COMMISSION STAFF WORKING PAPER

REPORT ON THE OUTCOME OF THE PUBLIC CONSULTATION ON THE GREEN PAPER ON THE REVIEW OF THE CONSUMER ACQUIS

1. Introduction

On 7 February 2007, the Commission adopted the Green Paper on the Review of the Consumer Acquis[1] (the "Green Paper"). The aim of the Green Paper was to launch a public consultation on how to simplify and complete the existing regulatory framework. The Review covers eight directives listed in Annex II of the Green Paper. The overarching aim of the Review is to achieve a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity.

The Green Paper sought to collect views from all interested parties on the possible policy options for the Review of the Consumer Acquis as well as on a number of specific issues. The Commission invited all interested parties to send their reasoned views on these issues by mail or by electronic mail by 15 May 2007. All options indicated in the Green paper were non-exhaustive and interested parties could therefore put forward other ideas which some of them did.

In line with the Commission's general principles and standards for consulting interested parties[2], this report analyses the contributions received from Member States, other public authorities, the European Parliament, the European Economic and Social Committee, as well as European and national business or consumer associations, academics, legal practitioners and others.

The objective of the report is to summarise the ideas, opinions and suggestions made. It tries to identify, as objectively as possible, notably in the light of an independent analytical report by an external consultant[3], the main trends, views and concerns set out in the contributions.

In addition, for the sake of transparency, all contributions have been published in full on the website of the Directorate-General Health and Consumer Protection (DG SANCO), except those cases where the respondent has expressed an objection.

The report is structured as follows:

- (1) this introduction,

- (2) some general observations on the consultation,

- (3) an executive summary and

- (4) the detailed analysis of the comments received.

The structure of the detailed analysis follows the order of the questions set out in the Green Paper.

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1 COM(2006) 744 final, 08.02.2007

2 Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, Communication from the Commission, COM(2002) 704, 11.12.2002.

3 Final Analytical Report on the Green Paper on the Review of the Consumer Acquis by the Consumer Policy Evaluation Consortium published on the website of Directorate-General Health and Consumer Protection

This Report does not draw political conclusions from the consultation process.

2. General observations on the consultation

The Green Paper has been welcomed positively by the majority of respondents. Only a minority of them have expressed reservations of varying degrees of intensity.

The Green Paper has attracted a very high number of responses (more than 300) from a wide range of stakeholders. The highest number of contributions comes from the business sector followed by consumer organisations, public authorities (at national or local level), academics, legal practitioners and others. It should be noted that the European Parliament[4], the European Economic and Social Committee[5] and all Member States (except Denmark) have responded to the public consultation.

3. Executive summary

What has emerged from the consultation is the following:

- A majority of respondents call for the adoption of a horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation; i.e. targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border. The horizontal legislative instrument should in the view of most respondents be combined with vertical revisions of the existing sectoral directives (for example revision of the Timeshare and Package Travel Directives).

- There is a strong support for tightening-up and systematising the consumer acquis, e.g. introducing common definitions of consumers/professionals and delivery, rules on withdrawal rights and the insertion at EU level of a "black" list of unfair contract terms (i.e. terms banned upfront) and a "grey" list of such terms (i.e. terms presumed to be unfair) instead of the current purely indicative list.

- The issue of consumer protection in respect of digital content services is important for many stakeholders (especially consumer organisations). It raised, however, serious concern in certain business quarters. Several respondents have correctly argued that this is a complex matter, which requires further careful analysis. This suggests that this analysis will be conducted separately from the general follow-up to the Green Paper.

4. The main results of the public consultation

4.1 General legislative approach (Question A1 in the Green Paper)

The great majority of stakeholders (Member States, businesses and consumers alike) support a mixed approach combining the adoption of a horizontal instrument with revision of existing sectoral directives whenever necessary.

4.2. Scope of the horizontal instrument (Question A2 in the Green Paper)

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[4] European Parliament resolution of 6 September 2007 on the Green Paper on the Review of the Consumer Acquis 2007/2010 (INI) A6-0281/2007

[5] Opinion INT/336 of 12.7.2007

The great majority of stakeholders (Member States, businesses and consumers alike) favour the application of the horizontal instrument to all consumer contracts whether they concern domestic or cross-border transactions.

4.3. Degree of harmonisation (Question A3 in the Green Paper)

Diverging views have been expressed on this important issue but overall the majority of respondents (62%) favour full targeted harmonisation of some of the issues raised in the Green Paper.

