by OFCOM (Office of Communications), but in addition contractual and tortious liability applies. The Communications Act 2003 requires the providers to develop codes of practice, which have to be approved by OFCOM. The Communications Act 2003 does not regulate liability for non-performance or damages but the codes of practice have to include provisions on liability. Sec. 45 Communications Act 2003 allows OFCOM to set general conditions for the provision of telecommunications services. Sec. 52 Communications Act 2003 specifies the matters, for which OFCOM can set general conditions. They include complaints by domestic and small business customers, the resolution of disputes with domestic and small business customers, remedies and redress, information

about service standards, as well as any other matter necessary for the protection of domestic and small business customers. Such general conditions were first set on 22 July 2003 and several modifications have been made since. The modifications have to be notified. Paragraph 3 of the General Conditions requires the communications providers to

> "take all reasonably practicable steps to maintain, to the greatest extent possible: (a) the proper and effective functioning of the Public Telephone Network provided by it at fixed locations at all times, and (b) in the event of *force majeure* the availability of the Public Telephone Network and Publicly Available Telephone Services provided by it at fixed locations, […]".

Paragraphs 9 and 10 of the General Conditions lay out requirements for minimum contract terms and transparency obligations. These provisions only regulate what issues have to be regulated in the contract and which information has to be given, but they do not regulate the contents. Following para 14 of the General Conditions providers are obliged to produce a basic Code of Practice for Domestic and Small Business Customers. The codes have to be in plain English, which is easy to understand and copies have to be provided on request and free of charge. Providers also have to adopt codes of practice for any Premium Rate Services they offer as well as codes of practice for complaints and sales and marketing. The General Conditions also contain guidelines for codes of practice.

The liability of the providers is contractual and follows the normal rules for contractual liability, i.e. breach of contract if promises are not fulfilled. Some providers include special rules for defects caused by *force majeure,* others exclude any liability for these circumstances.

BT (British Telecommunications plc, the largest fixed line provider in the UK) offer a divert to any other landline or mobile number free of charge whenever possible, and alternatively a reimbursement of the line rental charge for the disconnected period on a daily basis. Other providers, such as Vodafone, exclude liability in case of *force majeure* or other external influences (such as problems with other providers or network disruptions).

The contract terms only promise the provision of services using reasonable skill and care as well as trying to minimise disruption. A customer therefore cannot claim reimbursement of charges for breach of contract as long as reasonable skill and care and some effort to minimise disruption is undertaken. This exclusion of liability goes very far and makes it very difficult to prove any failure of the service provider. Some providers exclude their contractual liability completely in case of *force majeure*. Liability for any loss of income is explicitly excluded.

BT offers generally a service guarantee, but the guarantee is excluded in case of *force majeure*. The code of practice limits liability to refund of rental for the period without service but also makes a commitment to call diversion whenever possible. In other cases, BT limits the liability for financial loss to £1000.00 (around 1450 Euros) per residential phone line. Claims have to be made within four months of the problem being solved.

Also, BT's liability is limited for certain contracts (pay & call, a pay as you go service and BT In-Contact Plus, which only allows to receive calls and phone out to emergency services as well as some BT services).

Vodafone do not promise that service will be available at all times in their contracts (and standard terms and conditions). Regarding repairs, consideration of faults is promised, but the terms say explicitly that they do not undertake to resolve all faults. Defects in equipment are covered for the first 12 months after delivery, afterwards faults and defects are entirely the responsibility of the customer. Any liability for financial loss due to faulty equipment or otherwise defective service is excluded. Liability for negligence causing death or personal injury is not excluded, but liability is excluded for loss of profits or revenue, loss of use, lost business or missed opportunities, or indirect damage that was not foreseeable at the time of conclusion of the contract - whether negligence or otherwise (which implies intent).

Even if some of those exclusions may be unfair under the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1999, this will not have great practical relevance, since in many likely cases of defects, the service provision will not be included in the contract. Legal provisions ceiling the liability to a certain amount do not exist.

Whether the operator is a private person or a body of public law does not make any difference. Since the sector is privatised, all providers are private anyway. Generally, English law does not differentiate between contracts involving two private parties and contracts between a private party and a public entity.

Slight differences exist however for universal service providers (BT and Kingston). The universal service obligations are not only obligations to provide the services at affordable prices and to all locations, but they also require a certain minimum level of service (i.e. a minimum speed for internet connections of 28.8 kbit/s).

In case of lack of maintenance the liability depends on the service the individual provider promises in the contract. If this service is not provided, the provider is liable for breach of contract. Liability can be limited or excluded, as long as the clauses are not unfair. In practice, some providers exclude liability as far as possible, but the more crucial point seems to be that the services offered are different and likely defects are not promised in the contract.

c. Germany

Contracts for telecommunications services have partially been regulated by special statutes in Germany, e.g. by the *Telekommunikationsgesetz* (Telecommunications Act - TKG), which serves transposition of the Directives mentioned above (with the exception of the Competition Directive, *cf*. III. 2. a.). These statutes do not however regulate liability entirely. § 44a TKG only limits liability to a certain amount (see below). In general the provider of the telecommunications services is liable according to ordinary rules of civil law.

In Germany a contract to activate a line for the exchange of speech (or data) is regarded as a contract to pursue an activity in the form of a continuing obligatory relationship. For these contracts no special rules concerning non-performance and liability exist. Thus the common rules about defective performance are applied. If a fixed line telephone connection cannot be provided due to cable defects caused by a heavy storm, it is impossible for the provider of the telecommunications services to perform. The customer is therefore not obliged to pay the agreed consideration for the relevant time period according to § 326 (1), 1st sentence BGB. If he has already paid, then he can require restitution of this sum from the provider according to § 326 (4) in conjunction with §§ 346 - 348 BGB.

According to § 280 (1), 1st sentence BGB the telephone provider furthermore is liable to the customer due to breach of contract for damages suffered as a result of the lack of service.

A condition of this claim, however, is that the telephone operator is responsible for the inability to perform. In this respect there is a presumption that the debtor (i.e. the telephone operator) must be responsible. In the event that the damage to the line is solely due to the severe storm and thus solely due to natural factors (*force majeure*), the telephone operator will, however, be able to rebut this presumption. The case is different is the failure in service is due to deficient maintenance of the telephone lines.

Also liability in tort (§§ 823 et seq. BGB) - which in German law is available alongside liability in contract - requires fault. Nevertheless, liability of the telephone provider will generally be excluded according to rules of tort law even if it is at fault. That is because German tort law only grants protection against the violation of certain rights (e.g. life, health, freedom and property), but does not protect the individual against a mere loss of wealth.

Tortuous liability on the part of the telephone provider would also be excluded in the unlikely - nevertheless possible - case in which the consumer could not call the emergency services due to a failure in the telephone service and thereby suffered severe injuries to health. A failure to adequately maintain the telephone network could only ground liability for an omission. Such liability according to German law however requires firstly a positive duty to act as well and furthermore that this positive duty to act should prevent precisely this kind of damage from occurring. At least the latter is lacking in respect of the owner's duty of maintenance.