4.3.1. Full (targeted) harmonisation versus minimum harmonisation

The great majority of the Member States support full harmonisation targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border. EFTA and 4 EU Member States support in principle minimum harmonisation but EFTA could accept targeted full harmonisation on a case by case basis.

The European Parliament suggests that the horizontal instrument should start from the principle of full targeted harmonisation. It considers that sectoral directives that are being reviewed should be based on the principle of minimum harmonisation, combined with the principle of mutual recognition for the coordinated area. The Parliament does not, however, a priori oppose full targeted harmonisation where this proves necessary in the interests of consumers and professionals.

The great majority of business associations (almost 80%) at EU and national level support full or full targeted harmonisation of some key issues (for example, withdrawal rights or the definition of consumer/professional). They believe, however, that if the scope of harmonisation were too broad, then it would be tantamount to a European civil code for consumer contracts, which they would oppose. They stress that changes to the acquis should not lead to the creation of additional burdens on businesses and therefore the review should aim at simplification and be accompanied by a thorough impact assessment.

The majority of consumer associations support minimum harmonisation combined with the application of the law of the country of destination as laid down in Article 5 of the proposed Rome I Regulation on the law applicable to contractual obligations[6]. However, it should be noted that among those consumer associations, some would be ready to accept full harmonisation provided that the level of protection were high and that it were targeted at very specific issues and not extended to general principles of contract law. A few consumer associations go even further by supporting full harmonisation.

4.3.2. Harmonisation variant: the introduction of a mutual recognition (or country of origin) clause for the aspects not fully harmonised by the horizontal instrument

There is less consensus on the mutual recognition than on the issue of the degree of harmonisation. Many of the contributions are clearly influenced by the possible outcome of the current negotiations in Council and Parliament on Article 5 of the proposed Rome I Regulation[7]. The current drafting of Article 5 states that, in principle, the law applicable

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6 COM(2005)650 final.

7 COM(2005)650 final.

to consumer contracts is the law of the country where the consumer has his habitual residence (the "law of the country of the consumer"). The interaction between Article 5 of the proposed Rome I Regulation and the possible insertion in future consumer protection directives of a mutual recognition clause, are often cited by stakeholders as requiring clarification in order to ensure coherence.

Overall the support for the insertion of a mutual recognition clause into any future legislative instrument following up on the Green Paper is limited.

Specifically, only five Member States would accept mutual recognition for certain aspects where this would be justified for reasons of completion of the internal market. Another Member State argues in favour of the country of origin principle. The remainder are against both mutual recognition and country of origin.

The majority of those who are in favour of minimum harmonisation reject the principle of mutual recognition or country of origin. This is for example the case of the majority of consumer associations (61%) who fear "a race to the bottom" and legal uncertainty, in particular as to which consumer protection rules would apply to a cross-border transaction in the light of the proposed Rome I Regulation.

In contrast, a mutual recognition clause is acceptable for the majority of those respondents (52%) who are in favour of full targeted harmonisation. For example, the majority of businesses accept the insertion of a mutual recognition clause since it would facilitate their cross-border business. However, they underline that national courts may find it difficult to apply such a clause, in particular, in the light of the proposed Rome I Regulation.

The European Parliament supports the principle of mutual recognition, but only for the sectoral legislation.

The country of origin principle is rejected by the great majority of respondents. Some of them point out its inconsistency with the proposed Rome I Regulation designating the law of the country of destination as the one applicable to consumer contracts.

4.4. Definition of "consumer" and "professional" (Question B1 in the Green Paper)

There is a broad consensus among Member States and stakeholders to define these two notions in a more consistent manner across the acquis. The majority of stakeholders favour a restrictive definition of consumer (i.e. natural persons acting for purposes which are outside their trade, business or professions). Some of those stakeholders who favour this view consider that the definition in the Unfair Commercial Practices Directive could constitute a good model.

Only some academics plead in favour of an extension of the definition of consumers to mixed use cases. Another minority group of respondents argues in favour of extending the definition of "consumer" to small businesses and non-profit organisations (in practice for an enlargement of the scope of consumer protection). They claim that such entities may be in a position of weakness which is comparable to that of consumers. However, the majority of respondents do not share this view.