The liability of the debtor - i.e. the provider of the telecommunications services - for intentional conduct cannot be excluded or limited prior to the infringement. According to § 309 No 7 a) BGB liability for injury of life, body, or health cannot be excluded or limited by reference to standard contract terms. Exemption or limitation of liability for other damages caused by gross negligence by reference to standard contract terms is impermissible according to § 309 No 7 b) BGB. On the other hand it remains however possible to exclude or limit liability by reference to standard contract terms for other damages than injury of life, body, or health merely caused by ordinary negligence. Thus for example *Arcor* excludes liability for these other damages by reference to standard contract terms in case that the damages only result from ordinary negligence. Germany's main provider of telecommunication services, *Deutsche Telekom,* on the other hand does not limit liability by reference to standard contract terms for contracts to merely activate a fixed line for the exchange of speech but only for contracts to also provide internet services. For these contracts liability for ordinary negligence is limited by reference to standard contract terms to a fixed amount of money. According to § 307 (2) No 1 BGB it is finally impermissible to obligate the customer to pay the agreed consideration although the provider is unable to perform or to exclude the customer's right to require restitution in case he has already paid.

§ 44a 1st sentence TKG limits the liability of the telecommunications service providers to an amount of 12,500 Euros per customer. The liability is also limited to an amount of ten million Euros in total for each incident causing disruption. The damages are reduced proportionally, if the damages that the provider has to pay to numerous individuals because of the same incident exceed this limit. The limitation is not effective, if the damage is caused intentionally. If the customers are consumers, § 44a 5th sentence TKG prohibits a contractual limitation of the provider's liability for the damages incurred by customers to an amount lower than the amount for minimum damages regulated in the sentences before.

After the liberalization of the telecommunications market and the abolition of the state monopoly telecommunications services are only provided by private law entities subject to the general rules of civil law. It is also irrelevant whether the state is a major shareholder in the entity. Thus there is no distinction in liability between public and private entities in the telecommunication market any longer.

d. Czech Republic

Under Czech law a provider is responsible in the given case. With regard to the possibility of the provider to exclude or limit his liability, it has to be taken into account that compensation for damage can be limited only in the way allowed by the Civil Code, unless otherwise provided in the contract and on condition of compliance with good morals and protection of the consumer. Under the general provisions of the Civil Code for compensation limitations are stated. In terms of liability it does not make a difference whether the service provider is a private or a public entity.

e. Finland

Telecommunications services are regulated in Communications Market Act. The user has the right to obtain a subscriber connection to the fixed telephone network in the user's permanent domicile. A telecommunications operator may refuse to enter into an agreement for a subscriber connection only on grounds laid down in the Communications Market Act. The legal relationship between the consumer and the telecommunications operator is also covered by the Consumer Protection Act (38/1978).

According to the Act the agreement for a subscriber connection shall also specify liability for defects. If the error is reparable the consumer has the right to claim supplementary performance from the telecommunications operator. Furthermore the consumer is entitled to a corresponding price reduction and a compensation for the damage possibly incurred.

In case of compensation consumer is entitled to at least 15 euros for each week that the telephone line is defective (maximum 120 euros). If further damages are incurred consumer protection principles may apply. If the damage results from negligence compensation is possible. This is subject to a principle of reasonableness. However, if the damage is solely attributable to *force majeure* the operator is not liable.

It is impossible for the provider to limit or exclude his liability.

Following privatisation of the telecommunications industry in Finland it does not make any difference whether the service provider is a private or a public entity.

3. Rail Transport

Case

A consumer books a train ticket, which costs 50 Euros, from A to B (airport). The train is delayed for 150 minutes, because it turns out in the cause of a routine control, that the locomotive driver is drunk. The service provider is unable to replace him for some time. Caused by this delay, the consumer misses his plane, which causes him damage. He has to pay an additional fee of 500 € for the necessary booking of a later flight.

a. Spain

Liability for health services, gas, electricity and transport is strict (Art. 28 , *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios*). Railway service providers may be public or private; the sector is liberalized (Art. 42.2, II *Ley 39/2003, 17* November*, del Sector Ferroviario*).

According to Art. 59 e *Ley 39/2003*, users have a right to compensation in case of delay, but Art. 89 of the statutory instrument that further defines the service (*Real Decreto 2387/2004, 30 December, por el que se aprueba el Reglamento del Sector Ferroviario*) restricts the provider's liability for delay, and determines its extent in case of interruption or cancellation. For instance, if the delay does not exceed an hour, there will be no compensation; if it does, and as long as it is not due to *force majeure*, 50% of the value of the ticket will serve as compensation. These specifications are incorporated into the terms and conditions published by the public enterprise *Renfe-Operadora*, which at the moment has no private competitors.

There certainly is a limitation in liability for certain delays that benefit a public enterprise. Therefore, according to this regulation, compensation for delay would appear to be restricted to part of the ticket price and would only apply for certain qualified delays. Notwithstanding, liability for breach of contract cannot be excluded and the consumer may claim pecuniary and non-pecuniary damages (such as those caused by missing a flight) before the courts or through arbitration (transport or consumers arbitration). This is confirmed by said Art. 89 of the aforementioned statutory instrument and by clause 25 of *Renfe's* terms and conditions. On the other hand, because it is a contract with consumers, *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* applies.

If Art. 28.3 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* applies, the limit on compensation is fixed at 500 Million Pesetas [circa 3 Million Euros] (the amount to be periodically revised by the Government).

The same kind of terms and conditions would be approved were the company private, since the statutory instrument that further defines the service specifically provides for these limitations of liability (Art. 89 *Real Decreto 2387/2004, 30 December, por el que se aprueba el Reglamento del Sector Ferroviario*). Thus there certainly are restrictions to liability in the relevant regulations and in general terms and conditions that currently benefit the public enterprise that is in charge of providing railway services in Spain and, so far, has no competitors. Statutory instruments, though, would allow these restrictions even when the provider were private. In all cases, claims for this restricted compensation are compatible with general claims for lack of performance or breach of contract.

b. United Kingdom

All rail operators in the UK are privately owned. Thus there is no need to legally distinguish between private and public entities. The network (infrastructure, such as track, signalling, bridges, tunnels, stations and depots) is operated by Network Rail, other private companies licenced for passenger train operation operate the trains. The licences require the passenger train operators to include the National Rail Conditions of Carriage (hereafter NRCC) into all contracts with customers. According to No. 42 NRCC where delays arise for reasons within the control of the train company (such as "shortage of staff" or a drunken driver) the passenger is entitled to compensation in accordance with the arrangements set out in that train company's Passenger's Charter (which all passenger train operators are required to have). As the train driver is vicarious agent of the train company, the train company is liable for his conduct. This would follow from general rules, but is explicitly specified in condition 44 of the NRCC. The amount of compensation varies between companies. However, if the train is more than one hour late, as is the case here, as a minimum set in condition 42 (b) NRCC the passenger is entitled to compensation in form of travel vouchers of 20% of the price paid for the ticket. The rules apply accordingly to return tickets (10% refund if either outward or return journey is at least one hour delayed, 20% refund, if both journeys are at least one hour delayed. Condition 42 (c) states explicitly that the compensation granted based on condition 42 regulates the liability for this case finally:

> "This Condition 42 sets out the entire liability of the relevant Train Companies in relation to delays, cancellations and poor service. Except as shown in this Condition 42, the Train Companies do not accept liability for any loss (including consequential loss) caused by the delay and or cancellation of any train. However, they will consider additional claims in exceptional circumstances."

Train companies usually do not accept liability for any loss (including consequential loss) caused by the delay. They will however consider additional claims in exceptional circumstances. The availability of any meaningful remedy would therefore essentially depend upon the discretion of the rail operator. In cases such as the situation at issue, fear of bad press will occasionally compel the rail operator to reach a settlement with the victim.

The customer could decide not to travel and return the ticket. If the ticket is returned immediately, the price paid for the ticket will be refunded immediately (condition 26 (a)). This may be subject to an administrative fee not exceeding £10. For certain types of reduced or discounted tickets, the refund may be restricted. Refund can be given (condition 27) in cash or cheque (including return of the customer's cheque), in case of payment by credit card or debit card by credit to the relevant account, or Rail Travel Vouchers. Special rules apply for season tickets.

For the route in the example, from Manchester Airport to Hull, the route includes two train operating companies, Northern Rail from Manchester Airport to Manchester Piccadilly, and Transpennine Express from Manchester Piccadilly to Hull. Northern Rail offers 50% refund of the price paid for the ticket in case of delays of more than one hour. Transpennine Express (part of First Travel Group) offers 100% refund (in vouchers) for delays of 30 minutes or more for single tickets, and 50% for return tickets. For delays of more than one hour, Transpennine Express offers 100% refund for the whole train journey.

c. Germany

Transport by rail would be considered as a service contract, which obliges the service provider not only to make all endeavours necessary, but also to reach the result promised under the contract ("*Werkvertrag*" or "*obligation de résultat*"; not "*Dienstvertrag*" or "*obligation de moyenne*"). Therefore, according to general rules, the service provider breaches the contract and would be liable for damages. However, a specific provision in the railway regulation (§ 17 *Eisenbahnverkehrsordnung*) excludes the carrier's liability, except for the cases covered by the COTIF/CIV It has been questioned, whether this provision infringes EC-Law, in particular the Unfair Contract Terms Directive 93/13/EEC. But as this exclusion clause is not part of unfair standard term but a statute, it not subject to any of the controls installed under the transposition law of this Directive.

Under public pressure, the biggest service provider, *Deutsche Bahn AG*, meanwhile grants in a "Customer Charta" a small refund of the ticket price if a train is delayed for more than 60 minutes. The refund would be 20% of the ticket price and as a minimum 5 Euros, which will not be paid in cash but in the form of a travel voucher. This compensation scheme is only applicable for long-distance trains. In the case under examination, the consumer would be entitled for a travel voucher which is worth 10 Euros. Further damages would be excluded under § 17 *Eisenbahnverkehrsordnung.*

The actual German government is planning to improve the protection of railway customers in case of delayed trains. It is under discussion to grant the passenger higher compensations in case of delays which are attributable to the carrier (e.g. more 30 minutes 6-10 Euros; more than 60 minutes 50%, more than 120 minutes 75%).

The *Deutsche Bahn AG* is a private company, which shares are owned to 100 % by the German state. It also underlies a universal service obligation (§ 10 *Allgemeines Eisenbahngesetz*). Both, the broad exclusion of damages under § 17 *Eisenbahn-verkehrsordnung* and the universal service obligation under § 10 *Allgemeines Eisenbahngesetz* are applicable also on non state owned railway operators.

d. Czech Republic

The very general and basic legal framework in the Czech Civil Code merely regulates general features of transportation contracts (§§ 760-764-Contract of transport of persons). The law imposes a duty on the transport provider to achieve a specific result: to bring the consumer to a specific destination (§ 760). Under the regime of the regular transportation the provider, in case of damage incurred to the consumer as a consequence of any delay, is obliged to pay damages [§ 763 (2)]. Having said that the Civil Code refers to the railway regulation (No. 175/2000). That regulation (No. 175/2000) however, excludes explicitly any claim for damages [Sec. 42 (4)]. The situation is highly questionable as the Civil Code is silent. It appears to be preferable to assume that the provider is liable since the liability provided by the Civil Code should not be excluded by a secondary legal source.

e. Finland

Liability of rail transport companies to their passengers is based on the transport contract. Rail transport companies are liable to indemnify a passenger for damage and loss generated by a delay in train services, the maximum compensation being € 5000. The economic and financial damage or loss generated must be sufficiently established by the passenger.

However the liability for damages excludes such delay to which the passenger can reasonably expect to be normal, such as due to weather conditions, a possible change of transport vehicles, or other transport-related circumstance. This does not include the train driver being drunk.

A pre-requisite of liability is negligence.

Public or pivate ownership is irrelevant for liability.

4. Liberal Professions (Legal Advice)

Case

A legal representation becomes more complex and time-consuming than expected. The lawyer charges higher fees without having previously informed the client.

a. Spain

Fees are regulated in *L. 2/1974, 13th February, de Colegios Profesionales and Real Decreto 658/2001, 22 June, Estatuto General de la Abogacía*. Art. 4.1 ñ RD 658/2001 and Art. 5 ñ L. 2/1974, establish that lawyers are free to fix their fees, so they are not obliged to follow the Bar recommendations. The Bar Association standards are provided for reference only and if no alternative agreement exists. Such regulation aims to increase competition and, as a consequence, to improve the provision of legal services. Nevertheless, Art. 44 RD 658/2001 adds that fees should be fixed in accordance with the services actually provided by the lawyer and codes of ethics and legislation against unfair trading demand moderation (also, Art. 2.2 and 2.4 L. 2/1974; Art. 1 *L. 16/1989, 17th July, de Defensa de la Competencia*).

Judgements on costs always apply the Bar standard fees (Art. 44.1 RD 658/2001). The Bar Association may adopt disciplinary measures in cases where the lawyer's fees have repetitively been declared excessive or undue (Art. 44.4 RD 658/2001) and this is considered an administrative infraction (Art. 85 RD 658/2001), sanctioned with the suspension of the license to practice for up to 3 months (Art. 87.2 RD 658/2001).

In any case, lawyers can always claim expenses from their clients (Art. 44.1 RD 658/2001).

Spanish Law forbids the so-called *quota litis* agreements, i.e., agreements entered into by the lawyer and the client before the case is closed where the latter promises to pay the former a percentage - in money, goods or other benefits - of what is finally granted by the court, so that conditional fee arrangements are not allowed (Art. 44.3 RD 658/2001).

Where a fee has been fixed contrary to the principle of moderation, only the Courts, not the Bar Association, can reduce it. The same applies when there is no agreement on the fee; the Courts may be required to set remuneration, in accordance with the importance of the case and the nature of the service carried out. Neither Lawyers nor Courts are obliged to follow the Bar standards. Lawyers have to prove what services have been rendered as well as the results attained (among others, STS 8 November 2004 [RJ 6720]; STS 25 October 2002 [RJ 9911]). Agreements on costs are forbidden (STS 12 May 1998, RJ 3577).

The Bar Association may act as an arbitrator (Art. 4.1 n RD 658/2001) if the parties have agreed to submit the dispute to arbitration; otherwise they maintain the right to claim before the Courts.

There are no mandatory rules about the lawyer's duty to inform his client regularly about the progress of the case and its consequences with regard to the fees. The different Bar Associations establish their own rules. For instance, the Barcelona Bar Association recommends lawyers provide the economic previsions in writing with regard to (See. *Collegi d'Advocats de Barcelona. Criteris orientadors en material d'honoraris, 2005*):

a) Description of the service and/or required activities.

b) Criteria that apply to calculating the basis and the amount of the fee,

c) Provision for possible occurrences that may arise while carrying out the professional activity, and how they will be quantified,

d) Estimated budget of initial services,

e) Reference to fees due to other professionals that may intervene,

f) Time and means of payment of the fee.