4.5. Consumers acting through an intermediary (Question B2 in the Green Paper)

Maintaining the status quo is the preferred option for almost half of the respondents. There are contrasting views between the business sector and consumer groups. The majority of business stakeholders and most Member States support the status quo. In their opinion, it would be difficult to develop a clear definition of intermediary and clearly indicate when the professional acts in his own name as opposed to on behalf of the other consumer. A majority of consumer organisations favour an extension of the definition of professional. They point out that the party benefiting from the expertise of the professional intermediary would be in a stronger position vis-à-vis the other party. The extension would therefore restore the balance between the parties to the transaction and prevent circumventions of consumer protection rules. Some consumer organisations stress that the status quo should be maintained but that the intermediary should be required to inform the consumer that he represents another consumer.

When responding to this question, a number of stakeholders (notably businesses) express doubts about the possibility to regulate online trading platforms and the need for a clarification of their legal status.

4.6. Introduction of a general clause on good faith and fair dealing (Question C in the Green Paper)

Respondents to the Green Paper are divided on the need to introduce an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing. Member States have contrasting views: twelve are in favour of maintaining the status quo and ten are in favour of the introduction of a good faith clause. A clear majority of business stakeholders oppose the general clause and this opinion is shared by the European Parliament. Some consumer associations support the introduction of a general clause provided that it is based on minimum harmonisation.

Those Member States and stakeholders who oppose the introduction of a general duty consider this issue to be part of general contract law and therefore not suitable for specific regulation within consumer protection law. They claim that it would be impossible to agree on a uniform content of the clause due to the diverging national legal traditions. Furthermore, diverging interpretations of the clause in different Member States would lead to legal uncertainty.

4.7. Extension of the scope of the unfairness test to individually negotiated terms (Question D1 in the Green Paper)

The majority of respondents prefer the status quo. Consumer and business stakeholders disagree on the issue: while consumer groups opt for an extension of the scope, the business sector strongly opposes it. The majority of Member States (15) support an extension while 9 prefer the status quo.

Many stakeholders, who favour maintaining the status quo, argue that an extension would be contrary to the legal traditions of the Member States and to the principle of freedom of contract. Business stakeholders underline that consumers are already protected by the Unfair Commercial Practices Directive and that further protection in cases where the consumer is actually in a position to negotiate is not necessary.

The respondents, who favour an extension, argue that the individual negotiation of contractual terms does not necessarily put the consumer in a stronger position, since the professional has more knowledge and expertise in negotiating terms.

Some respondents, including the European Parliament, consider that the positions of businesses and consumers could be reconciled by a clear definition of "(non)individually negotiated terms" so that only those cases where the consumer had a real chance to influence the content of the term would fall outside the unfairness test.

4.8. The legal effects of the list of unfair terms (Question D2 in the Green Paper)

Half of the respondents, the European Parliament and a clear majority of Member States (18) support the introduction of a combination of "black" and "grey" lists of unfair terms (option 4 in the Green Paper). A black list of unfair terms would contain terms which would be banned completely whilst the grey list would contain terms that would be presumed to be unfair. Business stakeholders are relatively divided between the status quo and the other options.

Respondents, who favour maintaining the status quo, argue that the present list has worked well in practice and that it is more "future proof" and flexible than the grey and black lists.

Some of the business and consumer stakeholders support the introduction of a black list only (option 3 in the Green Paper) arguing that it would promote legal certainty notably by avoiding the difficulties arising from the different national transpositions and interpretations of the existing indicative list.

The majority, which supports a combination of grey and black lists, argue that this option provides more protection for consumers and is more flexible overall. The black list should be closed, thus ensuring increased legal certainty. The grey list on the other hand leaves room for a case-by-case analysis of the terms, thus preventing dishonest professionals from circumventing the legislation.

4.9. Scope of unfairness test: price and subject matter of the contract (Question D3 in the Green Paper)

A clear majority of respondents (including Member States) support maintaining the status quo. Almost all business stakeholders oppose any extension. In their view, it would risk going against market economy principles whereby the price is determined by competition (price is not something to be determined by a court) and the free choice of consumers (who have the possibility to read the contract and make an informed choice). In their view any extension would also be contrary to the principle of freedom of contract.

Consumer organisations, of which a majority support the extension, recognise that market economy is based on the freedom to set prices. However, in their view, this does not exclude that there is a structural imbalance between the consumer and the professional, the latter holding a stronger bargaining position. Therefore, extending the unfairness test would facilitate restoring the contractual balance.

4.10. Providing for contractual effects of the failure to provide information (Question E in the Green Paper)

More than half of the respondents support one of the two solutions suggested to regulate this matter; i.e. extension of the cooling-off period as a uniform remedy or different remedies for breaching different groups of information requirements. Several respondents (39%) opt for the latter option and so does a clear majority of the Member States. The business sector and the European Parliament prefer the status quo. Several respondents express the view that remedies should be available if the omission of information constitutes a serious infringement which is detrimental to the interests of the consumer. The right to remedies may thus be limited to information requirements that are essential for the consumer to decide whether to conclude the contract or not. Businesses and academics draw attention to the fact that the quality rather than the quantity of information should be considered. Consumer organisations consider that the establishment of a consistent horizontal approach in the field of remedies does not obviate the need for specific (and more protective) rules in some sectors, such as distance selling and timeshare.

Stakeholders in favour of the introduction of different remedies for the breach of different groups of information requirements consider that such a differentiation should take into account the different degrees of importance of the information omitted and the context in which the omission takes place. Some consumer stakeholders prefer this option because a general extension of the cooling-off period to cover all cases would affect legal certainty and result in a long period of uncertainty over the validity of the contract. A number of business stakeholders argue that such an extension of the cooling-off period would be too harsh on traders since even an unimportant failure to give information would expose the trader to the risk of cancellation of the contract without any real justification.

Those preferring a prolonged cooling-off period as a uniform remedy believe that it constitutes a solution to the current fragmented situation which misleads consumers. However, some business stakeholders believe that if such a uniform remedy was adopted, a maximum cooling-off period of 3 months should be set.

4.11. Harmonisation of the length of the cooling-off periods (Question F1 in the Green Paper)

There is a preference for one cooling-off period for all kinds of consumer contracts to which the right of withdrawal applies. Almost 57% of respondents prefer such an option, ranging from 44 % among business stakeholders to as many as 65 % among consumer groups and 75 % of legal practitioners. Twenty Member States favour this option. According to businesses, the considerable divergences between the Member States' legislation make it difficult to handle withdrawals in cross-border cases and to give correct information to the consumer. However, the stakeholder groups have different opinions on the appropriate length of the cooling-off period. Some business stakeholders think that a length of 14 calendar days would be too long. Some of them argue that too long a period would increase the risk of abuse by the consumer and extend the period during which the consumer needs to take care that the product stays as new. Consumer groups on the contrary generally support a longer cooling off period than the period usually applied today. Some of them emphasise the need for an even longer cooling-off period for certain consumer contracts which are particularly complicated (e.g. timeshare).

Some stakeholders (14%) favour the second option, i.e. the introduction of two categories of directives to which a specific cooling off-period would be attached. They argue that there is a need for proportionality depending on how the sales are carried out, the type of product and the price. This view has also been expressed by some of the stakeholders attracted by the status quo option. They account for 20% of business stakeholders and 15 % of academics, but very few among the other respondents. They consider that different cooling off-periods may be needed for different services; there are for instance inclusive services, such as broadband subscriptions including flat rate with traffic limits, which can only be evaluated by the consumer after the first billing cycle.

4.12. Harmonisation of the modalities of exercising the right of withdrawal (Question F2 in the Green Paper)

There is a clear consensus that the introduction of one uniform procedure for exercising the right of withdrawal is needed. A strong majority of the stakeholders opt for such a solution. They argue that a unified and consistent regulation would lead to simplification and provide legal clarity. Among consumer groups the preferred option is to have no formal requirements for the notification of withdrawal. Those endorsing such a model are of the opinion that the right of withdrawal should be exercised in the simplest and least expensive way for consumers.

Several business stakeholders stress the need of imposing a form of proof of the withdrawal, e.g. a written communication by the consumer, such as registered mail or other written support, e.g. e-mail or fax. Some consumer organisations advocate also that, for reasons of evidence, withdrawal should be carried out in writing.

The European Parliament believes that the introduction of a standard withdrawal form in all Community languages would simplify procedures, reduce costs and increase transparency and consumer confidence. The idea has also been put forward by certain respondents that the consumers could have a choice of different methods by which they can communicate their decision to withdraw. Some businesses argue that a uniform procedure for notice of withdrawal should be set per sector and some others claim that the procedure should be flexible enough to adopt firm-specific processes.