The Barcelona Bar Association rules also establish the need to inform the client and act upon his or her written consent, when it is reasonable to expect the fees to amount to more than 25% of the economic value at stake.

Remedies adopted by Courts are independent of this duty to inform. Bar Association rules, at least in Barcelona, do not provide for sanctions for breach of the duty to inform, although it may amount to malpractice and give rise to disciplinary measures.

Public bodies do not as a rule provide legal services. When, for instance, a Bar Association offers legal advice, it acts in its private entity capacity. Private law rules apply and the ordinary jurisdiction will hear cases arising from this relationship. If, on the other hand, the town hall or some other public body were offering legal advice, it would do so for free and it would advertise the service stating clearly that the advice given can never replace a lawyer's criteria. Therefore, liability would be excluded, but the same would apply were the information provided by a private association.

b. United Kingdom

The position is, of course, initially a matter of contract between lawyer and client, though, as will be seen, there is significant protection for the client imposed by statute and cannot be contracted out of.

The legal position in England and Wales is very different depending on whether the case is "contentious business" (court proceedings) or "non-contentious business" (not court proceedings), though the definitions are rather strange, and a surprising amount of work related to court proceedings is within the definition of "non-contentious business". The definitions are in s.87 Solicitors Act 1974, which statute forms the statutory basis of state regulation of the profession of solicitor in England and Wales.

"Contentious business" is "business done whether as solicitor or advocate in or for the purposes of *proceedings begun* before a court or before an arbitrator appointed under the Arbitration Act 1950 other than non-contentious probate business" (our emphasis) (i.e. work on litigation, *but only after court or arbitration proceedings have been formally "begun"*). All other legal work (including preparatory work for litigation or an arbitration, prior to formal commencement) is "non-contentious business". Furthermore, work in all proceedings before most administrative tribunals and the first-level employment tribunals is classed as "non-contentious business" (both before and after commencement).

Non-contentious business

The normal way in which the client would challenge the solicitor's bill is for the client to require his solicitor to obtain a remuneration certificate from The Law Society (the body which currently performs both the representative trade association function for solicitors and also acts as regulator delegated by the state, though the two functions are to be separated later this year). The legal basis for this is The Solicitors' (Non-Contentious Business) Remuneration Order 1994 (SI 1994/2616).

A remuneration certificate states what sum The Law Society considers would be a fair and reasonable charge for the work covered by the bill. It could be the same as the original bill or a lower amount, but not more. The solicitor cannot recover more than the amount permitted under the certificate.

The procedure does not deal any other issues than the reasonableness of the fee, i.e. it does not deal with, for example, alleged negligence by the solicitor, disputes as to the terms of the instructions the client gave, disputes about the law, or disputes about the quality of the work done.

The remuneration certificate procedure only applies if the bill is for less than £50 000. The client must be informed in writing of his right to require a remuneration certificate before the solicitor may sue on the bill (this is generally done on the bill itself). The client loses his right to require the solicitor to seek a remuneration certificate if either (i) he does not inform the solicitor within a time limit (which is, generally, one month from the date of the bill) or (ii) the client has already paid the bill. The solicitor can require the client to pay half the amount of the bill before he makes the application. The client pays no fee for this process.

Art. 3 of the 1994 Order says that "fair and reasonable" remuneration has to be decided

"having regard to all the circumstances of the case", but lists the following factors to which regard is to be had "in particular":

(a) the complexity of the matter or the difficulty or novelty of the questions raised;

(b) the skill, labour, specialised knowledge and responsibility involved;

(c) the time spent on the business;

(d) the number and importance of the documents prepared or perused, without regard to length;

(e) the place where and the circumstances in which the business or any part thereof is transacted;

(f) the amount or value of any money or property involved;

(g) whether any land involved is registered land;

(h) the importance of the matter to the client; and

(i) the approval (express or implied) of the entitled person…..to:

  a. the solicitor undertaking all or any part of the work giving rise to the costs; or

  b. the amount of the costs.

If the solicitor had given an estimate of his fees in advance, then in general the permitted amount of the bill will be reduced to that figure, even if the estimate was only given casually, unless it is very clear that the client did not rely on that estimate in deciding to instruct the solicitor and could not reasonably have expected to have done so.

Exceptionally, the client could apply to the court for "taxation" of the solicitor's bill in respect of non-contentious business, in a similar way to the "taxation" of a bill for contentious business (see below) but the client will have to pay the professional fees relating to the "taxation".

Contentious business

The assumption we make is that the matter is purely one between solicitor and client, and there is not any question of some other party (the loser in litigation involving the client) who is having to contribute to the client's legal bill and wishes to challenge the amount (in which case other rules would apply).

The client can apply in the High Court for "taxation" of the solicitor's bill, also referred to as "costs assessment" (i.e. assessment of the bill by a judge specialising in assessing solicitors' bills, who verifies whether (i) it was reasonable to perform all pArts of the work the solicitor performed, and (ii) the amount of the bill is fair and reasonable). The legal basis is s.70 Solicitors Act 1974.

If the client applies for "taxation", the solicitor cannot sue on the bill until completion of the process. The client loses the right to seek "taxation" if he does not apply to the court within 12 months of delivery of the bill, unless the court is convinced that "special circumstances" apply (there is case-law about that). Similarly to the position with a remuneration certificate, the court can confirm the amount of the bill or reduce it, but cannot increase it.

In relation to fees for contentious business as between solicitor and client, rule 44.5 of the Civil Procedure Rules 1998 state that the court is to "have regard to all the circumstances" in deciding whether the fees were of a reasonable amount, and then goes on set out a list of factors (to which "regard" must be had in so doing) which are very similar to those set out above in relation to non-contentious business.

Whilst the court will in the end apply its own view (and very often reduce the amount of the bill on either or both of the grounds above (unreasonably incurred; unreasonable in amount)), rule 48.8 of the CPR says that, in relation to solicitor and client "costs" (as fees are referred to), "costs" are presumed:

- to have been reasonably incurred if they were incurred with the express or implied approval of the client;
- to be reasonable in amount if the client has either expressly or by implication approved the amount; and
- to have been unreasonably incurred if both (i) their nature or amount is "unusual" and (ii) the solicitor did not tell the client that as a result he might not recover all of them from the other party (in the event of the client winning the litigation).

Costs assessments are generally handled by the separate profession of costs draftsmen, and can be very time-consuming, complicated and themselves expensive in terms of professional fees.

c. Belgium

Art. 459 of the Code of Civil Procedure (*Gerechtelijk Wetboek, Code Judiciaire*) provides that lawyers have to fix their fees with the moderation that is expected from their profession. Contingency fees are not allowed. Where the fee is not fixed in accordance with the principle of fair moderation it is reduced by the Bar Council having regard to the importance of the case and the nature of the work.

Where the lawyer has fixed the fee unilaterally (generally with the implicit agreement of the client) the court can only exercise marginal control.

Where parties have not agreed to submit the dispute to arbitration they maintain the right to submit the dispute to court.

The French and German Bar of Belgium and the Flemish Bar of Belgium have both adopted rules on the information to be provided to clients regarding fees. The Flemish bar has recently drafted a model contract between lawyer and client containing these duties. These duties are limited to the pre-contractual phase. Where the lawyer and his client have entered into an agreement regarding fees (hourly rate or flat fee) the Bar Council cannot reduce the fee.