4.13. Harmonisation of cost imposed on consumers in the event of withdrawal (Question F3 in the Green Paper)

There are diverging views on the issue of who should bear the costs of returning the product in case of withdrawal. There is a clear division between consumer and business interests on this issue. Consumer organisations are united in considering that consumers should bear no costs when withdrawing from a contract, while the other stakeholder groups disagree with this, but are divided on which costs consumers should incur.

One reason put forward for not imposing any costs on consumers when withdrawing from the contract is that the seller should bear the risk associated with the withdrawal right. This practice is already applied in Finland and, according to its supporters, works efficiently. However, some respondents who prefer this option and among them several consumer stakeholders, believe that it might be fair that the consumer pays the costs of returning the goods when he withdraws from the contract without any specific reason.

Several businesses and several Member States think that consumers should face the same costs when exercising the right of withdrawal irrespective of the type of contract. It is believed that such a solution would prevent abuses and excesses. No costs at all for the consumer would impose an unfair burden on traders in the opinion of these respondents. Almost as many stakeholders go for the status quo option, i.e. not harmonising the costs in case of withdrawal. Ten Member States tend to support this alternative. Both respondents preferring status quo and those advocating the same costs for all consumers for all kinds of contracts, underline that if the consumer withdrawing from the contract would not bear any costs, this would result in a general price increase for all consumers since the costs would probably be passed on by suppliers to consumers.

Business stakeholders emphasize that the costs arising in the case of withdrawal are not comparable across the directives; they range from defraying expenses for legal formalities to costs for returning goods. Many contributions highlight that different sales methods have different consequences for professionals when consumers use their right of withdrawal and that there is need for sector regulation. The business sector also considers that a harmonised regulation must stipulate which claims a professional can assert for goods which are no longer new. They stress that returned physical goods may become second hand products and then lose part of their value while intangibles, such as data files, cannot be returned without a risk that the consumer copies them before sending them back.

4.14. Introduction of general contractual remedies (Question G1 in the Green Paper)

Stakeholders are almost equally divided between the status quo and the introduction of general contractual remedies with a marginal predominance for the former option. The introduction of general contractual remedies is supported by consumer stakeholders and academics which contrasts with the positions of businesses among which the preference for the status quo clearly dominates. Member States are equally split between the two possibilities.

A number of respondents observe that there are significant variations between the Member States. Those in favour of the introduction of general contractual remedies consider that these variations provide diverging protection to consumers, which in itself is a reason for a more harmonised approach. Stakeholders favouring the status quo think that the national legal systems rightly provide for different legal remedies in case of breach of contract, depending on the type of contract and article in question. They maintain that this is an issue of general civil law, which should be left aside. Also the European Parliament considers the contractual remedies to be something to be determined by national contract law. Finally academics point out that there is no evidence that the disparities between the national remedies constitute a real internal market barrier.

4.15. Introduction of a general right to damages (Question G2 in the Green Paper)

Almost half of the respondents are opposed to the idea of introducing a general right to damages at EU level. Among business stakeholders that view is shared by as many as three quarters of the respondents. It is stressed that damages is a matter for national legal systems and that Member States already provide for compensation in their legislation in case of breach of contract. Particularly moral damages are mentioned as hard to define at EU level because of their strong cultural dimension.

Yet, a majority of consumer stakeholders and academics endorse the introduction of a general right to damages for purely economic damages and moral losses, considering that such an option would ensure uniform consumer protection. Consumer organizations insist in this context on the development of the alternative dispute resolution (ADR) system to allow all consumers to easily obtain compensation.

4.16. Extension of the scope of the Consumer Sales Directive to other types of contracts (Question H1 in the Green Paper)

The question of whether the scope of the Consumer Sales Directive should be extended to cover certain service contracts has raised significant debate. Consumer associations, many Member States and academics are in favour of extending the Directive to other contracts under which goods are supplied to consumers (e.g. car rental agreements) whereas the majority of business stakeholders oppose it.

This question of a possible extension of the scope to digital content services (i.e. software and data) is even more controversial. On the one hand the software industry is strongly opposed to an extension of the scope of this Directive. They underline the specificity of software as opposed to tangible goods. Software has to be updated regularly, is never bug-free and its conformity may depend on how it is used by consumers and how the computer and other software applications inter-operate. In the opinion of the software industry any EU regulation in this field could be an obstacle to innovation and would increase prices and reduce consumer choice. On the other hand, consumer associations and academics are in favour of regulating this issue at European level. Member States' contributions also reveal a large support for an extension of the scope of the Directive (18 countries), among which six support an extension only to software and data. The European Parliament has called on the Commission to examine thoroughly the issues regarding the protection for consumers when concluding contracts for the provision of digital content, with a view to determining whether it is appropriate to propose one or more specific instruments or to extend the rules laid down by the above-mentioned Directive to that type of contracts.