The rules and the model contract do not mention the duty of the lawyer to inform his client regularly about the accumulation of the fees. It should be mentioned in this regard that under present Belgian law lawyers' fees can generally not be recouped from the losing party.

Since there is no general duty for the lawyer to inform the clients about the accumulation of fees in a case, or the clients' right of appeal against them, a reduction of the fee by the Bar Council or the judge will only occur where the fee is unreasonably high, but not because the client was unaware and could reasonably be unaware of the amount.

A recent study of the decisions of bar councils in Flanders has provided interesting information on fee disputes (number of disputes and number of lawyers concerned, the breakdown of fee disputes according to the type of clients: 73,72 % being private individuals, the criteria used for the reduction of the fees, the occurrence of retainers, the success rate of client claims: less than 40% etc..). The study does not mention any disputes about the lack of regular information of accumulation of the fees. This might partly be explained by a typical practice by lawyers to ask for retainers (although consumers may still have questions as to when the retainer will be exhausted and followed by a new one).

d. Germany

Lawyers fees are regulated in a particular statute, the *Rechtsanwaltsvergütungsgesetz* (Law on the Remuneration of Lawyers). This statute provides for tariffs which cover the very most cases of legal representation. Lawyers and clients can agree on fees which are higher than the tariff. In exceptional cases the lawyer may also agree fees which are lower than the tariff (§ 49b (1) *Bundesrechtsanwaltsordnung* [Federal Lawyers Act]).

Because of the system of tariffs, lawyers are generally not obliged to inform their clients about their fees. However, if the height of the fees depends on the value in litigation (which is often the case), the lawyer must just indicate that this criterion is relevant (§ 49b (5) *Bundesrechtsanwaltsordnung* [Federal Lawyers Act]), but not calculate the concrete amount (*Hartmann*, NJW 2004, 2484). A client, irrespective whether he is a consumer or not, is deemed to know that he will have to pay the statutory fee. Therefore clients are expected to inform themselves or to ask their lawyer. If the client does not ask, the lawyer is only obliged to inform the client about the fees to be expected in very exceptional circumstances (Federal Supreme Court, decision of 14 December 2005 - IX ZR 210/03). If asked, the lawyer must, of course, inform about the amount the fees will probably reach (Federal Supreme Court, judgement of 13 March 1980 - III ZR 145/78). If it turns out later that the preliminary assessment was to low, the lawyer must timely inform the client that the fees to be expected will be higher. If the lawyer does not timely inform the client on the excess of the originally estimated costs, he cannot charge the client with the surplus (Federal Supreme Court, judgement of 26 October 1955 - VI ZR 145/54; judgement of 13. 3. 1980 - III ZR 145/78).

Under German law, in those (many) cases where the tariff apply, the lawyer will normally not be obliged to inform the client about the estimated amount of his fees. However, he must inform the client that the statutory fees will depend on the value of the issue in question.

Only in the case when the lawyer has been asked by the client to inform on the amount of his fees and the actual amount of fees runs up much higher than the amount estimated, the client may refuse to pay the surplus.

There is no possibility of the lawyer to contractually exclude or limit his obligation to inform the client on the fact that the fees to be expected will be higher.

e. Czech Republic

According to Art. 9 of the Ethical Codex (EK) of the Czech Bar Association (Resolution of the Managing Board of 31.10.1996) the attorney is always obliged to inform his client promptly about the handling of its case and to supply him with the documents necessary for the client to make an informed decision about the further progress of the case. This can be interpreted to imply that the client must be promptly informed about costs and any charging.

In § 3 of the Czech Attorneys' Remuneration Regulation (Regulation No 177/1996) in conjunction with § 10 EK further details as to determination of costs and charging are given: according to these provisions the attorney is *inter alia* obliged to supply the client with true information as to the expected extent of his activity and his contractual remuneration. Contractual remuneration must be reasonable; in particular it may not be in a clear disproportion to the value and difficulty of the case.

The relationship between a lawyer and a consumer is, as a rule, based on contract, within, however, a mandatory legal framework of public law rules including the Act on advocacy (No. 85/1996 „Act").

The Ethical code ("Code") issued on the basis of Sec.17 and 44 of the Act states that the lawyer is not responsible for the result of the representations but he has to proceed in observing professional standards, respecting due care and exercising best efforts (sec.13 Act). He has *inter alia* to provide the consumer with adequate information of the scope of his activity expected including the amount of his fees (Art. 10 (1) Code). The fees must be proportionate taking into consideration the value and difficulty of the case. Other factors in assessing the proportionality of the fees are *inter alia* special knowledge experience and aptitude of the lawyer as well as his reputation and skills.

There is no specific rule in the Czech law which would explicitly provide for a lawyerś duty to inform his client of a expected significant increase of the fees in the process of representation.

There exists a claim for price reduction as a result of disproportionality of the fees. This is of course irrespective of the existence of specific lawyer's information duty if fees increase significantly. Apart from this, there may be a price reduction claim based on lawyer's liability for defective performance.

f. Finland

Pursuant to the Lawyers Act fees must be reasonable. Professional rules for lawyers are set by the Bar. The Finnish Bar Association has power to regulate prices and handle complaints.

A lawyers's fee is fixed for each mandate by the amount and quality of the work required. The degree of difficulty of the mandate and the interest involved are also relevant. The lawyer must inform his client about the fee during his first meeting with him and if the case takes more work than the work foreseen the lawyer is obliged to inform his client. The client may also ask the Bar Association for a recommendation regarding the fee. The recommendation will be given by the Supervisory Board, which consists of six lawyers and three persons other than members of the Bar.

A binding decision in dispute regarding a lawyer's fee can only be issued by a court. This however is only possible once arbitration possibilities before the board of the bar association of the consumer complaints board have been exhausted. The latter cannot make binding decisions but only recommendations.

The consumer can be granted a remedy against a lawyer who has failed to inform him that the fee will largely exceed what was foreseen: If through negligent or deliberate conduct the lawyer has allowed fees to accumulate without clearing this with the client first then the lawyer is in breach of the bar code of conduct. Therefore the consumer is entitled to claim for price reductions and even compensation. There is nevertheless the aforementioned procedural hurdle, that the consumer must first obtain a non-binding decision from an arbitration tribunal before seeking a binding court decision.

5. Health

Case 1

A needy patient (consumer) in a nursing home falls out of his wheelchair and is injured. The accident is caused by negligence on the part of the caregiver in charge.

Case 2

A consumer receives a dental implant in a dental practice and suffers injury caused by a medical malpractice.

a. Spain

90% of health services in Spain are public services. The *Seguridad Social* is the Spanish public health system and in the areas covered by the public system users do not conclude a contract with the operator of the facilities. For private health services see specifically *infra* case 2.

Art. 106 (2) of the Spanish Constitution (1978) states that individuals have the right to be compensated for any damage suffered as a consequence of the defective provision of a public service and it excludes liability in cases of *force majeure*. Health is a typical non-economic service, which is guaranteed by the Constitution and is therefore obligatory for the Administration. The Administration is liable for damages caused both by regular and irregular functioning of public services (Art. 139 LRJAP-PAC). Therefore, liability is strict.

Private or semi-public service providers are subject to the general fault based liability rules of private law. The general rules of tort contained in the Spanish Civil Code (Arts. 1.902 to 1.910) establish a fault based system of tortious liability.

Ordinary courts (*jurisdicción civil*) have always applied to the INSALUD (Social Security Organisation) and to the rest of sanitary bodies standards of liability based on fault (Arts. 1902 CC ss): lack of medical diligence and failure to conform to the *lex artis*. Damages should be a direct result of fault (causation) and both (damages and causation) have to be proven by the patient, unless the damages are disproportionate to the treatment (STS 29 June 1999, RJ 4895; STS 9 December 1999, RJ 8173; STS 15 September 2003, RJ 6418) or result from treatment not directed by a medical professional (such as, in most cases, cosmetic surgery) (either a *contrato de servicio,* contract of services or a *contrato de obra*, contract of manufacture) [*See infra* example 2]. However, surprisingly, the same criteria are applied by the specialized administrative courts (*jurisdicción contencioso administrative*). The purpose of establishing different forums has no real effect in practice, although it has to be emphasized that the ordinary civil courts are not able to declare liability on the part of the Administration.

It is necessary to distinguish between these two types of jurisdiction because, as the Spanish report explains, the forum to claim liability on the part of the Administration has always been a disputed issue. In any event though, ordinary courts will hear cases concerning private medicine.

Liability for health services is also regulated by Art. 28 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios*. Liability is strict, and it is irrelevant whether the provider is private or public. *Cf.* STS 15 September 2003 (RJ 6418), STS 1 July 1997 (RJ, 5471), STS 9 December 1998 (RJ 9427), STS 29 November 2002 (RJ 10404). However, sometimes the courts decide that Art. 28 LGDCU would comprise only public Hospitals but not individual professionals. See STS 1 July 1997 (RJ 5471), STS 9 December 1998 (RJ 9427), STS 29 June 1999 (RJ 4895), STS 24 September 24 (RJ 7272), STS 30 December 30 (RJ 9496).

On the other hand, in some other instances the courts have not applied Art. 28 LGDCU when the Administration was the defendant, especially with regard to health services.

In the given example case 1, the caregiver can be held liable under tort law according to Art. 1902 CC. There is also a direct claim against the hospital (if it is a private Hospital) where the caregiver is employed, for *culpa in vigilando* (Art. 1903.1 & 4 CC), unless the direction can prove that it supervised the employee with due diligence (general duty of care = diligence of *pater familias*). Claims against private entities are usually filed against the corresponding insurance companies (liability insurance is compulsory, as established by Art. 46 L. 44/2003, 21 November, *de Ordenación de las Profesiones sanitarias*).

Damages are met directly by Administration, if the Administration is the defendant (in the case of public hospitals) (Art. 145.1 L. 30/92, *de Régimen jurídico de las Administraciones públicas*); strict liability should apply. However, although the Administration is vicariously liable for the torts of its employees, the Administration has a claim against the employee to indemnify itself against such liability where the tort was committed in *dolus (intentionally)*, through fault or gross negligence ("*negligencia grave*") by the employee (Art. 145.2 L. 30/92,). The following criteria, *inter alia*, are relevant: damages caused, intent and personal professional liability (Art. 145.2, II L. 30/92). It may also be possible for the patient to claim directly against the Administration's insurance company (insurance regulated by Arts. 5, 9, 206.6 RD Legislativo 2/2000, 16 Juny, *por el que se aprueba el texto refundido de contratos con las administraciones públicas* and Art. 3 RD 1098/2001, 12 October, *por el que se aprueba el Reglamento General de la Ley de Contratos de las Administraciones Públicas*) or jointly against both of them (Administration and Insurance Company). But neither one nor the other are options very frequently used in practice. Pecuniary and also non-pecuniary damages (*pecunia doloris*) could be available.

Dental implants (case 2) are not covered by *Seguridad Social*. Accordingly, patients have to conclude a services contract with the dentist (often classified as *contract of manufacture,* since the result is relevant). The Spanish general rules on contractual liability are contained in Arts. 1.101 *et seq*. CC (*Código Civile* - Spanish Civil Code). Liability is fault-based and, where specific performance is not possible, compensation covers both damages and expectation interest. However, when the same facts can be classified not only as non-performance of a contractual obligation but also as a tort, the patient is free to choose whether to pursue his claim in contract or in tort (Art. 1101 CC, Art. 1902 CC). STS 28 June 1997 (RJ 1997, 5151), 10 November 1999 (RJ 1999, 8057) and 30 December 1999 (RJ 1999, 9752). Case Law has applied tortious liability in cases where the claimant has suffered injuries in a private dental clinic (*ex* Art. 1903.4 CC), when damages are caused either by the fault of the dentist or by a defect in the material used (STS 22 February 1991). With regard to dentists, courts tend to regard the contract as giving rise to an "*obligación de resultados*", i.e. a contract to achieve a particular result rather than to merely provide a service, so the burden of proof is easier for the patient to discharge (SJPI Cantabria, Santander, 25 April 2005, AC 2005/955; STS 22 April 1997, RJ 3249; 27 June 1997, RJ 5758; 21 July 1997, RJ 5523; STS 13 December 1997, RJ 8816, SAP Asturias 26 June 2006, JUR 16460). Once it has been established that the medical intervention did not achieve the expected results, case law obliges the physician or the medical centre to pay all costs for further treatment necessary as a result (STS 28 June 1997, RJ 5151; 2 December 1997, RJ 8964, 28 June 1999, RJ 6330, 24 September 1999 (RJ 7272), 2 November 1999, RJ 7998).

Rules apply, irrespective of whether the contract for services is concluded with the dentist himself or with the hospital or establishment is which he is employed. The burden of proof is borne by the patient (irrespectively of whether liability arises from contract or tort, SAP Murcia 26 February 2001, AC 2001/847), even though, as already noted, fault is usually presumed (*inter alia* STS 16 April 1991, RJ 2697, STS 11 February and 12 February 1997, RJ 940). Pecuniary and also non-pecuniary damages (*pecunia doloris*) could be available (SAP 26 Juny 2006, AC 216460).

There are no special provisions excluding liability in the specific area of health. In general contract law exclusion of liability for death or personal injury by way of standard terms is prohibited by the *disposición adicional primera Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios*. *Ex ante* it is generally impossible to exclude liability. In any case, there is no immunity rule in favour of the Administration. The caregiver can exclude liability *ex-post* only if he proves that he has acted with due diligence; the same applies for the operator of the facility.

With regard to case 2 freedom of contract allows limitation or exclusion of liability, unless damages have been caused intentionally ("*dolus*"): Art. 1102 CC. Without doubt such a clause would be considered abusive in relation to contracts for health services. In general contract law exclusion of liability for death or personal injury by way of standard terms is prohibited by the *Disposicion adicional primera* of *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* (Art. 10 bis, II No. 10) as modified by *Ley 7/1998 de 13 abril, sobre condiciones generales de la contratación.* Moreover, *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* would not permit any exemption clause.

Art. 1103 CC allows courts to moderate compensation. Also, Art. 28.3 *Ley 26/1984, 19 July, General para la Defensa de los Consumidores y Usuarios* sets the limit on compensation at 500 million Pta., 3 million Euros (the amount to be periodically revised by the Government).

b. United Kingdom

Most nursing homes are run privately, but some nursing care is undertaken by "care trusts", set up between the NHS (National Health Service - the UK public sector health service provider) and local authorities. Social care is also offered by local authorities and voluntary organisations. Since English law in most cases does not distinguish contractual relationships between two private parties on one hand and contracts between public entities and private parties on the other hand, usual contract law rules apply. Depending on the individual situation this may be a breach of contract. Standards and duties vary between different classifications of nursing homes. Care homes offer accommodation and meals as well as nursing care or in some specialisations medical care whereas residential homes only provide accommodation, meals and help with washing, *etc.* Depending on the classification of the home, the standards will vary. In a residential home, there are only usual duties of care arising form the contract as well as tortious liability. In a care home (possibly with specialisation), standards will be higher, but again, be contractual or tortious. The home may be liable under Health and Safety Rules, a breach of a contractual duty or tortious liability.