4.17. Second-hand goods sold at public actions (Question H2 in the Green Paper)

Respondents to the Green Paper are almost equally divided on the question of whether or not to apply the consumer sales rules to second-hand goods sold at public actions. This issue divides even the various categories of respondents (e.g. business organisations). Similarly, Member States have contrasting views: sixteen are in favour of applying consumer sales rules to second-hand goods sold at public actions while ten are against.

In any event, the consultation reveals a need for a clear definition of the notion of public auction. Some stakeholders, who consider that a horizontal instrument should cover second hand goods sold at public auctions, call for new specific rules which would for example take into account the fact that consumers often do not have the practical possibility of inspecting the goods prior to the purchase.

The European Parliament opt for maintaining the status quo, i.e. maintaining the option for Member States to provide that the definition of consumer goods does not include second-hand goods sold at public auctions.

4.18. Definition of delivery and the passing of risk (Questions I1 and I2 in the Green Paper)

It appears that the majority of the Member States, consumer associations and academics as well as the European Parliament are in favour of defining the notion of delivery and linking it with the transfer of risk. Business associations are more divided on this issue. A significant number of business associations and legal practitioners are in favour of regulating one or both issues at European level. However, other business stakeholders are in favour of the status quo.

On a possible definition of delivery, many stakeholders express the view that a one fits-all-purposes definition of delivery is not the best option since there are many ways in which delivery takes place: e.g. at the consumer's residence, at a third party's residence or in the shop itself. All stakeholders (business and consumers alike) recognise that the case where the consumer is not cooperative and unduly delays taking the delivery (for example, when the goods are not collected by the consumer at the post-office) demands specific regulation.

4.19. Extension of the legal guarantee for the period when remedies are performed and for recurring defects (Questions J1 and J2 in the Green Paper)

These two issues result in similar responses. With the exception of the business sector, the majority of all the other stakeholders' groups are in favour of an extension in both cases. The European Parliament shares this view. A large majority of Member States (20) support an extension. Only four Member States prefer the status quo.

However, even the stakeholders who are in favour of an extension suggest that the extension period should be specific and not infinite. To this end, they suggest that the good should be replaced when the same defect has arisen a certain pre-defined number of times.

A clear majority of business stakeholders oppose the extension and question the need for a regulatory intervention in this area. They underline that such an extension would create legal uncertainty and would increase the burden on trade.

4.20. Specific rules for second-hand goods (Question J3 in the Green Paper)

A majority of the respondents including a majority of Member States (18) argue in favour of specific rules for second hand goods whereby the seller and the consumer may agree on a shorter period of liability (but not less than one year). In their view this solution would guarantee the contractual freedom of the parties to the contract and would recognise the specific characteristics of second-hand goods.

However, a minority of stakeholders (mostly consumer organisations and academics) joined by the European Parliament are against specific rules and underline that such rules for second hand goods would most likely be detrimental to the consumer since he has a weaker bargaining power than the professional and probably would end up agreeing on a shorter guarantee period.

4.21. Burden of proof (Question J4 in the Green Paper)

Maintaining the existing six month reversal of the burden of proof is the preferred option for the majority of the respondents including the European Parliament. There are contrasting views between business and consumer groups as well as a split between Member States (with 15 in favour of status quo and 12 arguing for extending the reversal of the burden of proof). The business sector and legal practitioners argue that prolonging the length of the reversal would be disproportionate and would put an unjustified burden on business and could encourage abuse by consumers. In their view, the present rule has proved to be effective, and they see no reason for modifying it.

Consumer groups and some of the academics are in favour of a prolongation since the consumer does not have the necessary knowledge and expertise to determine if the defect already existed at the time of delivery or not. However, some of these respondents recognise that the prolongation should be consistent with the nature of the goods – perishable goods, for instance, could clearly be subject to different regulations.