In situation 2 the answer with regard to the legal regime under which the dentist can be held liable for possible damages depends on whether the dental service was provided privately or through the NHS. If the service is provided privately, the usual contract and torts rules apply. If the service is provided as a NHS service, the provision of the service is free for the patient. There is no consideration and it is therefore not a contractual relationship, which would require a payment. Liability is only tortious liability. If the problem is a product related one, product safety rules would apply.

As far as the exclusion or limitation of liability is in compliance with other (contractual) provisions, such as unfair contract terms and health and safety regulation, they are possible. The regulatory authority, the General Dental Council, regulates professional conduct, but not contractual relationships between dentist and patient. Nevertheless there are no legal provisions limiting liability to a certain amount.

It does not make any difference whether the operator is a private person or a body of public law. Basis is a contract between a provider and a customer and therefore contract law applies. All are regulated by the same rules.

c. Germany

There is no specific liability regime for health services. In case 1 the operator of the care facility can be held liable under general contract law. Furthermore both the caregiver and - under certain conditions - the operator may be held liable under tort law.

Contracts for services are dealt with in §§ 611 *et seq.* BGB (*Bürgerliches Gesetzbuch*, German Civil Code). Normally the consumer and the operator will have concluded a special type of contract for services named "*Heimvertrag*" pursuant to § 5 *Heimgesetz*. However the *Heimgesetz* does not contain specific provisions governing liability. Under general contract law the operator can be held liable for damages according to § 280 (1) BGB. The requirements are breach of a duty, fault (either negligence or intent, § 276 BGB) and injury or damages resulting (causation) from the breach of a duty. The operator as contracting party can be made liable for personal negligence as well as for any negligence on the part of his employees and auxiliary persons (§ 278 BGB). The consumer has to prove breach of a duty and causation. With regard to fault the burden of proof is shifted and borne by the operator; he has to demonstrate that neither he nor any of his auxiliary persons acted negligently (or even intentionally which will rarely be the case). The claim for damages essentially covers all material damages resulting from the breach of a duty, *i.e.* costs for medical treatment, transport costs, cost for special equipment for handicapped persons, disability, loss of income etc. (§§ 249 *et seq.* BGB). In case of violation of body or health the consumer is also entitled to non-pecuniary damages (also described as compensation for pain and suffering, § 253 (2) BGB). The consumer has no contractual claim against the caregiver because the latter is not party to the contract for services.

Moreover the caregiver can be held liable under tort law according to § 823 (1) BGB. There is direct claim against the tortfeasor (caregiver) and also a claim against the operator unless he can prove that he sufficiently supervised his employee (§ 831 BGB). The scope of damages covered is equivalent to contractual liability (all material damages plus compensation for non-pecuniary damages in case of violation of body or health). However it has to be noted that - in contrast to contract law - in tort law the burden of proving all elements of a violation of a subject of legal protection (life, body, health, property etc.) - causation and fault (again negligence or intent), is borne by the claimant.

Finally § 823 (2) BGB provides another, separate claim in tort law against the direct injurer (caregiver) for breach of protective law (this refers particularly but not exclusively to criminal offences as for instance bodily harm pursuant to § 229 StGB *Strafgesetzbuch*, German Criminal Code). For the consumer this claim will certainly be even more difficult to prove unless the tortfeasor has already been convicted by a criminal court for the criminal offence at issue. It has to be noted that contractual liability and liability under tort law coexist. Due to the lower burden of proof, in practice, the most advisable and most commonly used option for the consumer is to sue the operator in contract.

As to case 2 again there are no special provisions regulating the liability of persons in the medical profession such as dentists. The contract between consumer and dentist is a regular contract for services (§ 611 BGB). Therefore the dentist can be made liable under contract law pursuant to § 280 (1) BGB and also under tort law according to § 823 (1) (violation of subject of legal protection) or even § 823 (2) BGB (violation of protective law). The requirements and the scope of liability are the same as explained hereinbefore with regard to case 1.

Legally case 2 is even less complex since the dentist is contracting party and tortfeasor at the same time. In practice, for the consumer the crucial point is to prove breach of a duty on the part of the dentist and causation. In case of malpractice the consumer will have to demonstrate that the dentist has not complied with the necessary medical standards, *i.e.* he has not conducted the treatment *de lege artis* and also that this malpractice caused his injuries.

In contract law, exclusion of liability for violation of life, body and health by way of standard terms is prohibited by § 309 No. 7a) BGB. According to § 310 (3) No. 1 BGB in B2C contracts all terms are regarded as standard terms unless they are explicitly introduced by the consumer. Therefore exclusion of liability by individually negotiated clause is virtually unthinkable.

Generally, under German law, there only very few limitations as to the amount of damages available (for instance concerning liability for defective products which is limited to 85 million Euros for bodily injury according to § 10 (1) *Produkhaftungsgesetz*), but there is absolutely no limitation in the cases at issue

The contract for services remains a private law contract even if one party is a body of public law. In Germany about 85% of the population are members of the governmental health insurance (source: BMG *Bundesgesundheitsministerium*, Federal Ministry for Health and Social Security). The whole medical scheme and the contracts between insurances are subject to public law (§ 34 (3) *Sozialgesetzbuch* SGB VII). Nevertheless § 76 (4) *Sozialgesetzbuch* SGB V regulates that regarding the obligations of the medical professionals towards the patients private law, particularly the BGB remains applicable. Consequently in terms of liability it does not make any difference for the consumer whether the provider of the health services is a private or a public entity.

d. Czech Republic

Regarding situation 1, in Czech law there are no special rules on nursing home contracts and no special rules on liability for health or medical liability.

The provider of health services (owner or manager of the respective facility - here nursing home) can be found liable under general rules on liability for damage (§§ 420-450 Civil Code).

It is questionable which section of the Civil Code applies. Prima facie the general provision on strict liability of § 420a Civil Code which provides for damage caused while operating a business should apply. However, the prevailing case law tends rather to the application of § 420 Civil Code (general liability for fault) following the general academic opinion on the interpretation of the provisions at issue.

As to exclusion of liability general rule on contributory negligence (§ 441 Civil Code) may be applicable. Also, the provider can in principle limit his liability if it does not contradict good morals and observes the consumer protection rules.

It does not make any difference whether the provider is a private or a public entity.

The aforementioned explanations apply to situation 2 as well.

e. Finland

Case 1

In Finland the Act on the Status and Rights of Patients (*laki potilaan asemasta ja oikeuksista*) is the regulatory regime for protection of patients' rights. The nursing home can be held liable personally or vicariously for the torts of its employees and auxiliary persons.

The *potilasvahinkolaki* (Act on Treatment Injuries) also governs liability for accidents in hospitals or injury resulting from malpractice. In such cases the patient is entitled to compensation.

In the first instance the patient must claim compensation from *potilasvahinkokeskus* (Centre for Treatment Injuries), which seeks an opinion from Treatment Injury Board as a prerequisite to paying compensation.

If the caregiver acted negligently then damages will be available under principles of tort law. This is litigated in the ordinary civil courts.