4.22. The order in which remedies may be invoked (Question K1 in the Green Paper)

Maintaining the status quo is the preferred option for half of the respondents including the European Parliament. Views of the business sector and consumer groups diverge. The business sector and legal practitioners argue that the hierarchy of remedies established by Directive 1999/44/EC is effective and achieves a fair balance between sellers' and consumers' interests. A lack of hierarchy would lead to considerable uncertainty for the sellers. Especially the right to unconditionally terminate a contract could damage the sector considerably. Member States' contributions are furthermore almost equally divided between maintaining the status quo and abolishing the hierarchy of remedies (11 and 10 responses respectively).

According to the respondents, some of the problems arising from the current relatively complex rules could be solved by a clarification of the current wording of the Directive. This solution could, in their view, also address some of the concerns which are raised by business and consumer organisations.

4.23. Notification of the lack of conformity (Question K2 in the Green Paper)

A clear majority of business stakeholders and a noteworthy number of consumer organisations support the introduction of a uniform duty to notify the seller of a defect. Similarly, the European Parliament supports the elimination of the existing divergences concerning the conditions for notification. Those who are in favour of a uniform duty to notify point out that the introduction of such a duty would create legal certainty, without placing an unreasonable burden on consumers. However, the group is split on the time limits for the notification. For one group of respondents, including a number of consumer groups, legal practitioners and Member States, notification should be done "within a reasonable time" rather than establishing a cut-off date which would deprive consumers of their remedies. Others prefer a time limit of two months.

Respondents who oppose the duty to notify argue that it would create an additional burden for consumers. Ultimately, it is in the buyer's interest to notify the seller in due time anyway, in order to get a fully functioning product as quickly as possible (and within the designated guarantee period). The absence of such a duty would not pose any significant problems.

4.24. Direct producers' liability for non-conformity (Question L in the Green Paper)

Consumer and business stakeholders have contrasting views on the possibility to introduce direct producers' liability at European level. Almost all consumer organisations argue in favour of the introduction of direct producers' liability on top of the existing liability of the seller. A similar position is supported by fourteen Member States. In their view, this option would encourage cross-border transactions. Consumers can easily identify the identity of the producer since the name of the producer appears on the product and in a cross-border situation it would be easier for them to address a representative of the manufacturer in their own country rather than go back to the retail outlet in another country. Business stakeholders (notably retailers' organisations), who support this option, stress that they act as intermediaries between a producer and the final consumer; producers are usually responsible for any defects since these in most cases occur during the manufacturing process. Academics highlight that most producers already assume a certain degree of responsibility under voluntary (commercial) guarantees.

A clear majority of business stakeholders and several Member States (11) strongly oppose the introduction of such a liability. For many respondents it is impossible to expect that manufacturers will deal with contractual complaints from consumers with whom they have no contractual relationship. Some respondents highlight that by introducing direct producer liability, the responsibility as to who is liable for a defective product (the seller or the producer), may be obscured to the detriment of the consumer. The consumer could then find himself in the middle, getting redress from neither. Consumers are best protected by having the certainty that the seller is liable. The European Parliament has a similar view and does not consider it appropriate to introduce direct producers' liability rules.

4.25. Content of the commercial guarantee (Question M1 in the Green Paper)

Consumer and business stakeholders have contrasting views on the possibility to introduce a default content for commercial guarantees at European level. A clear majority of consumer stakeholders are in favour of introducing the default content whereas the majority of business stakeholders opt for maintaining the status quo. The other groups do not have a clear preference on this issue. Regarding Member States' contributions, the majority (16) support a default content, whereas nine Member States support the status quo. One Member State considers that consumers may get confused and understand "default rules" as "minimum" rules.

Business stakeholders highlight that commercial guarantees are provided on a voluntary basis by the producers or the sellers and, as such, go beyond the legal mandatory framework. They are marketing tools, which are used to attract consumers. To attach liability risks to them would only lead to a situation where such guarantees would no longer be granted in a large number of cases. Similarly, the European Parliament emphasises that questions relating to the commercial guarantee (content, transfer, limitation) are a matter of contractual freedom and therefore should not be regulated.

4.26. The transferability of the commercial guarantee (Question M2 in the Green Paper)

Consumer and business stakeholders disagree on the possibility to regulate the transferability of commercial guarantees at European level. A clear majority of consumer stakeholders call for an automatic transfer of the commercial guarantee whereas the majority of business stakeholders opt for maintaining the status quo.

A significant number of Member States' contributions (12) support an automatic transfer, while seven support the status quo and five opt for the transferability as a default rule.

Consumer organisations underline that the guarantee is associated with a specific product, irrespective of the buyer. Consequently a transfer would not increase the burden on businesses. There is no reason why the guarantee should expire with the resale, especially when consumer-to-consumer resale at online auctions is becoming increasingly popular.

4.27. Commercial guarantees for specific parts (Question M3 in the Green Paper)

There are again diverging opinions between consumer stakeholders and the business sector on the issue of commercial guarantees limited to a specific part; the former are in favour of option 3 (Information obligation and a guarantee covering the entire contract unless specified otherwise) and the latter opt for maintaining the status quo. The majority of Member States support the introduction of information obligation and rules providing that, by default, a guarantee cover the entire contract goods. Some respondents argue that it would be fair to provide for information and transparency requirements in case the commercial guarantees are limited to specific parts. This information would not pose a significant burden on business but would be extremely beneficial to consumers. This is supported by many consumer stakeholders, who highlight that one of the main problems regarding guarantees is the lack of intelligible information available to consumers about their legal rights and the scope of the commercial guarantee.

Business stakeholders reiterate their general position that guarantees are provided on a voluntary basis and are marketing tools, which are used to attract consumers.

4.28. Other issues (Question N in the Green Paper)

A number of respondents have raised issues that are not mentioned in the Green Paper. These are both issues of principle and more specific issues which stakeholders find should be dealt with at EU level.

Several stakeholders ask for clarification regarding the relationship between a future horizontal instrument and other EU legislation or ongoing legislative procedures, such as the Rome Convention/Rome I proposal on the law applicable to contractual obligations, other directives (e.g. the E-commerce Directive, Consumer Credit Directive, the Directive on Distance Marketing of Financial Services, the Payment Service Directive) and the Common Frame of Reference (CFR).

Although enforcement issues are not treated within the Review of the Acquis, the enforcement of consumer rights has been commented on frequently throughout the consultation. In particular the need for introducing collective redress mechanisms at EU level is highlighted by consumer organisations and some Member States. The European Parliament recalls the discussion on collective redress, saying that this deserves further consideration. The European Parliament, in its resolution on the obligations of cross-border service providers (2006/2049(INI)), calls on the Commission to continue reflecting on the introduction of an EU legislative instrument on collective actions by consumers on a cross-border basis so as to allow greater access to legal redress for consumers.

Many respondents ask for more Alternative Dispute Resolution (ADR) mechanisms and easier access for consumers to ADRs and courts. A more effective implementation and

enforcement at national level of existing rules, as well as a strengthening of market surveillance, is equally called for. The ECC Net should, according to some respondents, be reinforced. Some stakeholders and the European Parliament draw the attention to the usefulness of consumer education to make consumers aware of their rights.

Regarding the eight directives covered by the review, a number of respondents insist on the need for a substantial (sectoral) revision of the Package Travel Directive to take account of new market developments. Issues of particular relevance for the Distance Selling Directive, which the Commission has consulted on separately in a communication in 2006, are commented on in several contributions. Examples include how to fulfil information requirements in case of m-commerce where the display of a mobile phone limits the information that can be given, the definition of "durable medium" as the form of communication between the professional and the consumer as well as the exemption or inclusion of (online) auctions in the scope of the Directive.

A large number of contributions focus on the issue of pre-contractual information requirements. Although the Green Paper does not directly address this issue, more than a tenth of the respondents make reference to the need for a common core of pre-contractual rules in the acquis. Different stakeholder groups seem to agree that there should be more consistency and less overlap, while mostly acknowledging that general rules must be complemented by more detailed information in particular fields such as package travel and timeshare. Consumer stakeholders generally point to the need for more information provided to consumers as well as the need to improve availability of such information so that consumers can make a well informed choice. However, a general comment regarding information requirements which is also emphasized in several contributions by consumer groups is that consumers must not be overloaded with information.

Several respondents consider that after-sales services should be addressed within the framework of the review, in particular the issue of availability of spare parts. A number of stakeholders suggest the introduction of a de minimis rule for information requirements, with reference to German experiences. According to these stakeholders, these requirements would typically not apply for transactions with a value below 60-120 euro. Some consumer stakeholders express concerns about territorial discrimination, asserting that businesses refuse to sell products to consumers merely on the ground that they are residents of other Member States.

Small businesses claim that they are only in a slightly better position than consumers. Legal practitioners point out that a clear distinction between B2C and B2B transactions may not always be appropriate. There may be situations when small firms and organizations should be treated as consumers.