It is impossible for the owner/operator to exclude or limit his liability. There are no legal provisions ceiling the liability to a certain amount.

It does not make any difference whether the owner/operator is a private person or a body of public law.

Case 2

Due to Act on Health Care Professionals the general direction of dentists is duty of the Ministry of Social Affairs and the Health and the National Authority for Medicolegal Affairs directs and supervises health care professionals.

See Act on Health Care Professionals section 26:

"Sanctions for misconduct

If a health care professional

(1) neglects any obligation prescribed in sections 15 to 21, or a doctor or dentist neglects any obligation referred to in sections 15 to 23,

(2) performs tasks for which his or her training and professional skills and knowledge shall be considered inadequate or his or her opportunities for action limited, or

(3) acts otherwise incorrectly or reprehensibly,

the National Authority for Medicolegal Affairs :

a) may issue specific regulations and instructions for professional activity;

b) impose restrictions on the right to practise professional activity as a licensed professional for a fixed period or until further notice;

c) withdraw the right to practise the profession of a licensed professional for a fixed time or until further notice; or

d) prohibit a professional with a protected title to use the occupational title of a health care professional as prescribed by Decree for a fixed period or until further notice; or

e) cancel the right of a professional to practise his or her profession."

In these cases all remedies are statuted at Act on Treatment Injuries (see answers for case 1).

Again, it is impossible for the owner/operator to exclude or limit his liability and there are no legal provisions ceiling the liability to a certain amount. It does not make any difference whether the owner/operator is a private person or a body of public law.

Annex 2: Present Studies, Reports and other Sources

1. Studies and Reports

a. "Universal Service, a new look at an old concept: Broadband access as a universal service in Europe - Prof. Dr. Nico van Eijk (August 2004)

http://www.ivir.nl/publications/vaneijk/ITS-paper%20Nico%20van%20Eijk.pdf

b. Final Report "**Preparing the Next Steps in Regulation of Electronic Communications - A contribution to the review of the electronic communications regulatory framework" (July 2006)**

http://ec.Europa.eu/information_society/policy/ecomm/doc/info_centre/studies_ext_consult/next_steps/regul_of_ecomm_july2006_final.pdf

c. Final Report **"Study on pan-European market for premium rate services" (June 2005)**

http://ec.Europa.eu/information_society/policy/ecomm/doc/info_centre/studies_ext_consult/premium_rate_services/prsfinalreport.pdf

d. Final Report **"The Impact on Universal Service of the Full Market Accomplishment of the Postal Internal Market in 2009" - Price Waterhouse Coopers (May 2006)**

http://ec.Europa.eu/internal_market/post/doc/studies/2006-impact-report_en.pdf

e. Final Report **"Main Developments in the Postal Sector (2004-2006)" (May 2006)**

http://ec.Europa.eu/internal_market/post/doc/studies/2006-wik-final_en.pdf

f. Report from the Commission to the Council and the European Parliament "**Prospective study on the impact on universal service of the full accomplishment of the postal internal market in 2009" (2006)**

http://eur-lex.Europa.eu/LexUriServ/site/en/com/2006/com2006_0596en01.doc

g. Final Report **"Comparative analysis of national liability systems for remedying damage caused by defective consumer services", Magnus/Micklitz (April 2004)**

http://ec.Europa.eu/consumers/cons_safe/serv_safe/liability/reportd_en.pdf

h. Briefing Note **"Liability of Principal Contractors: Selected National Experiences" (2006)**

http://www.Europarl.Europa.eu/comparl/imco/studies/0604_study_contractors_en.pdf

i. Report **"Commission Staff Working Document - Evaluation of the Performance of Network Industries Providing Services of General Economic Interest" (2005)**

http://ec.Europa.eu/internal_market/economic-reports/docs/2005/051220_report_final_en.pdf

j. Report **"The Integration of the EU Mortgage Credit Markets" (2004)**

http://ec.Europa.eu/internal_market/finservices-retail/docs/home-loans/2004-report-integration_en.pdf

k. Final Report **"Study of the impact of regulation 2560/2001 on bank charges for national payments" (September 2005)**

http://ec.Europa.eu/internal_market/payments/docs/reg-2001-2560/impact_en.pdf

l. "Commission Staff Working Document - addressed to the European Parliament and to the Council on the impact of Regulation (EC) No 2560/2001 on bank charges for national payments" (December 2006)

http://ec.Europa.eu/internal_market/payments/docs/reg-2001-2560/report-070111_en.pdf

m. Final Report **"Regulation 2560/2001: Study of competition for cross-border payment services" (September 2005)**

http://ec.Europa.eu/internal_market/payments/docs/reg-2001-2560/competition_en.pdf

n. Economic department working paper no. 449 (ECO/WKP (2005)36) **"The EU´s single market: At your service? - Line Vogt (2005)**

http://www.olis.oecd.org/olis/2005doc.nsf/43bb6130e5e86e5fc12569fa005d004c/a7ce5a97ea540230c1257099002cc1dc/$FILE/JT00191215.PDF

o. Final Report **"Economic Assessment of the Barriers to the Internal Market for Services" - Claus Kastberg Nielsen (January 2005)**

http://ec.Europa.eu/internal_market/services/docs/services-dir/studies/2005-01-cph-study_en.pdf

p. Final Report **"Study of Gambling Services in the Internal Market of the European Union" - Swiss Institute of Comparative Law (June 2006)**

http://ec.Europa.eu/internal_market/services/docs/gambling/study1_en.pdf

q. "A quantitative assessment of the EU proposals for the Internal Market for Services" - CPB Communication (revised), CPB Netherlands Bureau for Economic Policy Analysis (October 2005)

http://ec.Europa.eu/growthandjobs/pdf/pdf_groups/Table1a/CPB/04-09-29-CPBcommunication_internalmarket.pdf

r. CPB Netherlands Bureau for Economic Policy Analysis Discussion Paper no. 49 **"Regulatory heterogeneity as obstacles for internal service trade" - Henk Kox, Arjan Lejour (September 2005)**

http://www.Euroframe.org/fileadmin/user_upload/Euroframe/docs/2005/session1/Eurof05_lejour.pdf

s. CPB Netherlands Bureau for Economic Policy Analysis Paper no. 69 **"The free movement of services within the EU" - Henk Kox, Arjan Lejour, Raymond Montizaan (September 2005)**

http://www.cpb.nl/eng/pub/cpbreeksen/document/69/doc69.pdf

2. Other Sources

a. White Paper on services of general interest, COM(2004) 374 final

http://Europa.eu.int/eur-lex/en/com/wpr/2004/com2004_0374en01.pdf

b. Report on Competition in Professional Services, COM(2004) 83 final

http://www.eadp.org/main7/position/Regulated%20professionsfinal_communication_10feb04_en.pdf

c. Professional Services - Scope for more reform - Follow-up to the Report on Competition in Professional Services, COM(2004) 83

http://ec.Europa.eu/comm/competition/liberal_professions/sec200564_en.pdf

d. Research Report „Economic Impact Of Regulation In The Field Of Liberal Professions in Different Member States"

http://ec.Europa.eu/comm/competition/publications/prof_services/executive_en.pdf

e. "Legal Position of Social Welfare and Health Service Customer - Comparison between services arranged by private sector and local authorities" Finnish Consumer Agency Publication serie 2/2007

http://www.kuluttajavirasto.fi/user/loadFile.asp?id=6551